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

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 106, 204, 211, 212, 214, 216, 217, 223, 235, 236, 240, 244, 245, 245a, 248, 264, 274a, 286, 301, 319, 320, 322, 324, 334, 341, 343a, 343b and 392

[CIS No. 2627–18; DHS Docket No. USCIS–2019–0010]

RIN 1615–AC18

U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements; Correction

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule; correction.

SUMMARY: On August 3, 2020, the Department of Homeland Security (DHS) published a final rule to amend DHS regulations to adjust certain immigration and naturalization benefit request fees charged by U.S. Citizenship and Immigration Services (USCIS) and make certain other changes. In this rule, we are correcting several technical errors.

DATES: Effective October 2, 2020.

FOR FURTHER INFORMATION CONTACT: Kika Scott, Chief Financial Officer, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW, Washington, DC 20529–2130, telephone (202) 272–8377.

SUPPLEMENTARY INFORMATION:

Need for Correction

On August 3, 2020, the Department of Homeland Security published a final rule in the **Federal Register** at 85 FR 46788 revising immigration and naturalization benefit request fees charged by U.S. Citizenship and Immigration Services (USCIS), fee exemptions and fee waiver requirements, premium processing time limits, and intercountry adoption processing (FR Doc. 2020–16389). DHS has also published a rule to correct four technical errors in the final rule. *See* 85 FR 49941 (Aug. 17, 2020).

The **Federal Register** did not include the effective date of the rule in a table in the rule, and inserted text that was not in the signed document. In addition, DHS included amendatory instructions in the final rule that would inadvertently remove certain text that was not intended, not remove certain text that was intended to be removed, or, from a technical standpoint, result in grammatically incorrect phrasing or format.

Correction of Publication

Accordingly, the publication on August 3, 2020, at 85 FR 46788, the final rule that was the subject of FR Doc. 2020–16389 is corrected as follows:

■ 1. On page 46831, column 2, under the headings ''G. Comments on Specific Fees,'' ''1. Fees for Online Filing'', the number ''545'' is corrected to read ''commenters''.

■ 2. On page 46829, in Table 4, column 2, the two instances of ''[INSERT EFFECTIVE DATE OF 2018/2019 FEE RULE]'' are corrected to read ''October 2, 2020''.

■ 3. On page 46886, column 3, footnote 121 is removed.

§ 214.1 [Corrected]

■ 4. On page 46923, column 3, instruction 31.d.ii for § 214.1 is corrected to read '' ''Form I–129'' and adding in its place in the second sentence ''application or petition'' and adding in its place in the third sentence ''application or''.''

§ 214.2 [Corrected]

■ 5. On page 46923, column 3, instruction 32.o. for § 214.2 is corrected to read ''By revising paragraph (h)(19)(i) introductory text;''.

■ 6. On page 46923, column 3, instruction 32.p. for § 214.2 is corrected to read ''In paragraph (h)(19)(vi)(A), by removing ''a Petition for Nonimmigrant Worker (Form I–129)'' and adding in its place ''the form prescribed by USCIS'';''.

■ 7. On page 46924, column 1, instruction 32.ff. for § 214.2 is corrected to read ''In paragraph (p)(2)(iv)(H), by removing the text ''I–129''.''

§ 286.9 [Corrected]

■ 8. On page 46928, column 2, instruction 85 is corrected to read ''Section 286.9 is amended in paragraph (a) by removing ''§ 103.7(b)(1) of this chapter'' and adding in its place ''8 CFR 103.7(d)''.''

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel for the Department of Homeland Security.

[FR Doc. 2020–19213 Filed 8–27–20; 4:15 pm]

BILLING CODE 9111–97–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 380

RIN 3064–AE39

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 302

RIN 3235–AL–51

[Release No. 34–89394; File No. S7–02–16]

Covered Broker-Dealer Provisions Under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Federal Deposit Insurance Corporation (''FDIC'' or ''Corporation''); Securities and Exchange Commission (''SEC'' or ''Commission'' and, collectively with the FDIC, the ''Agencies'').

ACTION: Final rule.

SUMMARY: The Agencies, in accordance with section 205(h) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''), are jointly adopting a final rule to implement provisions applicable to the orderly liquidation of covered brokers and dealers under Title II of the Dodd-Frank Act (''Title II'').

DATES: The final rule is effective on October 30, 2020.

FOR FURTHER INFORMATION CONTACT:

FDIC:

Alexandra Steinberg Barrage, Associate Director, at (202) 898–3671, Division of Complex Institution Supervision and Resolution; Joanne W. Rose, Counsel, at (917) 320–2854, *jrose@fdic.gov,* Legal Division.

SEC:

Michael A. Macchiaroli, Associate Director, at (202) 551–5510; Thomas K. McGowan, Associate Director, at (202)

551–5521; Randall W. Roy, Deputy Associate Director, at (202) 551–5522; Raymond A. Lombardo, Assistant Director, at (202) 551–5755; Timothy C. Fox, Branch Chief, at (202) 551–5687; or Nina Kostyukovsky, Special Counsel, at (202) 551–8833, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION:

I. Background

Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 [1] (the ''Dodd-Frank Act'') provides an alternative insolvency regime for the orderly liquidation of large financial companies that meet specified criteria.[2] Section 205 of Title II sets forth certain provisions specific to the orderly liquidation of certain large broker-dealers, and paragraph (h) of section 205 requires the Agencies, in consultation with the Securities Investor Protection Corporation (''SIPC''), jointly to issue rules to implement section 205.[3]

In the case of a broker-dealer, or a *financial company* [4] in which the largest U.S. subsidiary is a broker-dealer, the Board of Governors of the Federal Reserve System (''Board'') and the Commission are authorized jointly to issue a written orderly liquidation recommendation to the U.S. Treasury Secretary (''Secretary''). The FDIC must be consulted in such a case.

The recommendation, which may be sua sponte or at the request of the Secretary, must contain a discussion regarding eight criteria enumerated in section 203(a)(2) [5] and be approved by a vote of not fewer than a two-thirds majority of the Board then serving and a two-thirds majority of the Commission then serving.[6] Based on similar but not identical criteria enumerated in section 203(b), the Secretary would consider the recommendation and (in consultation with the President) determine whether the financial company poses a systemic risk meriting liquidation under Title II.[7]

Title II also provides that in any case in which the Corporation is appointed receiver for a *covered financial company,*[8] the Corporation may appoint itself receiver for any *covered subsidiary* [9] if the Corporation and the Secretary make the requisite joint determination specified in section 210.[10]

A company that is the subject of an affirmative section 203(b) (or section 210(a)(1)(E)) [11] determination would be considered a *covered financial company* for purposes of Title II.[12] As discussed below, a *covered broker or dealer* is a covered financial company that is registered with the Commission as a broker or dealer and is a member of SIPC.[13] Under the process specified in section 203 or 210, the broker-dealer will be a ''covered broker-dealer,'' section 205 and the final rule will apply, the covered broker-dealer will be placed into orderly liquidation, and the FDIC will be appointed receiver.[14]

The FDIC and the SEC jointly published for public comment a notice of proposed rulemaking titled ''Covered Broker-Dealer Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act'' in the **Federal Register** on March 2, 2016. The 60-day comment period ended on May 2, 2016.[15] In keeping with the statutory mandate, the proposed rule, among other things, (i) clarified how the relevant provisions of the Securities Investor Protection Act of 1970 (''SIPA'') [16] would be incorporated into a Title II proceeding, (ii) specified the purpose and the content of the application for a protective decree required by section 205(a)(2)(A) of the Dodd-Frank Act,[17] (iii) clarified the FDIC's power as receiver with respect to the transfer of assets of a covered broker-dealer to a bridge broker-dealer, (iv) specified the roles of the FDIC as receiver and SIPC as trustee with respect to a covered broker-dealer, (v) described the claims process applicable to customers and other creditors of a covered broker-dealer, (vi) provided for SIPC's administrative expenses, and (vii) provided that the treatment of qualified financial contracts (''QFCs'') of the covered broker-dealer would be governed exclusively by section 210 of the Dodd-Frank Act.[18]

II. Comments on the Proposed Rule

A. Overview

Six comment letters were submitted to the FDIC and the SEC on the proposed rule. Three are from individuals (the ''Individual Letters''), one is from students in a law school financial markets and corporate law clinic (the ''Legal Clinic Letter''), one is from a group that states it is a ''group of concerned citizens, activists, and financial professionals that works to

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203, 124 Stat. 1376 (2010) and codified at 12 U.S.C. 5301 *et seq.* Title II of the Dodd-Frank Act is codified at 12 U.S.C. 5381–5394.

[2] *See* 12 U.S.C. 5384 (pertaining to the orderly liquidation of covered financial companies).

[3] *See* 12 U.S.C. 5385 (pertaining to the orderly liquidation of covered broker-dealers).

[4] Section 201(a)(11) of the Dodd-Frank Act (12 U.S.C. 5381(a)(11)) (defining *financial company*) and 12 CFR 380.8 (defining activities that are financial in nature or incidental thereto).

[5] *See* 12 U.S.C. 5383(a)(2)(A) through (G).

[6] *See* 12 U.S.C. 5383(a)(1)(B) (pertaining to vote required in cases involving broker-dealers).

[7] *See* 12 U.S.C. 5383(b) (pertaining to a determination by the Secretary).

[8] *See* 12 U.S.C. 5381(a)(8) (definition of *covered financial company*).

[9] *See* 12 U.S.C. 5381(a)(9) (definition of *covered subsidiary*). A covered subsidiary of a covered financial company could include a broker-dealer.

[10] *See* 12 U.S.C. 5390(a)(1)(e).

[11] *See id.*

[12] *See* 12 U.S.C. 5381(a)(8) (definition of *covered financial company*); 12 U.S.C. 5390(a)(1)(E)(ii) (treatment as covered financial company).

[13] *See* 12 U.S.C. 5381(a)(7) (definition of *covered broker or dealer*). For convenience, we hereinafter refer to entities that meet this definition as covered broker-dealers.

[14] *See* 12 U.S.C. 5384 (pertaining to orderly liquidation of covered financial companies).

[15] 81 FR 10798 (March 2, 2016).

[16] 15 U.S.C. 78aaa–*lll.*

[17] 12 U.S.C. 5385(a)(2)(A) (application for a protective decree).

[18] 12 U.S.C. 5390.

ensure that financial regulators protect the interests of the public'' (the ''OSEC Letter''), and one is a joint letter from three trade groups representing various segments of the financial services industry (the ''Joint Letter'').[19] The contents of the comments and the Agencies' responses thereto are addressed below.

B. The Individual Letters

Two individual commenters are generally supportive of the proposed rule.[20] The first individual commenter requests that the notification requirements of the proposed rule be extended to apply to holding companies as well as the broker-dealer.[21] Section 205 of the Dodd-Frank Act and the proposed rule apply only in situations where the broker-dealer itself is subject to a Title II liquidation.[22] Other provisions of Title II address the orderly liquidation of other financial companies, including holding companies. Therefore, the Agencies have made no changes in the final rule based on this comment. The second individual commenter states that the proposed rule might limit an individual consumer's right to sue a broker-dealer, particularly if the claim would be heard in an arbitration with the Financial Industry Regulatory Authority (''FINRA'').[23] Any such limitations regarding an individual consumer's right to sue a broker-dealer that would arise because of the commencement of orderly liquidation exist by virtue of Title II of the Dodd-Frank Act, and are not a result of any matters addressed in the proposed rule.[24] Accordingly, the Agencies have made no changes in the final rule as a result of this comment. The third individual commenter is concerned that the proposed rule may disadvantage the customers of a covered broker-dealer.[25] As discussed below, in implementing section 205 of the Dodd-Frank Act, consistent with the statutory directive contained therein,[26] the Corporation and the Commission are seeking to ensure that all customer claims relating to, or net equity claims based upon, customer property or customer name securities are satisfied in a manner and in an amount at least as beneficial to the customers as would have been the case if the broker-dealer were liquidated under SIPA.[27] Accordingly, the final rule preserves customer status as would be the case in a SIPA proceeding. Therefore, the Agencies have made no changes in the final rule based on this comment.

C. The Law Clinic Letter

The Law Clinic Letter addresses two specific situations in which the commenter believes the application of the proposed rule might in some manner or on some facts have the possibility of delaying or obstructing consumer access to property in a Title II liquidation of a covered broker-dealer. First, in this commenter's view, the discretion provided to SIPC under the proposed rule to use estimates for the initial allocation of assets to customer accounts at the bridge broker-dealer is too broad and may result in over-allocations to these accounts to the detriment of other customers when the overpayments are recalled.[28] In particular, the commenter opines that a conservative initial allocation intended to minimize the possibility of an over-allocation to any customer and mitigate potential costs and uncertainty associated with allocation refinements is ''too vague and is not codified in the rule itself.''[29] Further, the commenter asserts as ''irresponsible'' the Agencies' decision to base customer allocations on the books and records of the covered broker-dealer without fully understanding the potential costs to customers.[30] The commenter also pointed out that the Agencies lack the data demonstrating that delays experienced by customers in accessing their accounts actually constitute an actionable problem.[31] The commenter requests that the Agencies modify the final rule to make it clear that estimates may be used only when the liquidated entity acts in bad faith to impede the reconciliation process.[32]

As stated in the preamble to the proposed rule, the purpose of using estimates in the customer property allocation process is to ensure that customers receive the assets held for their customer accounts, together with SIPC payments, if any, as quickly as is practicable. Historically, the trustees in SIPA liquidations have utilized estimates to allow customers partial access to their customer accounts before a final reconciliation is possible. Returning customer assets to customers as quickly as possible is important for a number of reasons. For example, customers may depend financially on these assets. By way of additional example, it is possible that customers may need access to their assets in order to be able to de-risk positions or re-hedge positions. In the case of an orderly liquidation of a covered broker-dealer, SIPC, as trustee, is charged with making a prompt and accurate determination of customer net equity and allocation of customer property.

Although the circumstances of a particular orderly liquidation may make this process difficult, consistent with historical practice in SIPA liquidations, the Agencies would endeavor to provide customers prompt access to their accounts to the extent possible based upon estimates while that reconciliation is being completed. Accordingly, the Agencies have made no changes in the final rule as a result of this comment.

In response to the commenter's concern that the notion of a conservative initial allocation is vague and not codified in the proposed rule, the Agencies note that the manner in which an orderly liquidation of a covered broker-dealer would proceed would depend on the relevant facts and circumstances. A prescriptive definition of conservative initial allocation that is codified may not be appropriate for the orderly liquidations of covered broker-dealers under all circumstances. Therefore, the Agencies have chosen not to define or to codify the notion of a conservative initial allocation in the final rule.[33]

Second, the Law Clinic Letter suggests two scenarios where a customer of a covered broker-dealer potentially could be worse off under the proposed rule than such customer would have been in a SIPA liquidation.[34] The first scenario the commenter describes is whenever a customer's net equity claim is not fully satisfied by the allocation of customer

[19] *See* comments to File No. S7–02–16 (available at: *https://www.sec.gov/comments/s7-02-16/s70216.htm*).

[20] *See generally* letter from Keith E. Condemi and letter from Matt Bender.

[21] *See* letter from Keith E. Condemi at 1.

[22] 12 U.S.C. 5385; *see also* 12 U.S.C. 5383 (setting forth that the Commission would also be able to make a recommendation in a case where the largest U.S. subsidiary of a financial company is a broker or dealer).

[23] *See* letter from Matt Bender at 1.

[24] *See* 12 U.S.C. 5385(c).

[25] *See* letter from Pamela D. Marler at 1.

[26] *See* 12 U.S.C. 5385(f)(1) (pertaining to the statutory requirements with respect to the satisfaction of claims).

[27] *Id.*

[28] *See Law Clinic Letter* at 2.

[29] *See id.*

[30] *See id.* at 5.

[31] *See id.*

[32] *See id.*

[33] For reasons explained in the Economic Analysis, the Agencies disagree with the commenter's assertion that the Agencies decided to allow estimates of customer allocations to be based on the books and records of the covered broker-dealer without fully understanding the potential costs to customers. Further, and for reasons explained in the Economic Analysis, the Agencies disagree with the commenter's point that the Agencies lack the data demonstrating that delays experienced by customers in accessing their accounts constitute an actionable problem. *See infra* Section V.E.1.

[34] *See Law Clinic Letter* at 5.

property and the SIPC advance.[35] The commenter states that under the proposed rule, this residual claim, which becomes a general unsecured claim against the broker-dealer's general estate, is satisfied only after SIPC is repaid for its advances to customers.[36] The commenter further points out that, by contrast, under SIPA, SIPC would receive limited subrogation rights against customers in exchange for the advance,[37] and that SIPA does not allow SIPC to recover its advance before a customer with a residual net equity claim is made whole.[38]

Title II requires that all obligations of a covered broker-dealer relating to, or net equity claims based upon, customer property or customer name securities shall be promptly discharged by SIPC, the Corporation, or the bridge financial company, as applicable, by the delivery of securities or the making of payments to or for the account of such customer, in a manner and in an amount at least as beneficial as would have been the case had the covered broker-dealer been liquidated in a proceeding under SIPA.[39] The Agencies note that under the proposed rule, ''SIPC shall make advances in accordance with, and subject to the limitations imposed by, 15 U.S.C. 78fff–3.'' [40] This language incorporates the limits on SIPC's subrogation rights applicable in a SIPA liquidation.[41]

The commenter states that customers with residual unpaid net equity claims could be worse off than they would be in a SIPA liquidation if the combined trustee and receiver's expenses in the Title II liquidation exceed the expenses of a hypothetical trustee in a SIPA liquidation because sections 205(g)(2) and 210(b) of the Dodd-Frank Act subordinate these residual unpaid net equity claims to the expenses of the trustee and the receiver.[42] The Agencies understand the commenter's concern about the potential for increased costs. However, one of the goals of this rulemaking is to describe the respective roles of the FDIC and SIPC for the purpose of promoting coordination between the FDIC and SIPC and reducing potential overlap of functions (and associated expenses) to be performed by the trustee and receiver. The Agencies believe that the rule will accomplish this goal. Even if the combined expenses of the trustee and the receiver in a Title II orderly liquidation were to exceed the expenses of a trustee in a SIPA liquidation, the operation of Commission Rules 15c3–1[43] and 15c3–3,[44] and the resulting history of customer recoveries in SIPA liquidations, should mitigate the commenter's concern that such costs will materially impact customer recoveries in an orderly liquidation. These rules help ensure that, in the event of a broker-dealer failure, there is an estate of customer property available, plus additional liquid assets of the broker-dealer in an amount in excess of all the broker-dealer's unsubordinated liabilities, available to pay customer claims. During SIPC's 49-year history, cash and securities distributed for the accounts of customers totaled approximately $141.5 billion. Of that amount, approximately $140.5 billion came from debtors' estates and $1.0 billion from the SIPC Fund.[45] Further, of the approximately 770,400 claims satisfied in completed or substantially completed cases as of December 31, 2019, a total of 355 were for cash and securities whose value was greater than the limits of protection afforded by SIPA.[46] These customer recovery figures generally support the Agencies' view that incorporating the existing SIPA customer claims process into the orderly liquidation should help ensure that customers in an orderly liquidation of a covered broker-dealer would fare as well as they would have in a SIPA liquidation. Additionally, the vast majority of such recoveries came from the pool of customer property established pursuant to the requirements of Commission Rule 15c3–3.[47] Such pool of customer property will be available to satisfy customer claims in Title II. Accordingly, the Agencies have made no changes in the final rule as a result of this comment.

D. The OSEC Letter

The OSEC Letter generally supports the proposed rule and outlines several benefits to the proposed rule, recognizing that the proposed rule relied upon the established framework for liquidations under SIPA in describing the orderly liquidation claims process.[48] The commenter highlights one perceived difference between the SIPA process and the process described in the proposed rule, however, and suggests that the rule would be improved by increasing the amount of time that customers have to file claims.[49] The OSEC Letter states that the proposed rule tracks section 8(a)(3) of SIPA by mandating that customer claims for net equity must be filed within 60 days after the date the notice to creditors to file claims is first published, while general creditors of the covered broker-dealer have up to six months to file their claims and have a good faith exception for late filings.[50] The OSEC Letter also suggests that the proposed rule be used as an opportunity to reduce moral hazard by imposing restrictions on executive compensation at broker-dealers.[51] The OSEC letter states that the proposed rule ''fails to adequately penalize senior management, employees, and advisors who are complicit in producing the covered broker dealer's financial instability.'' [52] The OSEC Letter supports the establishment of a bridge broker-dealer and suggests that the FDIC consider and encourage the establishment of multiple bridge entities to limit over-concentration and interconnectedness risk.[53]

While the Agencies appreciate the comments raised in the OSEC Letter, the Agencies have not made changes in the final rule as a result of these comments. First, the OSEC Letter has misconstrued the proposed rule with respect to the time allowed for claims. The proposed rule provides that all creditors—customers as well as general unsecured creditors—have the opportunity to file claims within time frames consistent with the requirements of SIPA and of the Dodd-Frank Act. Under the

[35] *See id.* at 6.

[36] *See* 12 CFR 380.65(c); 17 CFR 302.105(c), as proposed.

[37] *See* 15 U.S.C. 78fff–3(a).

[38] *See Law Clinic Letter* at 6.

[39] *See* 12 U.S.C. 5385(f)(1).

[40] *See* 12 CFR 380.64(a)(2); 17 CFR 302.104(a)(2), as proposed.

[41] *See* 15 U.S.C. 78fff–3(a).

[42] *See Law Clinic Letter* at 6.

[43] *See* 17 CFR 240.15c3–1; *see also, e.g.,* Financial Responsibility Rules for Broker-Dealer, Exchange Act Rel. No. 70072 (July 30, 2013), 78 FR 51824, 51849 (August 21, 2013) (explaining that the purpose of Rule 15c3–1 is to help ensure that a broker-dealer holds, at all times, more than one dollar in highly liquid asset for each dollar of unsubordinated liabilities (*i.e.,* current liabilities)).

[44] *See* 17 CFR 240.15c3–3. Rule 15c3–3 is designed to ''give more specific protection to customer funds and securities, in effect forbidding brokers and dealers from using customer assets to finance any part of their businesses unrelated to servicing securities customers . . . .'' *Financial Responsibility Rules for Broker-Dealers,* Exchange Act Release No. 70072 (July 30, 2013), 78 FR 51824, 51826 (August 21, 2013). *See also Net Capital Requirements for Brokers and Dealers,* Exchange Act Release No. 21651 (January 11, 1985), 50 FR 2690, 2690 (January 18, 1985); *Broker-Dealers; Maintenance of Certain Basic Reserves,* Exchange Act Release No. 9856 (November 10, 1972), 37 FR 25224, 25224 (November 29, 1972).

[45] *See* SIPC 2019 Annual Report, at 8, *available at https://www.sipc.org/media/annual-reports/2019-annual-report.pdf.*

[46] *See id.* at 9.

[47] 17 CFR 240.15c3–3.

[48] *See generally OSEC Letter.*

[49] *See id.* at 3.

[50] *See id.*

[51] *See id.*

[52] *See id.*

[53] *See id.* at 5.

proposed rule, customers would have the same six-month period to file claims as all other creditors and have an exception for late filings comparable to the SIPA good faith exception. However, under both SIPA and the proposed rule, if a customer files its claim within 60 days after the date the notice to creditors to file claims is first published, the customer is assured that its net equity claim will be paid, in kind, from customer property or, to the extent such property is insufficient, from SIPC funds. If the customer files a claim after the 60 days, the claim need not be paid with customer property and, to the extent such claim is paid by funds advanced by SIPC, it would be satisfied in cash, securities, or both, as SIPC determines is most economical to the estate. Therefore, the Agencies have made no changes in the final rule as a result of the comment.

The OSEC Letter also suggests that the proposed rule be used as an opportunity to reduce moral hazard by imposing restrictions on executive compensation at broker-dealers.[54] The OSEC letter states that the proposed rule ''fails to adequately penalize senior management, employees, and advisors who are complicit in producing the covered broker dealer's financial instability.'' [55] Restrictions on executive compensation are outside the scope of the rulemaking requirement of section 205(h) of the Dodd-Frank Act.[56] The Agencies have made no changes in the final rule as a result of this comment. Regarding the commenter's suggestion that the FDIC consider and encourage the establishment of multiple bridge entities to limit over-concentration and interconnectedness risk, the Agencies note that both the Dodd-Frank Act and the proposed rule permit the FDIC to establish multiple bridge broker-dealers in a Title II orderly liquidation and therefore the Agencies have made no changes in the final rule as a result of this comment.

E. The Joint Letter

The Joint Letter is generally supportive of the proposed rule but states that certain portions of the proposed rule would benefit from additional clarification, either through additional rulemaking or interpretive statements.[57]

1. Necessity for Rule

The Joint Letter states that the proposed rule is likely to have an extremely narrow scope of application and calls into question the necessity of the proposed rule.[58] In the preamble to the proposed rule, the Agencies specifically acknowledged the limited circumstances in which the rule would be applied. However, the Dodd-Frank Act requires the Agencies jointly to issue rules to implement section 205 of the Dodd-Frank Act.[59] The Agencies believe that the clarifications provided by the final rule will prove valuable should a broker-dealer ever be subject to a Title II orderly liquidation and, therefore, the Agencies are promulgating this final rule.

2. Liquidation Under SIPA

The Joint Letter notes the concern that the proposed rule could create, rather than reduce, uncertainty because the proposed rule does not repeat the full statutory text of section 205(a) that SIPC will act as trustee for the liquidation under the Securities Investor Protection Act of the covered broker-dealer.[60]

The proposed rule clarifies that although the trustee will make certain determinations, such as the allocation of customer property, in accordance with the relevant definitions under SIPA, the orderly liquidation of the covered broker-dealer is in fact pursuant to a proceeding under the Dodd-Frank Act, rather than a process under SIPA. The Agencies acknowledge that the reference to a liquidation ''under SIPA'' in section 205 of the statute may create ambiguity. The purpose of the rulemaking required by section 205(h) of the Dodd-Frank Act is to clarify these provisions and provide a framework for implementing a Title II orderly liquidation of a broker-dealer. Thus, in the preamble to the proposed rule, the Agencies explained that the omission of the reference to the appointment of SIPC as a trustee for a liquidation ''under [SIPA]'' is intended to make clear that the rule applies to an orderly liquidation of a covered broker-dealer under the Dodd-Frank Act, not a SIPA proceeding.[61] The proposed rule seeks to eliminate any potential confusion caused by referring to a ''liquidation under [SIPA]'' in the Dodd-Frank Act when there is, in fact, no proceeding under SIPA and the broker-dealer is being liquidated under Title II, while implementing the statutory objective that the protections afforded to customers under SIPA are recognized in the Title II process. Therefore, the Agencies have made no changes in the final rule as a result of this comment.

3. Coordination With the Commodity Futures Trading Commission

The Joint Letter requests that the Agencies clarify how the orderly liquidation process would operate if the broker-dealer were a joint broker-dealer/futures commission merchant (''FCM'').[62] The Joint Letter points out that many broker-dealers in the United States are both broker-dealers registered with the SEC and FCMs registered with the U.S. Commodity Futures Trading Commission (the ''CFTC'').[63] FCMs fall under the definition of ''commodity broker'' under the Bankruptcy Code.[64] The Joint Letter states that, based on recent precedent, in the event a joint broker-dealer/FCM were to become subject to liquidation proceedings under SIPA, the trustee appointed by SIPC would be subject to the same duties as a trustee in a commodity broker liquidation under subchapter IV of chapter 7 of the Bankruptcy Code, to the extent consistent with SIPA.[65] The Joint Letter also states that, based on recent precedent, while the proceeding itself would be conducted under SIPA, there would likely be a parallel claims process in which the rules for determining what constitutes ''customer property'' with respect to commodity customers and the satisfaction of commodity customer claims through account transfers or distributions of customer property would be determined under the commodity broker liquidation provisions of subchapter IV of chapter 7 of the Bankruptcy Code and the CFTC Part 190 Rules.[66]

The Agencies believe that Title II addresses the commenter's question. More specifically, section 210(m) of the Dodd-Frank Act addresses the resolution of a commodity broker in Title II.[67] The section provides that the FDIC as receiver shall apply the provisions of subchapter IV of chapter 7 of the Bankruptcy Code, in respect of the distribution to any customer of all customer property and member property, as if such commodity broker were a debtor for purposes of such subchapter.

[54] *See OSEC Letter* at 3.

[55] *See id.*

[56] Section 956 of the Dodd-Frank Act addresses incentive-based payment arrangements. 12 U.S.C. 5641.

[57] *See generally Joint Letter.*

[58] *See id.* at 2.

[59] *See* 12 U.S.C. 5385(h).

[60] *See Joint Letter* at 4.

[61] *See* Section III.B. *See also* 12 U.S.C. 5383(b)(2).

[62] *See Joint Letter* at 6.

[63] *See id.*

[64] *See* 11 U.S.C. 101(6) (''Commodity broker means futures commission merchant . . . as defined in [11 U.S.C. 761] with respect to which there is a customer, as defined in [11 U.S.C. 761].'').

[65] 15 U.S.C. 78*fff*–1(b).

[66] 17 CFR part 190.

[67] 12 U.S.C. 5390(m).

4. The Incorporation of the Rules of SIPC Contained in 17 CFR Part 300

The Joint Letter recommends that the final rule clarify that any reference to SIPA also includes the rules of SIPC in 17 CFR part 300.[68] These rules are extensive and cover many topics including topics specifically covered by the proposed rule and in some cases may conflict with the claims process established by the Dodd-Frank Act and the rule. Furthermore, the purpose of the final rule is to address the orderly liquidation of brokers and dealers under Title II, which is distinct and separate from a proceeding under SIPA.[69] The Agencies therefore have made no changes in the final rule as a result of this comment.

5. Other Comments Contained in the Joint Letter

The Joint Letter also requests three clarifications of the proposed rule. First, the Joint Letter requests that the final rule clarify that certain past SIPC practices with respect to the treatment of customers whose accounts have been transferred to another institution will govern the treatment of customers in similar circumstances under Title II.[70] More specifically, the Joint Letter states that it is important for the stability of the financial markets that the Agencies affirmatively clarify that they intend to follow these past SIPC practices with respect to the treatment of customers whose accounts have been transferred to another institution.[71] The purpose of the rule is largely to clarify certain procedural matters and the particular requirements of the Dodd-Frank Act with respect to the orderly liquidation of broker-dealers. The rule is not intended to interpret SIPA or codify SIPC's past practices. However, the Agencies note that the involvement of SIPC in the orderly liquidation, as well as the Agencies' stated desire to model the orderly liquidation customer claims process on the SIPA customer claims process, make it clear that the Agencies and SIPC will endeavor to coordinate in a manner to promote financial market stability, consistent with the statutory imperatives in Title II.[72]

Second, the Joint Letter requests that the final rule clarify that if customer accounts are transferred to a bridge broker-dealer, the FDIC, in consultation with SIPC, will endeavor to transfer to the bridge broker-dealer any liabilities that are secured by customer property that has been rehypothecated by the covered broker-dealer.[73] While it is possible that a transfer to the bridge broker-dealer of any liabilities secured by customer property would be more expeditious and less burdensome than closing financing transactions in the covered broker-dealer and re-opening equivalent financing transactions with the bridge broker-dealer, the Agencies cannot commit to such an approach in the final rule because it is not known whether such an approach would prove appropriate in all cases. Moreover, the Agencies note that this practice is not required in a SIPA liquidation. Nevertheless, the Agencies restate their intention that the use of the bridge broker-dealer would be designed to give customers access to their accounts as quickly as practicable in the form and amount that they would receive in a SIPA liquidation.[74]

Third, the Joint Letter requests that the final rule clarify that the FDIC will cooperate with SIPC in allocating property from the broker-dealer's general estate to the pool of customer property if shortfalls in customer property resulted from regulatory compliance failures.[75] The Agencies, in consultation with SIPC, have cooperated to develop the final rule that, among other things, addresses this issue. The rule provides that SIPC, as trustee for a covered broker-dealer, shall determine, among other things, whether the property of the covered broker-dealer qualifies as customer property.[76] The rule incorporates the definition of ''customer property'' from SIPA,[77] with only a change from the term ''debtor'' to the term ''covered broker-dealer'' to reflect the use of the ''customer property'' definition in the context of orderly liquidation.[78] These provisions reflect the statutory requirement that all customer claims relating to, or net equity claims based upon, customer property or customer name securities be satisfied in a manner and in an amount at least as beneficial to customers as would have been the case if the broker-dealer were liquidated under SIPA.[79] The Agencies are of the view that these provisions of the rule directly address the commenter's concern.

III. Section-by-Section Analysis

A. Definitions [80]

The definitions section of the final rule defines certain key terms. Consistent with the remainder of the final rule, the definitions are designed to help ensure that, as the statute requires, all customer claims relating to, or net equity claims based upon, customer property or customer name securities are satisfied in a manner and in an amount at least as beneficial to them as would have been the case if the broker-dealer were liquidated under SIPA, without the appointment of the FDIC as receiver and without any transfer of assets or liabilities to a bridge financial company, and with a filing date as of the date on which the FDIC was appointed as receiver.[81] To effectuate the statutory requirement, the definitions in the final rule are very similar or identical to the corresponding definitions in SIPA and Title II, and where they differ, it is for purposes of clarity only and not to change or modify the meaning of the definitions under either act.

1. Definitions Relating to Covered Broker-Dealers

The final rule defines the term *covered broker or dealer* as ''a covered financial company that is a qualified broker or dealer.'' [82] Pursuant to section 201(a)(10) of the Dodd-Frank Act, the terms *customer, customer name securities, customer property,* and *net equity* in the context of a covered broker-dealer are defined as having the same meanings as the corresponding terms in section 16 of SIPA.[83]

Section 16(2)(A) of SIPA defines *customer* of a debtor, in pertinent part, as ''any person (including any person with whom the debtor deals as principal or agent) who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person for safekeeping, with a view to sale, to cover consummated sales,

[68] *See Joint Letter* at 8.

[69] *See, e.g.,* Section III.B.

[70] *See Joint Letter* at 7.

[71] *See id.*

[72] *See id.*

[73] *See Joint Letter* at 8.

[74] *See* 12 U.S.C. 5385(f)(1); *see also,* 81 FR at 10804.

[75] *See Joint Letter* at 8.

[76] *See* 12 CFR 380.64(a)(1); 17 CFR 302.104(a)(1).

[77] *See* 15 U.S.C. 78lll(4).

[78] *See* 12 CFR 380.60(g); 17 CFR 302.100(g).

[79] *See* 12 U.S.C. 5385(f)(1); *see also* 12 CFR 380.60(f)–(h); 17 CFR 302.100(f)–(h).

[80] The definitions section appears in 12 CFR 380.60 for purposes of the Corporation and 17 CFR 302.100 for purposes of the Commission.

[81] *See* 12 U.S.C. 5385(f)(1) (pertaining to obligations to customers) and 12 U.S.C. 5385(d)(1)(A)–(C) (limiting certain actions of the Corporation that would adversely affect, diminish or otherwise impair certain customer rights).

[82] *See* 12 CFR 380.60(d) and 17 CFR 302.100(d). *See also* 12 U.S.C. 5381(a)(7).

[83] 12 U.S.C. 5381(a)(10) (''The terms 'customer', 'customer name securities', 'customer property', and 'net equity' in the context of a covered broker or dealer, have the same meanings as in section 16 of the Securities Investor Protection Act of 1970 (15 U.S.C. 78*lll*).''). *See also* 15 U.S.C. 78*lll* and sections 380.60 and 302.100.

pursuant to purchases, as collateral, security, or for purposes of effecting transfer.'' [84] Section 16(3) of SIPA defines *customer name securities* as ''securities which were held for the account of a customer on the filing date by or on behalf of the debtor and which on the filing date were registered in the name of the customer, or were in the process of being so registered pursuant to instructions from the debtor, but does not include securities registered in the name of the customer which, by endorsement or otherwise, were in negotiable form.'' [85] Section 16(4) of SIPA defines *customer property,* in pertinent part, as ''cash and securities (except customer name securities delivered to the customer) at any time received, acquired, or held by or for the account of a debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted.'' [86] Section (16)(11) of SIPA defines *net equity* as ''the dollar amount of the account or accounts of a customer, to be determined by—(A) calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date—(i) all securities positions of such customer (other than customer name securities reclaimed by such customer); and (ii) all positions in futures contracts and options on futures contracts held in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the Commission, including all property collateralizing such positions, to the extent that such property is not otherwise included herein; *minus* (B) any indebtedness of such customer to the debtor on the filing date; *plus* (C) any payment by such customer of such indebtedness to the debtor which is made with the approval of the trustee and within such period as the trustee may determine (but in no event more than sixty days after the publication of notice under section (8)(a) [of SIPA]).'' [87]

The final rule defines the term *appointment date* as ''the date of the appointment of the Corporation as receiver for a covered financial company that is a covered broker or dealer.'' [88] The appointment date constitutes the *filing date* as that term is used under SIPA [89] and, like the filing date under SIPA, is the reference date for the computation of net equity.[90]

2. Additional Definitions

In addition to the definitions relating to covered broker-dealers under section 201(a)(10) of the Dodd-Frank Act,[91] the final rule defines the following terms: (1) *Bridge broker or dealer;* [92] (2) *Commission;* [93] (3) *qualified broker or dealer;* [94] (4) *SIPA* [95] and (5) *SIPC.*[96]

The term *bridge broker or dealer* is defined as ''a new financial company organized by the Corporation in accordance with section 210(h) of the Dodd-Frank Act for the purpose of resolving a covered broker or dealer.'' [97] The term *Commission* is defined as the ''Securities and Exchange Commission.'' [98] The term *qualified broker or dealer* refers to ''a broker or dealer that (A) is registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)); and (B) is a member of SIPC,'' but is not itself subject to a Title II receivership.[99] This definition is consistent with the statutory definition but is abbreviated for clarity. It is not intended to change or modify the statutory definition. The term *SIPA* refers to the ''Securities Investor Protection Act of 1970, 15 U.S.C. 78aaa–*lll.*'' [100] The term *SIPC* refers to the ''Securities Investor Protection Corporation.'' [101]

B. Appointment of Receiver and Trustee for Covered Broker-Dealer [102]

Upon the FDIC's appointment as receiver for a covered broker-dealer, section 205 of the Dodd-Frank Act specifies that the Corporation ''shall appoint . . . [SIPC] to act as trustee for the liquidation under [SIPA] of the covered [broker-dealer].'' [103] The final rule deviates from the statutory language in some cases to clarify the orderly liquidation process. For example, the final rule makes it clear that SIPC is to be appointed as trustee for the covered broker-dealer but does not repeat the phrase ''for the liquidation under SIPA'' since there is

[84] 15 U.S.C. 78*lll*(2)(A). *See also* 12 CFR 380.60(e) and 17 CFR 302.100(e) (''The term *customer* of a covered broker or dealer shall have the same meaning as in 15 U.S.C. 78*lll*(2) provided that the references therein to *debtor* shall mean the covered broker or dealer.'').

[85] 15 U.S.C. 78*lll*(3). *See also* 12 CFR 380.60(f) and 17 CFR 302.100(f) (''The term *customer name securities* shall have the same meaning as in 15 U.S.C. 78*lll*(3) provided that the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.'').

[86] 15 U.S.C. 78*lll*(4). The definition of *customer property* goes on to include: (1) ''securities held as property of the debtor to the extent that the inability of the debtor to meet his obligations to customers for their net equity claims based on securities of the same class and series of an issuer is attributable to the debtor's noncompliance with the requirements of section 15(c)(3) of the 1934 Act and the rules prescribed under such section''; (2) ''resources provided through the use or realization of customers' debit cash balances and other customer-related debit items as defined by the Commission by rule''; (3) ''any cash or securities apportioned to customer property pursuant to section 3(d) [of SIPA]''; (4) ''in the case of a portfolio margining account of a customer that is carried as a securities account pursuant to a portfolio margining program approved by the Commission, a futures contract or an option on a futures contract received, acquired, or held by or for the account of a debtor from or for such portfolio margining account, and the proceeds thereof''; and (5) ''any other property of the debtor which, upon compliance with applicable laws, rules, and regulations, would have been set aside or held for the benefit of customers, unless the trustee determines that including such property within the meaning of such term would not significantly increase customer property.'' *See also* 12 CFR 380.60(g) and 17 CFR 302.100(g) (''The term *customer property* shall have the same meaning as in 15 U.S.C. 78*lll*(4) provided that the references therein to *debtor* shall mean the covered broker or dealer.'').

[87] 15 U.S.C. 78*lll*(11) (emphasis added). *See also* 12 CFR 380.60(h) and 17 CFR 302.100(h) (''The term *net equity* shall have the same meaning as in 15 U.S.C. 78*lll*(11) provided that the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.'').

[88] *See* 12 CFR 380.60(a) and 17 CFR 302.100(a).

[89] *See* 12 CFR 380.60(a) and 17 CFR 302.100(a).

[90] *See* 12 CFR 380.60(a) and 17 CFR 302.100(a). *See also* 12 U.S.C. 5385(a)(2)(C) (''For purposes of the liquidation proceeding, the term 'filing date' means the date on which the Corporation is appointed as receiver of the covered broker or dealer.''); 15 U.S.C. 78*lll*(7) (''The term 'filing date' means the date on which an application for a protective decree is filed under section 5(a)(3), except that—(A) if a petition under title 11 of the United States Code concerning the debtor was filed before such date, the term 'filing date' means the date on which such petition was filed; (B) if the debtor is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such debtor has been appointed and such proceeding was commenced before the date on which such application was filed, the term 'filing date' means the date on which such proceeding was commenced; or (C) if the debtor is the subject of a direct payment procedure or was the subject of a direct payment procedure discontinued by SIPC pursuant to section 10(f), the term 'filing date' means the date on which notice of such direct payment procedure was published under section 10(b).'').

[91] *See* 12 U.S.C. 5381(a)(10) (''The terms 'customer', 'customer name securities', 'customer property', and 'net equity' in the context of a covered broker or dealer, have the same meanings as in section 78*lll* of title 15.'').

[92] *See* 12 CFR 380.60(b) and 17 CFR 302.100(b).

[93] *See* 12 CFR380.60(c) and 17 CFR 302.100(c).

[94] *See* 12 CFR 380.60(i) and 17 CFR 302.100(i).

[95] *See* 12 CFR 380.60(j) and 17 CFR 302.100(j).

[96] *See* 12 CFR 380.60(k) and 17 CFR 302.100(k).

[97] *See* 12 CFR 380.60(b) and 17 CFR 302.100(b). *See also* 15 U.S.C. 5390(h)(2)(H) (setting forth that the FDIC, as receiver for a covered broker or dealer, may approve articles of association for one or more bridge financial companies with respect to such covered broker or dealer).

[98] *See* 12 CFR 380.60(c) and 17 CFR 302.100(c).

[99] *See* 12 CFR 380.60(i) and 17 CFR 302.100(i).

[100] *See* 12 CFR 380.60(j) and 17 CFR 302.100(j).

[101] *See* 12 CFR 380.60(k) and 17 CFR 302.100(k).

[102] The section about the appointment of receiver and trustee for covered broker-dealers appears in 12 CFR 380.61 for purposes of the Corporation and 17 CFR 302.101 for purposes of the Commission. The rule text for both agencies is identical.

[103] *See* 12 U.S.C. 5385(a)(1).

no proceeding under SIPA and the covered broker-dealer is being liquidated under Title II. As noted above, the orderly liquidation process under Title II is an alternative to a liquidation under SIPA.[104] Section 205 of the Dodd-Frank Act also states that court approval is not required for such appointment.[105] For ease and clarity, the final rule specifies the statutory roles of SIPC as trustee and the FDIC as receiver, which are further explained in other sections of the final rule.[106]

C. Notice and Application for Protective Decree for Covered Broker-Dealer[107]

Upon the appointment of SIPC as trustee for the covered broker-dealer, Title II requires SIPC, as trustee, promptly to file an application for a protective decree with a federal district court, and SIPC and the Corporation, in consultation with the Commission, jointly to determine the terms of the protective decree to be filed.[108] Although a SIPA proceeding is conducted under bankruptcy court supervision,[109] a Title II proceeding is conducted entirely outside of the bankruptcy courts, through an administrative process, with the FDIC acting as receiver.[110] As a result, a primary purpose of filing a notice and application for a protective decree is to give notice to interested parties that an orderly liquidation proceeding has been initiated. The final rule provides additional clarification of the statutory requirement of notice and application for a protective decree by setting forth the venue in which the notice and application for a protective decree is to be filed. It states that a notice and application for a protective decree is to be filed with the federal district court in which a liquidation of the covered broker-dealer under SIPA is pending, or if no such SIPA liquidation is pending, the federal district court for the district within which the covered broker-dealer's principal place of business is located.[111] This court is a federal district court of competent jurisdiction specified in section 21 or 27 of the Exchange Act, 15 U.S.C. 78u, 78aa.[112] It also is the court with jurisdiction over suits seeking de novo judicial claims determinations under section 210(a)(4)(A) of the Dodd-Frank Act.[113] While the statute grants authority to file the notice and application for a protective decree in any federal court of competent jurisdiction specified in section 21 or 27 or the Securities Exchange Act of 1934, the final rule restricts the filing to the courts specified above in order to make it easier for interested parties to know where the protective decree might be filed. The final rule also clarifies that if the notice and application for a protective decree is filed on a date other than the appointment date (*i.e.,* the date the FDIC is appointed as receiver), the filing shall be deemed to have occurred on the appointment date for purposes of the rule.[114]

This section of the final rule governing the notice and application for a protective decree also includes a non-exclusive list of notices drawn from other parts of Title II.[115] The goal of the application for protective decree is to inform interested parties that the covered broker-dealer is in orderly liquidation and to highlight the application of certain provisions of the orderly liquidation authority, particularly with respect to applicable stays and other matters that might be addressed in a protective decree issued under SIPA. The final rule specifies that a notice and application for a protective decree under Title II may, among other things, provide for notice: (1) That any existing case or proceeding under the Bankruptcy Code or SIPA would be dismissed, effective as of the appointment date, and no such case or proceeding may be commenced with respect to a covered broker-dealer at any time while the Corporation is the receiver for such covered broker-dealer; [116] (2) of the revesting of assets, with certain exceptions, in a covered broker-dealer to the extent that they have vested in any entity other than the covered broker-dealer as a result of any case or proceeding commenced with respect to the covered broker-dealer under the Bankruptcy Code, SIPA, or any similar provision of state liquidation or insolvency law applicable to the covered broker-dealer; [117] (3) of the request of the Corporation as receiver for a stay in any judicial action or proceeding in which the covered broker-dealer is or becomes a party for a period of up to 90 days from the appointment date; [118] (4) that except with respect to QFCs,[119] no person may exercise any right or power to terminate, accelerate, or declare a default under any contract to which the covered broker-dealer is a party or to obtain possession of or exercise control over any property of the covered broker-dealer or affect any contractual rights of the covered broker-dealer without the consent of the FDIC as receiver of the covered broker-dealer upon consultation with SIPC during the 90-day period beginning from the appointment date; [120] and (5) that the exercise of rights and the performance of obligations by parties to QFCs with the covered broker-dealer may be affected, stayed, or delayed pursuant to the provisions of Title II (including but not limited to 12 U.S.C. 5390(c)) and the regulations promulgated thereunder.[121]

[104] *See* 12 U.S.C. 5383(b)(2).

[105] *Id.*

[106] *See* 12 CFR 380.61 and 17 CFR 302.101.

[107] The notice and application for protective decree for the covered broker-dealer section appears in 12 CFR 380.62 for purposes of the FDIC and 17 CFR 302.102 for purposes of the Commission.

[108] *See* 12 U.S.C. 5385(b)(3) (pertaining to the filing of a protective decree by SIPC).

[109] *See* 15 U.S.C. 78eee(b).

[110] *See* 15 U.S.C. 5388 (requiring the dismissal of all other bankruptcy or insolvency proceedings upon the appointment of the Corporation as receiver for a covered financial company).

[111] *See* 12 CFR 380.62(a) and 17 CFR 302.102(a).

[112] *See* 12 U.S.C. 5385(a)(2)(A) (specifying the federal district courts in which the application for a protective decree may be filed).

[113] *See* 12 U.S.C. 5390(a)(4)(A) (a claimant may file suit in the district or territorial court for the district within which the principal place of business of the covered financial company is located).

[114] *See* 12 CFR 380.62(a) and 17 CFR 302.102(a).

[115] *See* 12 CFR 380.62(b) and 17 CFR 302.102(b).

[116] *See* 12 CFR 380.62(b)(2)(i) and 17 CFR 302.102(b)(2)(i). *See also* 12 U.S.C. 5388(a) (regarding dismissal of any case or proceeding relating to a covered broker-dealer under the Bankruptcy Code or SIPA on the appointment of the Corporation as receiver and notice to the court and SIPA).

[117] *See* 12 CFR 380.62(b)(2)(ii) and 17 CFR 302.102(b)(2)(ii). *See also* 12 U.S.C. 5388(b) (providing that the notice and application for a protective decree may also specify that any revesting of assets in a covered broker or dealer to the extent that they have vested in any other entity as a result of any case or proceeding commenced with respect to the covered broker or dealer under the Bankruptcy Code, SIPA, or any similar provision of State liquidation or insolvency law applicable to the covered broker or dealer shall not apply to assets of the covered broker or dealer, including customer property, transferred pursuant to an order entered by a bankruptcy court).

[118] *See* 12 CFR 380.62(b)(2)(iii) and 17 CFR 302.102(b)(2)(iii). *See also* 12 U.S.C. 5390(a)(8) (providing for the temporary suspension of legal actions upon request of the Corporation).

[119] *See* 12 U.S.C. 5390(c)(8)(D) (defining *qualified financial contract* as ''any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation, resolution, or order to be a qualified financial contract for purposes of this paragraph'').

[120] 12 U.S.C. 5390(c)(13)(C)(i) .

[121] *See* 12 CFR 380.62(b)(2)(iv) and 17 CFR 302.102(b)(2)(iv). *See also* 12 U.S.C. 5390(c)(8)(F) (rendering unenforceable all QFC *walkaway clauses* (as defined in 12 U.S.C. 5390(c)(8)(F)(iii)) including those provisions that suspend, condition, or extinguish a payment obligation of a party because of the insolvency of a covered financial company or the appointment of the FDIC as receiver) and 12 U.S.C. 5390(c)(10)(B)(i) (providing that a person who is a party to a QFC with a covered financial company may not exercise any right that such person has to terminate, liquidate, or net such contract solely by reason of or incidental to the appointment of the FDIC as receiver (or the insolvency or financial condition of the covered financial company for which the FDIC has been appointed as receiver)—until 5:00 p.m. (eastern

The final rule makes clear that the matters listed for inclusion in the notice and application for a protective decree are neither mandatory nor all-inclusive. The items listed are those that the Agencies believe might provide useful guidance to customers and other parties who may be less familiar with the Title II process than with a SIPA proceeding. It is worth noting that the language relating to QFCs is rather general. In certain circumstances it may be worthwhile specifically to highlight the one-day stay provisions in section 210(c)(10) of the Dodd-Frank Act, the provisions relating to the enforcement of affiliate contracts under section 210(c)(16) of the Dodd-Frank Act, and other specific provisions relating to QFCs or other contracts.

D. Bridge Broker-Dealer[122]

1. Power To Establish Bridge Broker-Dealer; Transfer of Customer Accounts and Other Assets and Liabilities

Section 210 of the Dodd-Frank Act sets forth the Corporation's powers as receiver of a covered financial company.[123] One such power the Corporation has, as receiver, is the power to form bridge financial companies.[124] Paragraph (a) of this section of the final rule states that the Corporation as receiver for a covered broker-dealer, or in anticipation of being appointed receiver for a covered broker-dealer, may organize one or more bridge broker-dealers with respect to a covered broker-dealer.[125] Paragraph (b) of this section of the final rule states that if the Corporation were to establish one or more bridge broker-dealers with respect to a covered broker-dealer, then the Corporation as receiver for such covered broker-dealer shall transfer all customer accounts and all associated customer name securities and customer property to such bridge broker[s]-dealer[s] unless the Corporation, after consultation with the Commission and SIPC, determines that: (1) The transfer of such customer accounts, customer name securities, and customer property to one or more qualified broker-dealers will occur promptly such that the use of the bridge broker[s]-dealer[s] would not facilitate such transfer to one or more qualified broker-dealers; or (2) the transfer of such customer accounts to the bridge broker[s]-dealer[s] would materially interfere with the ability of the FDIC to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States.[126] The use of the word ''promptly'' in the final rule, in this context, is intended to emphasize the urgency of transferring customer accounts, customer name securities, and customer property either to a qualified broker-dealer or to a bridge broker-dealer as soon as practicable to allow customers the earliest possible access to their accounts.

Paragraph (c) of this section of the final rule states that the Corporation as receiver for the covered broker-dealer also may transfer to such bridge broker[s]-dealer[s] any other assets and liabilities of the covered broker-dealer (including non-customer accounts and any associated property) as the Corporation may, in its discretion, determine to be appropriate. Paragraph (c) is based upon the broad authority of the Corporation as receiver to transfer any assets or liabilities of the covered broker-dealer to a bridge financial company in accordance with, and subject to the requirements of, section 210(h)(5) of the Dodd-Frank Act[127] and is designed to facilitate the receiver's ability to continue the covered broker-dealer's operations, minimize systemic risk, and maximize the value of the assets of the receivership.[128] The transfer of assets and liabilities to a bridge broker-dealer under the final rule will enable the receiver to continue the day-to-day operations of the broker-dealer and facilitate the maximization of the value of the assets of the receivership by making it possible to avoid a forced or other distressed sale of the assets of the covered broker-dealer. In addition, the ability to continue the operations of the covered broker-dealer may help mitigate the impact of the failure of the covered broker-dealer on other market participants and financial market utilities and thereby minimize systemic risk.

Finally, paragraph (c) of this section of the final rule clarifies that the transfer to a bridge broker-dealer of any account or property pursuant to this section does not create any implication that the holder of such an account qualifies as a ''customer'' or that the property so transferred qualifies as ''customer property'' or ''customer name securities'' within the meaning of SIPA or within the meaning of the final rule. Under Title II, the Corporation may transfer all the assets of a covered broker-dealer to a bridge broker-dealer.[129] Such a transfer of assets may include, for example, securities that were sold to the covered broker-dealer under reverse repurchase agreements. Under the terms of a typical reverse repurchase agreement, it is common for the broker-dealer to be able to use the purchased securities for its own purposes. In contrast, Commission rules specifically protect customer funds and securities and essentially forbid broker-dealers from using customer assets to finance any part of their businesses unrelated to servicing securities customers.[130] An integral component of the broker-dealer customer protection regime is that, under SIPA, customers have preferred status relative to general creditors with respect to customer property and customer name securities.[131] Given the preferred status of customers, litigation has arisen regarding whether, consistent with the above example, claims of repurchase agreement (''repo'') counterparties are

time) on the business day following the appointment, or after the person has received notice that the contract has been transferred pursuant to 12 U.S.C. 5390(c)(9)(A)).

[122] The bridge broker or dealer section appears in 12 CFR 380.63 for purposes of the Corporation and 17 CFR 302.103 for purposes of the Commission.

[123] 12 U.S.C. 5390.

[124] *See* 12 U.S.C. 5390(h)(1)(A) (granting general power to form bridge financial companies). *See also* 12 U.S.C. 5390(h)(2)(H)(i) (granting authority to organize one or more bridge financial companies with respect to a covered broker-dealer).

[125] *See* 12 CFR 380.63 and 17 CFR 302.103. *See also* 12 U.S.C. 5390(h)(2)(H) (granting the Corporation as receiver authority to organize one or more bridge financial companies with respect to a covered broker-dealer).

[126] *See* 12 CFR 380.63(b) and 17 CFR 302.103(b). *See also* 12 U.S.C 5390(a)(1)(O)(i)(I)–(II) (listing the specific conditions under which customer accounts would not be transferred to a bridge financial company if it was organized).

[127] *See* 12 U.S.C. 5390(h)(5)(A) (providing that the receiver ''may transfer any assets and liabilities of a covered financial company''). The statute sets forth certain restrictions and limitations that are not affected by this final rule. *See, e.g.,* 12 U.S.C. 5390(h)(1)(B)(ii) (restricting the assumption of liabilities that count as regulatory capital by the bridge financial company) and 12 U.S.C. 5390(h)(5)(F) (requiring that the aggregate liabilities transferred to the bridge financial company may not exceed the aggregate amount of assets transferred).

[128] *See* 12 CFR 380.63(f) and 17 CFR 302.103(f). *See also* 12 U.S.C. 5390(h)(5) (granting authority to the Corporation as receiver to transfer assets and liabilities of a covered financial company to a bridge financial company). Similarly, under Title II, the Corporation, as receiver for a covered broker-dealer, may approve articles of association for such bridge broker-dealer. *See* 12 U.S.C. 5390(h)(2)(H)(i). The bridge broker-dealer would also be subject to the federal securities laws and all requirements with respect to being a member of a self-regulatory organization, unless exempted from any such requirements by the Commission as is necessary or appropriate in the public interest or for the protection of investors. *See* 12 U.S.C. 5390(h)(2)(H)(ii).

[129] *See* 12 U.S.C 5390(h)(2)(H) and 12 U.S.C. 5390(h)(5) (granting authority to the Corporation as receiver to transfer assets and liabilities of a covered broker-dealer).

[130] *See Net Capital Requirements for Brokers and Dealers,* Exchange Act Release No. 21651 (January 11, 1985), 50 FR 2690, 2690 (January 18, 1985). *See also Broker-Dealers; Maintenance of Certain Basic Reserves,* Exchange Act Release No. 9856 (November 10, 1972), 37 FR 25224, 25224 (November 29, 1972).

[131] *See* 15 U.S.C. 78fff(a).

''customer'' claims under SIPA.[132] In implementing section 205 of the Dodd-Frank Act, consistent with the statutory directive contained therein,[133] the Corporation and the Commission are seeking to ensure that all customer claims relating to, or net equity claims based upon, customer property or customer name securities are satisfied in a manner and in an amount at least as beneficial to the customers as would have been the case if the broker-dealer were liquidated under SIPA.[134] Accordingly, the final rule preserves customer status as would be the case in a SIPA proceeding. Thus, the final rule clarifies that moving assets to a bridge financial company as part of a Title II orderly liquidation is not determinative as to whether the holder of such an account qualifies as a ''customer'' or if the property so transferred qualifies as ''customer property'' or ''customer name securities.'' Rather, the status of the account holder and the assets in the orderly liquidation of a covered broker-dealer will depend upon whether the claimant would be a customer under SIPA.[135]

2. Other Provisions With Respect to Bridge Broker-Dealer

The final rule addresses certain matters relating to account transfers to the bridge broker-dealer.[136] The process set forth in this part of the final rule is designed to ensure that all customer claims relating to, or net equity claims based upon, customer property or customer name securities are satisfied in a manner and in an amount at least as beneficial to customers as would have been the case if the broker-dealer were liquidated under SIPA.[137] In a SIPA proceeding, the trustee would generally handle customer accounts in two ways. First, a trustee may sell or otherwise transfer to another SIPC member, without the consent of any customer, all or any part of a customer's account, as a way to return customer property to the control of the customer.[138] Such account transfers are separate from the customer claim process. Customer account transfers are useful insofar as they serve to allow customers to resume trading more quickly and minimize disruption in the securities markets. If it is not practicable to transfer customer accounts, then the second way of returning customer property to the control of customers is through the customer claims process. Under bankruptcy court supervision, the SIPA trustee will determine each customer's net equity and the amount of customer property available for customers.[139] Once the SIPA trustee determines that a claim is a customer claim (an ''allowed customer claim''), the customer will be entitled to a ratable share of the fund of customer property. As discussed above, SIPA defines ''customer property'' to generally include all the customer-related property held by the broker-dealer.[140] Allowed customer claims are determined on the basis of a customer's net equity,[141] which, as described above, generally is the dollar value of a customer's account on the filing date of the SIPA proceeding less indebtedness of the customer to the broker-dealer on the filing date.[142] Once the trustee determines the fund of customer property and customer net equity claims, the trustee can establish each customer's pro rata share of the fund of customer property. Customer net equity claims generally are satisfied to the extent possible by providing the customer with the identical securities owned by that customer as of the day the SIPA proceeding was commenced.[143]

Although a Title II orderly liquidation is under a different statutory authority than a SIPA proceeding, under the final rule, the process for determining and satisfying customer claims will follow a substantially similar process to a SIPA proceeding. Upon the commencement of a SIPA liquidation, customers' cash and securities held by the broker-dealer are returned to customers on a pro rata basis.[144] If sufficient funds are not available at the broker-dealer to satisfy customer net equity claims, SIPC advances will be used to supplement the distribution, up to a ceiling of $500,000 per customer, including a maximum of $250,000 for cash claims.[145] When applicable, SIPC will return securities that are registered in the customer's name or are in the process of being registered directly to each customer.[146] As in a SIPA proceeding, in a Title II orderly liquidation of a covered broker-dealer, the process of determining net equity thus begins with a calculation of customers' net equity. A customer's net equity claim against a covered broker-dealer is deemed to be satisfied and discharged to the extent that customer property of the covered broker-dealer, along with property made available through advances from SIPC, is transferred and allocated to the customer's account at the bridge broker-dealer. The bridge broker-dealer undertakes the obligations of the covered broker-dealer only with respect to such property. The Corporation, as receiver, in consultation with SIPC, as trustee, will allocate customer property and property made available through advances from SIPC in a manner consistent with SIPA and with SIPC's normal practices thereunder. The calculation of net equity will not be affected by the assumption of liability by the bridge broker-dealer to each customer in connection with the property transferred to the bridge broker-dealer. The use of the bridge broker-dealer is designed to give customers access to their accounts as quickly as practicable, while ensuring that customers receive assets in the form and amount that they would receive in a SIPA liquidation.[147]

The final rule also provides that allocations to customer accounts at the bridge broker-dealer may initially be derived from estimates based upon the books and records of the covered broker-dealer or other information deemed relevant by the Corporation as receiver,

[132] *See, e.g., In re Lehman Brothers Inc.,* 492 B.R. 379 (Bankr. S.D.N.Y. 2013), *aff'd,* 506 B.R. 346 (S.D.N.Y. 2014).

[133] *See* 12 U.S.C. 5385(f)(1) (pertaining to the statutory requirements with respect to the satisfaction of claims).

[134] *Id.*

[135] *See* 15 U.S.C. 78*lll*(2)(B) (SIPA definition of *customer*). *See also* 12 U.S.C. 5381(a)(10) (defining *customer, customer name securities, customer property,* and *net equity* in the context of a covered broker-dealer as the same meanings such terms have in section 16 of SIPA (15 U.S.C. 78*lll*)); *In re Bernard L. Madoff Inv. Sec. LLC,* 654 F.3d 229, 236 (2d Cir. 2011).

[136] *See* 12 CFR 380.63(d) and 17 CFR 302.103(d).

[137] *See* 12 U.S.C. 5385(f) (obligations of a covered broker-dealer to customers shall be ''satisfied in the manner and in an amount at least as beneficial to the customer'' as would have been the case had the actual proceeds realized from the liquidation of the covered broker-dealer been distributed in a proceeding under SIPA).

[138] *See* 15 U.S.C. 78fff–2(f).

[139] *See generally* 15 U.S.C. 78fff.

[140] *See* 15 U.S.C. 78*lll*(4). *See also* Section II.A.1.

[141] *See* 15 U.S.C. 78*lll*(11).

[142] *Id. See also* Section II.A.1.

[143] *See* 15 U.S.C. 78fff–2(d).

[144] 15 U.S.C. 8fff–2(b).

[145] 15 U.S.C. 8fff–3(a).

[146] 15 U.S.C. 8fff–2(b)(2)

[147] This outcome will satisfy the requirements of section 205(f)(1) of the Dodd-Frank Act. *See* 12 U.S.C. 5385(f)(1) (''Notwithstanding any other provision of this title, all obligations of a covered broker or dealer or of any bridge financial company established with respect to such covered broker or dealer to a customer relating to, or net equity claims based upon, customer property or customer name securities shall be promptly discharged by SIPC, the Corporation, or the bridge financial company, as applicable, by the delivery of securities or the making of payments to or for the account of such customer, in a manner and in an amount at least as beneficial to the customer as would have been the case had the actual proceeds realized from the liquidation of the covered broker or dealer under this title been distributed in a proceeding under [SIPA] without the appointment of the Corporation as receiver and without any transfer of assets or liabilities to a bridge financial company, and with a filing date as of the date on which the Corporation is appointed as receiver.'').

in consultation with SIPC as trustee.[148] This approach is based upon experience with SIPA liquidations where, for example, there were difficulties reconciling the broker-dealer's records with the records of central counterparties or other counterparties or other factors that caused delay in verifying customer accounts.[149] This provision of the final rule is designed to facilitate access to accounts for the customers at the bridge broker-dealer as soon as is practicable under the circumstances while facilitating the refinement of the calculation of allocations of customer property to customer accounts as additional information becomes available. This process will help ensure both that customers have access to their customer accounts as quickly as practicable and that customer property ultimately will be fairly and accurately allocated.

The final rule also states that the bridge broker-dealer undertakes the obligations of a covered broker-dealer with respect to each person holding an account transferred to the bridge broker-dealer, but only to the extent of the property (and SIPC funds) so transferred and held by the bridge broker-dealer with respect to that person's account.[150] This portion of the final rule provides customers of the bridge broker-dealer with the assurance that the securities laws relating to the protection of customer property will apply to customers of a bridge broker-dealer in the same manner as they apply to customers of a broker-dealer which is being liquidated outside of Title II.[151] In the view of the Agencies, such assurances will help to reduce uncertainty regarding the protections that will be offered to customers.

This portion of the final rule also provides that the bridge broker-dealer will not have any obligations with respect to any customer property or other property that is not transferred from the covered broker-dealer to the bridge broker-dealer.[152] A customer's net equity claim remains with the covered broker-dealer and, in most cases, will be satisfied, in whole or in part, by transferring the customer's account together with customer property, to the bridge broker-dealer.[153] In the event that a customer's account and the associated account property is not so transferred, the customer's net equity claim will be subject to satisfaction by SIPC as the trustee for the covered broker-dealer in the same manner and to the same extent as in a SIPA proceeding.[154]

The bridge broker-dealer section of the final rule[155] also provides that the transfer of assets or liabilities of a covered broker-dealer, including customer accounts and all associated customer name securities and customer property, assets and liabilities held by a covered broker-dealer for non-customer creditors, and assets and liabilities associated with any trust or custody business, to a bridge broker-dealer, will be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court.[156] This section is based on the Corporation's authority, under three separate statutory provisions of Title II.[157] The broad language of this paragraph of the final rule is intended to give full effect to the statutory provisions of the Dodd-Frank Act regarding transfers of assets and liabilities of a covered financial company,[158] which represent a determination by Congress that, in order to mitigate risk to the financial stability of the United States and minimize moral hazard following the failure of a covered financial company, the Corporation as receiver must be free to determine which contracts, assets, and liabilities of the covered financial company are to be transferred to a bridge financial company, and to transfer such contracts, assets, and liabilities expeditiously and irrespective of whether any other person or entity consents to or approves of the transfer. The impracticality of requiring the Corporation as receiver to obtain the consent or approval of others in order to effectuate a transfer of the failed company's contracts, assets, and liabilities arises whether the consent or approval otherwise would be required as a consequence of laws, regulations, or contractual provisions, including as a result of options, rights of first refusal, or similar contractual rights, or any other restraints on alienation or transfer. Paragraph (e) of the final rule will apply regardless of the identity of the holder of the restraint on alienation or transfer, whether such holder is a local, state, federal or foreign government, a governmental department or other governmental body of any sort, a court or other tribunal, a corporation, partnership, trust, or other type of company or entity, or an individual, and regardless of the source of the restraint on alienation or transfer, whether a statute, regulation, common law, or contract. It is the Corporation's view that the transfer of any contract to a bridge financial company would not result in a breach of the contract and would not give rise to a claim or liability for damages. In addition, under section 210(h)(2)(E) of the Dodd-Frank Act, no additional assignment or further assurance is required of any person or entity to effectuate such a transfer of assets or liabilities by the Corporation as receiver for the covered broker-dealer. Paragraph (e) of the final rule will facilitate the prompt transfer of assets and liabilities of a covered broker-dealer to a bridge broker-dealer and enhance the Corporation's ability to maintain critical operations of the covered broker-dealer. Rapid action to set-up a bridge broker-dealer and transfer assets, including customer accounts and customer property, may be critical to preserving financial stability and to giving customers the promptest possible access to their accounts.

Paragraph (f) of the bridge broker-dealer provision of the final rule provides for the succession of the bridge broker-dealer to the rights, powers, authorities, or privileges of the covered broker-dealer.[159] This provision of the final rule draws directly from authority provided in Title II and is designed to facilitate the ability of the Corporation as receiver to operate the bridge broker-dealer.[160] Pursuant to paragraph (g) of the bridge broker-dealer provision,[161]

[148] *See* 12 CFR 380.63(d) and 17 CFR 302.103(d). *See also* 12 U.S.C. 5385(h) (granting the Corporation and the Commission authority to adopt rules to implement section 205 of the Dodd-Frank Act).

[149] *See, e.g., In re Lehman Brothers Inc.,* (Bankr. S.D.N.Y 2008), Trustee's Preliminary Investigation Report and Recommendations, *available at http://dm.epiq11.com/LBI/Project#*).

[150] *See* 12 CFR 380.63(d) and 17 CFR 302.103(d).

[151] *See also* 12 U.S.C. 5390(h)(2)(H)(ii) (stating that the bridge financial company shall be subject to the federal securities laws and all requirements with respect to being a member of a self-regulatory organization, unless exempted from any such requirements by the Commission, as is necessary or appropriate in the public interest or for the protection of investors).

[152] *See* 12 CFR 380.63(d) and 17 CFR 302.103(d).

[153] *See* 12 CFR 380.63(d) and 17 CFR 302.103(d).

[154] *See* 12 U.S.C. 5385(f)(2).

[155] *See* 12 CFR 380.63(e) and 17 CFR 302.103(e).

[156] *See* 12 CFR 380.63(e) and 17 CFR 302.103(e); *see also* 12 U.S.C. 5390(h)(5)(D).

[157] *See* 12 U.S.C. 5390(h)(5)(D). *See also* 12 U.S.C. 5390(a)(1)(G); 12 U.S.C. 5390(a)(1)(O). Notably, the power to transfer customer accounts and customer property without customer consent is also found in SIPA. *See* 15 U.S.C. 78fff–2(f).

[158] The final rule text omits the reference to ''further'' approvals found in 12 U.S.C. 5390(h)(5)(D). The reference in the statute is to the government approvals needed in connection with organizing the bridge financial company, such as the approval of the articles of association and by-laws, as established under 12 U.S.C. 5390(h). These approvals will already have been obtained prior to any transfer under the proposed rule, making the reference to ''further'' approvals unnecessary and superfluous.

[159] *See* 12 CFR 380.63(f) and 17 CFR 302.103(f).

[160] *See* 12 U.S.C. 5390(h)(2)(H)(i).

[161] *See* 12 CFR 380.63(g) and 17 CFR 302.103(g).

the bridge broker-dealer will also be subject to the federal securities laws and all requirements with respect to being a member of a self-regulatory organization, unless exempted from any such requirements by the Commission as is necessary or appropriate in the public interest or for the protection of investors.[162] This provision of the final rule also draws closely upon Title II.[163]

Paragraph (h) of the bridge broker-dealer provision of the final rule states that at the end of the term of existence of the bridge broker-dealer, any proceeds or other assets that remain after payment of all administrative expenses of the bridge broker-dealer and all other claims against the bridge broker-dealer will be distributed to the Corporation as receiver for the related covered broker-dealer.[164] Stated differently, the residual value in the bridge broker-dealer after payment of its obligations will benefit the creditors of the covered broker-dealer in satisfaction of their claims.

E. Claims of Customers and Other Creditors of a Covered Broker-Dealer[165]

The final rule's section on the claims of the covered broker-dealer's customers and other creditors addresses the claims process for those customers and other creditors as well as the respective roles of the trustee and the receiver with respect to those claims.[166] This section provides SIPC with the authority as trustee for the covered broker-dealer to make determinations, allocations, and advances in a manner consistent with its customary practices in a liquidation under SIPA.[167] Specifically, the section provides: ''The allocation of customer property, advances from SIPC, and delivery of customer name securities to each customer or to its customer account at a bridge broker or dealer, in partial or complete satisfaction of such customer's net equity claims as of the close of business on the appointment date, shall be in a manner, including form and timing, and in an amount at least as beneficial to such customer as would have been the case had the covered broker or dealer been liquidated under SIPA.'' [168] Each customer of a covered broker-dealer will receive cash and securities at least equal in amount and value, as of the appointment date, to what that customer would have received in a SIPA proceeding.[169]

This section further addresses certain procedural aspects of the claims determination process in accordance with the requirements set forth in section 210(a)(2)-(5) of the Dodd-Frank Act.[170] The section describes the role of the receiver of a covered broker-dealer with respect to claims and provides for the publication and mailing of notices to creditors of the covered broker-dealer by the receiver in a manner consistent with both SIPA and the notice procedures applicable to covered financial companies generally under section 210(a)(2) of the Dodd-Frank Act.[171] The section provides that the notice of the Corporation's appointment as receiver must be accompanied by notice of SIPC's appointment as trustee.[172] In addition, the Corporation, as receiver, will consult with SIPC, as trustee, regarding procedures for filing a claim including the form of claim and the filing instructions, to facilitate a process that is consistent with SIPC's general practices.[173] The claim form will include a provision permitting a claimant to claim customer status, if applicable, but the inclusion of any such claim to customer status on the claim form will not be determinative of customer status under SIPA.

The final rule sets the claims bar date as the date following the expiration of the six-month period beginning on the date that the notice to creditors is first published.[174] The claims bar date in the final rule is consistent with section 8(a) of SIPA, which provides for the barring of claims after the expiration of the six-month period beginning upon publication.[175] The six-month period is also consistent with section 210(a)(2)(B)(i) of the Dodd-Frank Act, which requires that the claims bar date be no less than ninety days after first publication.[176] As required by section 210(a)(3)(C)(i) of the Dodd-Frank Act, the final rule provides that any claim filed after the claims bar date shall be disallowed, and such disallowance shall be final, except that a claim filed after the claims bar date will be considered by the receiver if (i) the claimant did not receive notice of the appointment of the receiver in time to file a claim before the claim date, and (ii) the claim is filed in time to permit payment of the claim, as provided by section 210(a)(3)(C)(ii) of the Dodd-Frank Act.[177] This exception for late-filed claims due to lack of notice to the claimant serves a similar purpose (*i.e.,* to ensure a meaningful opportunity for claimants to participate in the claims process) as the ''reasonable, fixed extension of time'' that may be granted to the otherwise applicable six-month deadline under SIPA to certain specified classes of claimants.[178]

Section 8(a)(3) of SIPA provides that a customer who wants to assure that its net equity claim is paid out of customer property must file its claim with the SIPA trustee within a period of time set by the court (not exceeding 60 days after the date of publication of the notice provided in section 8(a)(1) of SIPA) notwithstanding that the claims bar date is later.[179] The final rule conforms to this section of SIPA by providing that any claim for net equity filed more than 60 days after the notice to creditors is first published need not be paid or satisfied in whole or in part out of customer property and, to the extent such claim is paid by funds advanced by SIPC, it will be satisfied in cash or securities, or both, as SIPC, the trustee, determines is most economical to the receivership estate.[180]

Under the final rule, the Corporation as receiver is required to notify a claimant whether it allows a claim within the 180-day period [181] as such time period may be extended by written agreement,[182] or the expedited 90-day period,[183] whichever would be applicable. The process established for the determination of claims by customers of a covered broker-dealer for customer property or customer name securities constitutes the exclusive process for the determination of such claims.[184] This process corresponds to

[162] *See* 12 U.S.C. 5390(h)(2)(H)(ii).

[163] *Id.*

[164] *See* 12 CFR 380.63(h) and 17 CFR 302.103(h). *See also* 12 U.S.C. 5385(d)(2); 12 U.S.C. 5390(h)(15)(B).

[165] The section of the final rule on claims of customers and other creditors of a covered broker-dealer appears in 12 CFR 380.64 for purposes of the Corporation and 17 CFR 302.104 for purposes of the Commission. The rule text for both agencies is identical.

[166] *See* 12 CFR 380.64 and 17 CFR 302.104.

[167] *See* 12 CFR 380.64(a)(4) and 17 CFR 302.104(a)(4). *See also* 15 U.S.C. 78aaa *et seq.*

[168] *See* 12 CFR 380.64(a)(4) and 17 CFR 302.104(a)(4).

[169] *See* 15 U.S.C. 78aaa *et seq.*

[170] 12 U.S.C. 5390(a)(2)–(5).

[171] *See* 12 CFR 380.64(b) and 17 CFR 302.104(b). *See also* 12 U.S.C. 5390(a)(2).

[172] *See* 12 CFR 380.64(b)(1) and 17 CFR 302.104(b)(1) (''The Corporation as receiver shall coordinate with SIPC as trustee to post the notice on SIPC's website at *www.sipc.org.* . . .'').

[173] *See* 12 CFR 380.64(b)(2) and 17 CFR 302.104(b)(2).

[174] *See* 12 CFR 380.64(b)(3) and 17 CFR 302.104(b)(3) (discussing claims bar date).

[175] *See* 15 U.S.C. 78fff–2(a).

[176] *See* 12 U.S.C. 5390(a)(2)(B)(i).

[177] *See* 12 CFR 380.64(b)(3) and 17 CFR 302.104(b)(3). *See also* 12 U.S.C. 5390(a)(3)(C)(i)–(ii).

[178] *See* 15 U.S.C. 78fff–2(a)(3).

[179] *See* 15 U.S.C. 78fff–2(a)(3) and 15 U.S.C. 78fff–2(a)(1).

[180] *See* 12 CFR 380.64(b)(3) and 17 CFR 302.104(b)(3). *See also* 15 U.S.C. 78fff–2(a)(3).

[181] *See* 12 CFR 380.64(c) and 17 CFR 302.104(c). *See also* 12 U.S.C. 5390(a)(3)(A)(i).

[182] *See* 15 U.S.C. 5390(a)(3)(A).

[183] *See* 12 CFR 380.64(c) and 17 CFR 302.104(c). *See also* 12 U.S.C. 5390(a)(5)(B).

[184] *See* 12 CFR 380.64(c) and 17 CFR 302.104(c).

the SIPA provision that requires that customer claims to customer property be determined *pro rata* based on each customer's net equity applied to all customer property as a whole.[185] While the Dodd-Frank Act provides for expedited treatment of certain claims within 90 days, given that all customers may have preferred status with respect to customer property and customer name securities, no one customer's claim, or group of customer claims, will be treated in an expedited manner ahead of other customers' claims. Consequently, the concept of expedited relief will not apply to customer claims.[186] The receiver's determination to allow or disallow a claim in whole or in part will utilize the determinations made by SIPC, as trustee, with respect to customer status, claims for net equity, claims for customer name securities, and whether property held by the covered broker-dealer qualifies as customer property.[187] A claimant may seek a *de novo* judicial review of any claim that is disallowed in whole or in part by the receiver, including but not limited to any claim disallowed in whole or part based upon any determination made by SIPC.[188]

F. Additional Sections of the Rule

In addition to the previously discussed sections, the Agencies have included sections in the final rule addressing: (1) The priorities for unsecured claims against a covered broker-dealer; [189] (2) the administrative expenses of SIPC; [190] and (3) QFCs.[191] The Dodd-Frank Act sets forth special priorities for the payment of claims of general unsecured creditors of a covered broker-dealer, which are addressed in the final rule's section on priorities for unsecured claims against a covered broker-dealer.[192] The priorities for unsecured claims against a covered broker-dealer include claims for unsatisfied net equity of a customer and certain administrative expenses of the receiver and SIPC.[193] The priorities set forth in the final rule express the cumulative statutory requirements set forth in Title II.[194] First, the priorities provide that the administrative expenses of SIPC as trustee for a covered broker-dealer will be reimbursed *pro rata* with administrative expenses of the receiver for the covered broker-dealer.[195] Second, the amounts paid by the Corporation as receiver to customers or SIPC will be reimbursed on a *pro rata* basis with amounts owed to the United States, including amounts borrowed from the U.S. Treasury for the orderly liquidation fund.[196] Third, the amounts advanced by SIPC for the satisfaction of customer net equity claims will be reimbursed subsequent to amounts owed to the United States, but before all other claims.[197]

Title II provides that SIPC is entitled to recover administrative expenses incurred in performing its responsibilities under section 205 on an equal basis with the Corporation.[198] Title II also sets forth a description of the administrative expenses of the receiver.[199] In order to provide additional clarity as to the types of administrative expenses that SIPC will be entitled to recover in connection with its role as trustee for the covered broker-dealer, the final rule provides that SIPC, in connection with its role as trustee for the covered broker-dealer, has the authority to ''utilize the services of private persons, including private attorneys, accountants, consultants, advisors, outside experts and other third party professionals.'' The section further provides SIPC with an allowed administrative expense claim with respect to any amounts paid by SIPC for services provided by these persons if those services are ''practicable, efficient and cost-effective.'' [200] The definition of *administrative expenses of SIPC* in the final rule conforms to both the definition of administrative expenses of the Corporation as receiver and the costs and expenses of administration reimbursable to SIPC as trustee in the liquidation of a broker-dealer under SIPA.[201] Specifically, the definition includes ''the costs and expenses of such attorneys, accountants, consultants, advisors, outside experts and other third parties, and other proper expenses that would be allowable to a third party trustee under 15 U.S.C. 78eee(b)(5)(A), including the costs and expenses of SIPC employees that would be allowable pursuant to 15 U.S.C. 78fff(e).'' [202] The definition excludes advances from SIPC to satisfy customer claims for net equity because the Dodd-Frank Act specifies that those advances are treated differently than administrative expenses with respect to the priority of payment.[203]

Lastly, the final rule's section on QFCs states that QFCs are governed in accordance with Title II.[204] Paragraph (b)(4) of section 205 of the Dodd-Frank Act states: ''Notwithstanding any provision of [SIPA] . . . the rights and obligations of any party to a qualified financial contract (as the term is defined in section 210(c)(8)) to which a covered broker or dealer for which the Corporation has been appointed receiver is a party shall be governed exclusively by section 210, including the limitations and restrictions contained in section 210(c)(10)(B).'' [205] Paragraph (c)(8)(A) of section 210 states that, ''no person shall be stayed or prohibited from exercising—(i) any right that such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with a covered financial company which arises upon the date of appointment of the

[185] *See* 15 U.S.C. 78fff–2.

[186] *See* 12 CFR 380.64(c) and 17 CFR 302.104(c).

[187] *Id.*

[188] *See* 12 CFR 380.64(d) and 17 CFR 302.104(d) (''The claimant may seek a judicial determination of any claim disallowed, in whole or in part, by the Corporation as receiver, including any claim disallowed based upon any determination(s) made by SIPC as trustee . . . by the appropriate district or territorial court of the United States . . . .''). *See also* 12 U.S.C. 5390(a)(4)–(5).

[189] The priorities for unsecured claims against a covered broker-dealer section appears in 12 CFR 380.65 for purposes of the Corporation and 17 CFR 302.105 for purposes of the Commission. The rule text for both agencies is identical.

[190] The SIPC administrative expenses section appears in 12 CFR 380.66 for purposes of the Corporation and 17 CFR 302.106 for purposes of the Commission. The rule text for both agencies is identical.

[191] The QFC section appears in 12 CFR 380.67 for purposes of the Corporation and 17 CFR 302.107 for purposes of the Commission. The rule text for both agencies is identical.

[192] *See* 12 U.S.C. 5390(b)(6) (providing the priority of expenses and unsecured claims in the orderly liquidation of SIPC members).

[193] *See* 12 CFR 380.65 and 17 CFR 302.105.

[194] *See* 12 U.S.C. 5390(b)(6) (providing the priority of expenses and unsecured claims in the orderly liquidation of SIPC members). *See also* 12 CFR 380.65 and 17 CFR 302.105.

[195] *See* 12 CFR 380.65(a) and 17 CFR 302.105(a). *See also* 12 U.S.C. 5390(b)(6)(A).

[196] *See* 12 CFR 380.65(b) and 17 CFR 302.105(b). *See also* 12 U.S.C. 5390(b)(6)(B); 12 U.S.C. 5390(n) (establishing the ''orderly liquidation fund'' available to the Corporation to carry out the authorities granted to it under Title II).

[197] *See* 12 CFR 380.65(c) and 17 CFR 302.105(c). *See also* 12 U.S.C. 5390(b)(6)(C).

[198] *See* 12 U.S.C. 5390(b)(6)(A). The regulation governing the Corporation's administrative expenses in its role as receiver under Title II is located at 12 CFR 380.22.

[199] *See* 12 U.S.C. 5381(a)(1).

[200] *See* 12 CFR 380.66(a) and 17 CFR 302.106(a).

[201] *See* 12 CFR 380.66(a) and 17 CFR 302.106(a). *See also* 12 U.S.C. 5381(a)(1) (defining *administrative expenses of the receiver*); 15 U.S.C. 78eee(5) (providing for compensation for services and reimbursement of expenses).

[202] *See* 12 CFR 380.66(a) and 17 CFR 302.106(a). *See also* 15 U.S.C. 78eee(b)(5)(A); 15 U.S.C. 78fff(e).

[203] *See* 12 CFR 380.66(b) and 17 CFR 302.106(b) (defining the term *administrative expenses of SIPC*). *See also* 12 U.S.C. 5390(b)(6)(C) (stating SIPC's entitlement to recover any amounts paid out to meet its obligations under section 205 and under SIPA).

[204] *See* 12 CFR 380.67 and 17 CFR 302.107.

[205] *See* 12 U.S.C. 5385(b)(4) (''Notwithstanding any provision of [SIPA] . . . the rights and obligations of any party to a qualified financial contract . . . to which a covered broker or dealer . . . is a party shall be governed exclusively by section 210 [of the Dodd-Frank Act]'').

Corporation as receiver for such covered financial company or at any time after such appointment; (ii) any right under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts described in clause (i); or (iii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more contracts or agreements described in clause (i), including any master agreement for such contracts or agreements.'' [206] Paragraph (c)(10)(B)(i)(I)-(II) of section 210 provides in pertinent part that a person who is a party to a QFC with a covered financial company may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (c)(8)(A) of section 210 solely by reason of or incidental to the appointment under Title II of the Corporation as receiver for the covered financial company: (1) Until 5:00 p.m. eastern time on the business day following the date of the appointment; or (2) after the person has received notice that the contract has been transferred pursuant to paragraph (c)(9)(A) of section 210.[207] The final rule reflects these statutory directives and states: ''The rights and obligations of any party to a qualified financial contract to which a covered broker or dealer is a party shall be governed exclusively by 12 U.S.C. 5390, including the limitations and restrictions contained in 12 U.S.C. 5390(c)(10)(B), and any regulations promulgated thereunder.'' [208]

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 [209] (''PRA'') states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (''OMB'') control number. The final rule clarifies the process for the orderly liquidation of a covered broker-dealer under Title II of the Dodd-Frank Act. The final rule addresses only the process to be used in the liquidation of the covered broker-dealer and does not create any new, or revise any existing, collection of information pursuant to the PRA. Consequently, no information has been submitted to the OMB for review.

[206] *See* 12 U.S.C. 5390(c)(8)(A).

[207] *See* 12 U.S.C. 5390(c)(10)(B).

[208] *See* 12 CFR 380.67 and 17 CFR 302.107.

[209] 44 U.S.C. 3501 *et seq.*

V. Economic Analysis

A. Introduction and General Economic Considerations

The Agencies are jointly adopting this rule to implement provisions applicable to the orderly liquidation of covered broker-dealers pursuant to section 205(h) of the Dodd-Frank Act in a manner that protects market participants by clearly establishing expectations and equitable treatment for customers and creditors of failed broker-dealers, as well as other market participants. The Agencies are mindful of the expected costs and benefits of their respective rules. The following economic analysis seeks to identify and consider the expected benefits and costs as well as the expected effects on efficiency, competition, and capital formation that would result from the final rule. Overall, the Agencies believe that the primary benefit of the final rule is to codify additional details regarding the process for the orderly liquidation of failed broker-dealers pursuant to Title II, which will provide additional structure and enable consistent application of the process. Importantly, the final rule does not affect the set of resolution options available to the Agencies in the event of the failure of a broker-dealer, nor does it affect the range of possible outcomes. The detailed analysis of the expected costs and benefits associated with the final rule is discussed below.

The Dodd-Frank Act specifically provides that the FDIC may be appointed receiver for a systemically important broker-dealer for purposes of the orderly liquidation of the company using the powers and authorities granted to the FDIC under Title II.[210] Section 205 of the Dodd-Frank Act sets forth a process for the orderly liquidation of covered broker-dealers that is an alternative to the process under SIPA, but incorporates many of the customer protection features of SIPA into a Title II orderly liquidation. Congress recognized that broker-dealers are different from other kinds of systemically important financial companies in several ways, not the least of which is how customers of a broker-dealer are treated in an insolvency proceeding relating to the broker-dealer.[211] Section 205 of the Dodd-Frank Act is intended to address situations where the failure of a large broker-dealer could have broader impacts on the stability of the United States financial system. The financial crisis of 2007–2009 and the ensuing economic recession resulted in the failure of many financial entities. Liquidity problems that initially began at a small set of firms quickly spread as uncertainty about which institutions were solvent increased, triggering broader market disruptions, including a general loss of liquidity, distressed asset sales, and system-wide redemption runs by some participants.[212] The final rule seeks to implement the orderly liquidation provisions of the Dodd-Frank Act in a manner that is designed to help reduce both the likelihood and the severity of financial market disruptions that could result from the failure of a covered broker-dealer.

In the case of a failing broker-dealer, the broker-dealer customer protection regime is primarily composed of SIPA and the Exchange Act, as administered by SIPC and the Commission. Among other Commission financial responsibility rules, Rule 15c3–3 specifically protects customer funds and securities held by a broker-dealer and essentially forbids broker-dealers from using customer assets to finance any part of their businesses unrelated to servicing securities customers.[213] With respect to SIPA, and as a general matter, in the event that a broker-dealer enters into a SIPA liquidation, customers' cash and securities held by the broker-dealer are returned to customers on a pro-rata basis.[214] If the broker-dealer does not have sufficient funds to satisfy customer net equity claims, SIPC advances may be used to supplement the distribution, up to a ceiling of $500,000 per customer, including a maximum of $250,000 for cash claims.[215] When applicable, SIPC or a SIPA trustee will return securities that are registered in the customer's name or are in the process of being registered directly to each customer.[216] An integral component of the broker-dealer customer protection regime is that, under SIPA, customers have preferred status relative to general creditors with respect to customer property and customer name securities.[217] SIPC or a SIPA trustee may sell or transfer customer accounts to another SIPC

[210] *See* 12 U.S.C. 5382, 12 U.S.C. 5383, and 12 U.S.C. 5384.

[211] *See* 12 U.S.C. 5385 (orderly liquidation of covered brokers and dealers).

[212] *See* Brunnermeier, M. (2009), *Deciphering the Liquidity and Credit Crunch 2007–2008,* Journal of Economic Perspectives 23, 77–100.

[213] *See Net Capital Requirements for Brokers and Dealers,* Exchange Act Release No. 21651 (January 11, 1985), 50 FR 2690, 2690 (January 18, 1985). *See also Broker-Dealers; Maintenance of Certain Basic Reserves,* Exchange Act Release No. 9856 (November 10, 1972), 37 FR 25224, 25224 (November 29, 1972).

[214] *See* 15 U.S.C. 78fff–2(b).

[215] *See* 15 U.S.C. 78fff–3(a).

[216] *See* 15 U.S.C. 78fff–2(c).

[217] *See* 15 U.S.C. 78fff(a).

member in order for the customers to regain access to their accounts in an expedited fashion.[218]

Title II of the Dodd-Frank Act supplemented the customer protection regime for broker-dealers. As described above in more detail, in the event a covered broker-dealer fails, Title II provides the FDIC with a broad set of tools to help ensure orderly liquidation, including the ability to transfer all assets and liabilities held by a broker-dealer—not just customer assets—to a bridge broker-dealer, as well as the ability to borrow from the U.S. Treasury to facilitate the orderly liquidation should the need arise.[219] Upon the commencement of an orderly liquidation under Title II, the FDIC is appointed the receiver of the broker-dealer and SIPC is appointed as the trustee for the liquidation process. The FDIC is given the authority to form and fund a bridge broker-dealer,[220] which would facilitate a quick transfer of customer accounts to a solvent broker-dealer and therefore would accelerate reinstated access to customer accounts.[221] To further reduce the risk of such a run on a failed broker-dealer, Title II imposes an automatic one-business day stay on certain activities by the counterparties to QFCs, so as to provide the FDIC an opportunity to inform counterparties that the covered broker-dealer's liabilities were transferred to and assumed by the bridge broker-dealer.[222]

The final rule is designed to implement the provisions of section 205 so that an orderly liquidation can be carried out for certain broker-dealers with efficiency and predictability and the intended benefits of orderly liquidation, as established by the Dodd-Frank Act, on the overall economy can be realized. Specifically, the final rule implements the framework for the liquidation of covered broker-dealers and includes definitions for key terms such as customer, customer property, customer name securities, net equity, and bridge broker-dealer. It sets forth three major processes regarding the orderly liquidation—the process of initiating the orderly liquidation (including the appointment of receiver and trustee and the notice and application for protective decree), the process of account transfers to the bridge broker-dealer, and the claims process for customers and other creditors. While establishing orderly liquidation generally, section 205 does not specifically provide the details of such processes.

The final rule provides several clarifications to the provisions in the statute. For example, under Title II, the FDIC has authority to transfer any assets without obtaining any approval, assignment, or consents.[223] The final rule further provides that the transfer to a bridge broker-dealer of any account, property, or asset is not determinative of customer status, nor that the property so transferred qualifies as customer property or customer name securities.[224] The final rule also clarifies terms such as the venue for filing the application for a protective decree and the filing date.[225]

In addition, the final rule clarifies the process for transferring assets to the bridge broker-dealer, which should help expedite customer access to their respective accounts. For example, the final rule provides that allocations to customer accounts at the bridge broker-dealer may initially be derived from estimates based upon the books and records of the covered broker-dealer or other information deemed relevant by the Corporation in consultation with SIPC.[226] This means that customers may potentially access their accounts more expeditiously, before the time-consuming record reconciliation process concludes.

Therefore, overall, the Agencies believe that the primary benefit of the final rule is to codify additional details regarding the process for the orderly liquidation of covered broker-dealers, which will provide additional structure and enable consistent application of the process. Importantly, the final rule does not affect the set of resolution options available to the Agencies upon failure of a covered broker-dealer, nor does it affect the range of possible outcomes. In the absence of the final rule, the Commission, the Board and the Secretary could still determine that an orderly liquidation under Title II is appropriate, and the FDIC would still have broad authority to establish a bridge broker-dealer and transfer all assets and liabilities held by the failed entity.[227] However, in the absence of the final rule, uncertainty could arise regarding the definitions (*e.g.,* the applicable filing date or the nature of the application for a protective decree) and the claims process, which could cause delays and undermine the goals of the statute. By establishing a uniform process for the orderly resolution of a broker-dealer, the final rule should improve the orderly liquidation process while implementing the statutory requirements so that orderly liquidations can be carried out with efficiency and predictability. Such efficiency and predictability in the orderly liquidation process should generally minimize confusion over the status of customer accounts and property and conserve resources that otherwise would have to be expended in resolving delays in the claims process or in connection with any potential litigation that could arise from delays. There has not been a liquidation of a broker-dealer under Title II in the interim that would clarify and bring certainty to the process.

The discussion below elaborates on the likely expected costs and benefits of the final rule and its expected potential impact on efficiency, competition, and capital formation, as well as potential alternatives.

B. Economic Baseline

To assess the economic impact of the final rule, the Agencies are using section 205 of the Dodd-Frank Act as the economic baseline which specifies provisions for the orderly liquidation of certain large broker-dealers. Section 205(h) directs the Agencies, in consultation with SIPC, jointly to issue rules to fully implement the section.[228] Although no implementing rules are currently in place, the statutory requirements of section 205 of the Dodd-Frank Act are self-effectuating and currently in effect. Therefore, the appropriate baseline is the orderly liquidation authority in place pursuant to section 205 without any implementation rules issued by the Agencies.

1. SIPC's Role

Section 205 provides that upon the appointment of the FDIC as receiver for a covered broker-dealer, the FDIC shall appoint SIPC as trustee for the liquidation of the covered broker-dealer

[218] *See* 15 U.S.C. 78fff–2(f).

[219] Under a SIPA liquidation, the Commission is authorized to make loans to SIPC should SIPC lack sufficient funds. In addition, to fund these loans, the Commission is authorized to borrow up to $2.5 billion from the U.S. Treasury. *See* 15 U.S.C. 78ddd(g)–(h).

[220] *See* 12 CFR 380.63 and 17 CFR 302.103 (regarding the FDIC's power to ''organize one or more bridge brokers or dealers with respect to a covered broker or dealer'').

[221] *See* Section III.D.2 on the FDIC's power to transfer accounts to a bridge broker-dealer.

[222] *See* Section III.F on the additional sections of the adopted rule that relate to qualified financial contracts.

[223] *See* 12 CFR 380.63 and 17 CFR 302.103.

[224] These determinations will be made by SIPC in accordance with SIPA. *See* 12 CFR 380.64(a)(1) and 17 CFR 302.104 (explaining ''SIPC, as trustee for a covered broker or dealer, shall determine customer status . . .'').

[225] *See* 12 CFR 380.62 and 17 CFR 302.102.

[226] *See* 12 CFR 380.63(d) and 17 CFR 302.103(d).

[227] *See* 12 U.S.C. 5383(a)(1)(B).

[228] 12 U.S.C. 5385(h).

under SIPA without need for any approval.[229] Upon its appointment as trustee, SIPC shall promptly file with a federal district court an application for protective decree, the terms of which will jointly be determined by SIPC and the Corporation, in consultation with the Commission.[230] Section 205 also provides that SIPC shall have all of the powers and duties provided by SIPA except with respect to assets and liabilities transferred to the bridge broker-dealer.[231] The determination of claims and the liquidation of assets retained in the receivership of the covered broker-dealer and not transferred to the bridge financial company shall be administered under SIPA.[232]

2. The Corporation's Power To Establish Bridge Broker-Dealers

Section 205 of the Dodd-Frank Act does not contain specific provisions regarding bridge broker-dealers. However, section 210 of the Dodd-Frank Act provides that, in connection with an orderly liquidation, the FDIC has the power to form one or more bridge financial companies, including bridge broker-dealers with respect to a covered broker-dealer.[233] Under Title II, the FDIC has the authority to transfer any asset or liability held by the covered financial company without obtaining any approval, assignment, or consent with respect to such transfer.[234] Title II further provides that any customer of a covered broker-dealer whose account is transferred to a bridge financial company shall have all rights and privileges under section 205(f) of the Dodd-Frank Act and SIPA that such customer would have had if the account were not transferred.[235]

3. Satisfaction of Customer Claims

Section 205(f) of the Dodd-Frank Act requires that all obligations of a covered broker-dealer or bridge broker-dealer to a customer relating to, or net equity claims based on, customer property or customer name securities must be promptly discharged in a manner and in an amount at least as beneficial to the customer as would have been the case had the broker-dealer been liquidated in a SIPA proceeding.[236]

4. Treasury Report

On February 21, 2018, the Treasury Department published a report on the orderly liquidation authority and bankruptcy reform[237] (''Treasury Report'') pursuant to the Presidential Memorandum issued on April 21, 2017.[238] Among other things, the Treasury Report recommended retaining the orderly liquidation authority as an emergency tool for use only under extraordinary circumstances.[239] The Treasury Report also recommended specific reforms to the orderly liquidation authority to eliminate opportunities for ad hoc disparate treatment of similarly situated creditors, reinforce existing taxpayer protections, and strengthen judicial review.[240] While some of these reforms relate to Title II of the Dodd-Frank Act, the Treasury Report did not recommend against implementing Section 205.[241]

C. Expected Benefits, Costs and Effects on Efficiency, Competition, and Capital Formation

1. Expected Benefits

a. Overall Expected Benefits

The key expected benefit of the final rule is that it creates a more structured framework to implement section 205 of the Dodd-Frank Act, so that the orderly liquidation of a covered broker-dealer can be carried out with efficiency and predictability if the need arises. As discussed in the economic baseline, section 205 provides parameters for the orderly liquidation of covered broker-dealers, while the final rule implements these statutory parameters. The final rule first provides definitions for certain key terms including customer, customer property, customer name securities, net equity, and bridge broker-dealer, among others.[242] It then sets forth three major processes regarding the orderly liquidation: The process of initiating the orderly liquidation,[243] the process of account transfers to the bridge broker-dealer,[244] and the claims process for customers and other creditors.[245]

First, besides incorporating the statutory requirement of appointing SIPC as the trustee for covered broker-dealers, the final rule provides a more detailed process for notice and application for protective decree. It provides clarification for the venue in which the notice and application for a decree is to be filed.[246] It clarifies the definition of the filing date if the notice and application is filed on a date other than the appointment date.[247] And finally, it includes a non-exclusive list of notices drawn from other parts of Title II to inform the relevant parties of the initiation of the orderly liquidation process and what they should expect.[248]

Second, the final rule sets forth the process to establish one or more bridge broker-dealers and to transfer accounts, property, and other assets held by a covered broker-dealer to such bridge broker-dealers, pursuant to Title II.[249] Section 205 of the Dodd-Frank Act does not specifically provide for such a process. The final rule specifies that the Corporation may transfer any account, property, or asset held by a covered broker-dealer (including customer and non-customer accounts, property and assets) to a bridge broker-dealer as the Corporation deems necessary, based on the FDIC's authority under Title II to transfer any assets without obtaining any approval, assignment, or consents.[250] The transfer to a bridge broker-dealer of any account, property or asset is not determinative of customer status.[251] The determinations of customer status are to be made by SIPC as trustee in accordance with SIPA.[252] As discussed above, given the preferred status of customers, litigation has been brought on customer status under SIPA (*e.g.,* repo counterparties' claims of customer status under SIPA). [253] Since the Corporation may transfer both customer and non-customer accounts, property, and assets held by a covered broker-dealer to a bridge broker-dealer according to the statute, some non-customer creditors may mistakenly interpret such a transfer as conferring customer status on them in the absence of a final rule (especially since in a SIPA

[229] 12 U.S.C. 5385(a).

[230] *See* 12 U.S.C. 5385(a)(2).

[231] 12 U.S.C. 5385. *See also* 12 CFR 380.64(a) and 17 CFR 302.104(a) (regarding SIPC's role as trustee).

[232] *Id.*

[233] *See* 12 U.S.C. 5390(h)(1)(A). *See also* 12 U.S.C. 5390(h)(2)(H).

[234] 12 U.S.C. 5390(a)(1)(G).

[235] *See* 12 U.S.C. 5390(h)(2)(H)(iii).

[236] *See* 12 U.S.C. 5385(f)(1).

[237] *See* Report to the President of the United States Pursuant to the Presidential Memorandum Issued April 21, 2017: Orderly Liquidation Authority and Bankruptcy Reform (Feb. 21, 2018). (''Treasury Report'') (available at *https://home.treasury.gov/sites/default/files/2018-02/OLA_REPORT.pdf*).

[238] *See* Presidential Memorandum for the Secretary of the Treasury, Orderly Liquidation Authority (Apr. 21, 2017) (available at *https://www.govinfo.gov/content/pkg/DCPD-201700266/pdf/DCPD-201700266.pdf*).

[239] *See* Treasury Report at 2.

[240] *See ibid.* at 1–2.

[241] *Ibid.* Appendix A at 44–45.

[242] *See* 12 CFR 380.60 and 17 CFR 302.100.

[243] *See* 12 CFR 380.61–380.62, 17 CFR 302.101–302.102.

[244] *See* 12 CFR 380.63 and 17 CFR 302.103.

[245] *See* 12 CFR 380.64 and 17 CFR 302.104.

[246] *See* 12 CFR 380.62(a) and 17 CFR 302.102.

[247] *Id.*

[248] *See* 12 CFR 380.62(b) and 17 CFR 302.102(b).

[249] *See* 12 CFR 380.63 and 17 CFR 302.103.

[250] *See* 12 CFR 380.63(e) and 17 CFR 302.103(e).

[251] *See* 12 CFR 380.64(a) and 17 CFR 302.104(a).

[252] *See* 12 CFR 380.64(a) and 17 CFR 302.104(a) as proposed.

[253] *See, e.g., In re Lehman Brothers Inc.,* 492 B.R. 379 (Bankr. S.D.N.Y. 2013), aff'd, 506 B.R. 346.

proceeding only customer assets are transferred). Such mistaken beliefs could give rise to litigation over customer status. The clarification in the final rule stresses that customer status is determined by SIPC separately from the decision to transfer an asset to a bridge broker-dealer, and could thus help prevent confusion concerning whether other creditors whose assets have also been transferred should be treated as customers. This clarification may mitigate a potential increase in litigation costs, although the economic benefit of such mitigation is likely to be *de minimis.*

Regarding the account transfers to bridge broker-dealers, in addition to the provisions on the specifics of a transfer (*e.g.,* the calculation of customer net equity, the assumption of the net equity claim by the bridge broker-dealer and the allocation of customer property), the final rule further provides that allocations to customer accounts at the bridge broker-dealer may initially be derived from estimates based upon the books and records of the covered broker-dealer or other information deemed relevant by the Corporation in consultation with SIPC.[254] Given that it could be time-consuming to reconcile the broker-dealer's records with the records of other parties, this provision may speed up the allocation of customer property to the customer accounts at the bridge broker-dealer, thus providing customers quicker access to their accounts.

Third, the final rule also addresses the claims process for customers and other creditors.[255] The final rule implements the statute's requirement that the trustee's allocation to a customer shall be in an amount and manner, including form and timing, which is at least as beneficial as such customer would have received under a SIPA proceeding, as required by section 205(f).[256] In addition, the final rule further addresses certain procedural aspects of the claims determination process, such as the publication and mailing of notices to creditors, the notice of the appointment of the FDIC and SIPC, the claims bar date, and expedited relief.

In summary, the final rule will provide interested parties with details on the implementation of the orderly liquidation process. By providing for a uniform process, the final rule could improve the efficiency and predictability of the orderly liquidation process. Under the baseline scenario, in absence of the final rule, uncertainty may arise because various parties may interpret the statutory requirements differently. For example, under the baseline, the repo counterparties of the broker-dealer may not understand that the transfer of the rights and obligations under their contracts to the bridge broker-dealer is not determinative of customer status, because such a transfer to another broker-dealer is only available for customers under a SIPA proceeding. That is, repo counterparties of the broker-dealer may mistakenly believe that the transfer of rights and obligations implies customer status and may thus inappropriately manage their exposures to the broker dealer once orderly liquidation is initiated. Moreover, repo counterparties might choose to take advantage of ambiguity under the baseline scenario because under SIPA, customers have preferred status relative to general creditors with respect to customer property and customer name securities. The final rule provides that the transfer of accounts to a bridge broker-dealer is not determinative of customer status, and that such status is determined by SIPC in accordance with SIPA. Uncertainty regarding matters such as customer status could result in litigation and delays in the claims process if orderly liquidation were to be commenced with respect to a covered broker-dealer. Therefore, the structure provided by the final rule could conserve resources that otherwise would have to be expended in settling such litigation and resolving delays that may arise, creating a more efficient process for enabling orderly liquidation. Moreover, under the baseline scenario, uncertainties about how customer claims would be handled might lead some customer claimants to reduce exposure if doubts about a broker-dealer's viability arise, by withdrawing free credit balances. Similarly, uncertainties about initiation of orderly liquidations and the process of transferring assets to the bridge broker-dealer might lead creditors to reduce repo and derivatives exposure before such actions are warranted. Such uncertainties, if they were to persist, could undermine the broader benefits that orderly liquidation could provide to financial stability. In this sense, the processes set forth by the final rule could help realize the economic benefits of section 205.

b. Benefits to Affected Parties

The Agencies believe that the final rule provides benefits comparable to those under the baseline scenario to relevant parties such as customers, creditors, and counterparties. To the extent that it provides additional guidance on procedural matters, the final rule may reduce potential uncertainty, thereby providing for a more efficient and predictable orderly liquidation process. Therefore, the Agencies believe the final rule will improve the orderly liquidation process and provide benefits beyond the statute, although such benefits are likely to be incremental.

The Agencies believe that the final rule will be beneficial to customers.[257] The final rule states that the bridge broker-dealer will undertake the obligations of a covered broker-dealer with respect to each person holding an account transferred to the bridge broker-dealer. This will provide customers with transferred accounts assurance that they will receive the same legal protection and status as a customer of a broker-dealer that is subject to liquidation outside of Title II.[258] Further, under the final rule, the transfer of non-customer assets to a bridge broker-dealer will not imply customer status for these assets. The clarification in the final rule stresses that customer status is determined by SIPC separately from the decision to transfer an asset to a bridge broker-dealer, and could thus help prevent confusion concerning whether other creditors whose assets have also been transferred should be treated as customers. This clarification may mitigate a potential increase in litigation costs, although the economic benefit of such mitigation is likely to be *de minimis.* To the extent that the clarification reduces delays in the return of customer assets to customers, because it reduces the likelihood of litigation, the final rule would be beneficial to customers. Finally, the final rule also provides that allocations to customer accounts at the bridge broker-dealer may initially be derived from estimates based on the books and records of the covered broker-dealer.[259] This provision could help facilitate expedited customer access to their respective accounts, as customers will not have to wait for a

[254] *See* 12 CFR 380.63(d) and 17 CFR 302.103(d).

[255] *See* 12 CFR 380.64 and 17 CFR 302.104.

[256] *See* 12 CFR 380.64(a)(4) and 17 CFR 302.104(a)(4).

[257] *See* Section II.D.1 discussing the preferred status of customer claims. *See also* 12 CFR 380.65(a)(1) and 17 CFR 302.105(a)(1) (explaining that ''SIPC . . . shall determine customer status . . .'').

[258] *See* 12 CFR 380.63(d) and 17 CFR 302.103(d) (''With respect to each account transferred to the bridge broker or dealer pursuant to paragraph (b), the bridge broker or dealer shall undertake the obligations of a broker or dealer only with respect to property transferred to and held by the bridge broker or dealer and allocated to the account as provided in section 380.64(a)(3) [for purposes of the FDIC and section 302.104(a)(3) for purposes of the SEC], including any customer property and any advances from SIPC.'').

[259] *See* 12 CFR 380.63(d) and 17 CFR 302.103(d).

final reconciliation of the broker-dealer's records with other parties' records.[260]

Additionally, the Agencies believe the final rule will yield benefits to both secured and unsecured creditors, as it clarifies the manner in which creditor claims could be transferred to a bridge broker-dealer. The Agencies believe that such clarification will reduce the likelihood of delayed access to creditor assets transferred from a covered broker-dealer.

2. Expected Costs

While the final rule ensures that in an orderly liquidation all customer claims are satisfied in a manner and in an amount at least as beneficial to them as would have been the case in a SIPA liquidation, orderly liquidation does entail a different treatment of QFC counterparties. Under SIPA, certain QFC counterparties may exercise specified contractual rights regardless of an automatic stay.[261] In contrast, Title II imposes an automatic one-day stay on certain activities by QFC counterparties,[262] which may limit the ability of these counterparties to terminate contracts or exercise any rights against collateral. The stay will remain in effect if the QFC contracts are transferred to a bridge broker-dealer. While these provisions may impose costs, the Agencies' baseline subsumes these costs because they are a consequence of the statute and are already in effect.

In addition, as discussed above, the final rule could benefit customers by allowing the allocations to customer accounts at the bridge broker-dealer to be derived from estimates based on the books and records of the covered broker-dealer. Such a process may accelerate customers' access to their accounts, as they will not have to wait for a final account reconciliation to access their accounts. As provided for in the final rule, the calculation of allocations of customer property to customer accounts will be refined as additional information becomes available. The Agencies believe that initial allocations will be made conservatively, which, with the backstop of the availability of SIPC advances to customers in accordance with the requirements of SIPA, should minimize the possibility of an over-allocation to any customer. To the extent that initial estimates of allocations to some customers are excessive, it is possible that customer funds may need to be reallocated after customers initially gain access to their accounts, resulting in additional costs for customers. Thus, this particular aspect of the final rule is a trade-off between expedited access to customer funds and the possibility of subsequent reallocation. The costs associated with subsequent reallocation may vary significantly depending on broker-dealer systems and the specific events. In the preamble, the Agencies acknowledged that they lacked data that would allow them to estimate the costs associated with subsequent reallocation. Commenters on the proposal did not provide information that would help the Agencies estimate these costs. For these reasons, the Agencies believe the costs associated with subsequent reallocation cannot be quantified at this time. However, as noted above, the Agencies believe initial allocations will be made conservatively, which would minimize the possibility of an over-allocation to any customer and mitigate potential costs and uncertainty associated with allocation refinements.

3. Expected Effects on Efficiency, Competition, and Capital Formation

The Commission and the Corporation have assessed the expected effects arising from the final rule on efficiency, competition, and capital formation. As discussed above, the Agencies believe the primary economic benefit of the final rule will be that it provides details on the implementation of section 205 of the Dodd-Frank Act, so that the orderly liquidation of a covered broker-dealer can be carried out with efficiency and predictability if the need arises. This structure could reduce uncertainty about the treatment of customer and creditor claims in an orderly liquidation, conserving resources and creating a more efficient process relative to orderly liquidation under the baseline.

In the absence of the final rule, uncertainty about the treatment of claims could encourage customers and creditors to reduce exposure to a broker-dealer facing financial distress, exacerbating the liquidity problems of the broker-dealer. These liquidity problems could drain cash from the broker-dealer and weaken its ability to meet its financial obligations to the point where the broker-dealer has to be liquidated, even if the broker-dealer's business is still viable and profitable. Such an outcome is inefficient if the value realized from the liquidation of the broker-dealer is less than the value of the broker-dealer as a going concern. Additionally, such an outcome would be inefficient if the assets held by the covered broker-dealer were sold at fire sale prices in the process of trying to meet extraordinary liquidity demands. By clarifying the orderly liquidation process, the final rule could further reduce the likelihood of customers and creditors reducing their exposures to a broker-dealer facing financial distress, thereby further reducing the likelihood that the broker-dealer faces liquidity problems. This, in turn may reduce the likelihood of the inefficient liquidation of the broker-dealer.

In the absence of the final rule, creditors of a financially distressed broker-dealer that happen to hold the broker-dealer's assets as collateral might rapidly sell those collateral assets if they are uncertain about the treatment of their claims in an orderly liquidation under the statute. To the extent that the rapid selling of collateral assets by creditors generates large declines in the prices of those assets and creates a wedge between the prices of those assets and their intrinsic values—values based on the size and riskiness of asset cash flows—price efficiency could be reduced. A reduction in the price efficiency of collateral assets may dissuade other market participants from trading those collateral assets for hedging or investment purposes because they are concerned that the assets' prices may not accurately reflect their intrinsic values. By clarifying the treatment of creditor claims in an orderly liquidation, the final rule could promote the price efficiency of collateral assets by reducing the likelihood of rapid collateral asset sales.

Beyond these identified potential effects, the Agencies believe that the additional effects of the final rule on efficiency, competition, and capital formation will be linked to the existence

[260] *See* 12 CFR 380.63(e) and 17 CFR 302.103(e). *See also* 15 U.S.C. 78eee(b)(2)(C)(i)–(ii).

[261] See 15 U.S.C. 78eee(b)(2)(C)(i)–(ii). *See also* Letter from Michael E. Don, Deputy General Counsel of SIPC to Robert A. Portnoy, Deputy Executive Director and General Counsel of the Public Securities Association, (February 4, 1986) (repurchase agreements); Letter from Michael E. Don to J. Eugene Marans, Cleary, Gottlieb, Steen & Hamilton, (August 29, 1988) (securities lending transactions); Letter from Michael E. Don to James D. McLaughlin, Director of the American Bankers Association, (October 30, 1990) (securities lending transactions secured by cash collateral or supported by letters of credit); Letter from Michael E. Don to John G. Macfarlane, III, Chairman, Repo Committee, Public Securities Association, (February 19, 1991) (securities lending transactions secured by cash collateral or supported by letters of credit); Letter from Michael E. Don, President of SIPC to Seth Grosshandler, Cleary, Gottlieb, Steen & Hamilton, (February 14, 1996) (repurchase agreements falling outside the Code definition of ''repurchase agreement''); and Letter from Michael E. Don to Omer Oztan, Vice President and Assistant General Counsel of the Bond Market Association, (June 25, 2002) (repurchase agreements).

[262] *See* 12 CFR 380.67 and 17 CFR 302.107 (''The rights and obligations of any party to a qualified financial contract to which a covered broker or dealer is a party shall be governed exclusively by 12 U.S.C. 5390, including the limitations and restrictions contained in 12 U.S.C. 5390(c)(10)(B), and any regulations promulgated thereunder.'').

of an orderly liquidation process itself, which is part of the baseline, and is an option available to regulatory authorities today. The Agencies' analysis of the effects of an orderly liquidation process on efficiency, competition, and capital formation focuses on those effects that derive from the process and structure created by the final rule, but not those that are due to the underlying statute, which is part of the economic baseline. By establishing a structured framework, the final rule sets clearer expectations for relevant parties and therefore could help reduce potential uncertainty and contribute to efficiency and liquidity as described above. Relative to the baseline scenario, where orderly liquidation exists as an option for regulatory authorities but without the framework provided in the final rule, having a structured process in place as a response to a potential crisis could also allow broker-dealers to more readily attract funding, thus facilitating capital formation.

D. Alternatives Considered

As described above, Title II establishes a process by which a covered broker-dealer would be placed into orderly liquidation. Furthermore, orderly liquidation is available as an option to regulators today, and the final rule does not affect the set of resolution options available to the Agencies, nor does it affect the range of possible outcomes. As an alternative to this final rule, the Agencies could rely on a very limited rule that focuses on defining key terms, in conjunction with statutory provisions, to implement Section 205. However, the Agencies believe this alternative approach would result in orderly liquidations, if any, that are less efficient and less predictable, and that would fail to achieve the benefits of the final rule described above. In particular, the absence of the provisions of the final rule outlining the process for notice and application for a protective decree, the process for establishing a bridge broker-dealer, and the process governing the transfer of accounts, property, and other assets held by the covered broker-dealer to the bridge broker-dealer, could lead to inconsistent application of the statutory provisions. Such inconsistency could cause delays in the liquidation process and increase the likelihood of litigation over issues such as customer status, increasing costs for customers and creditors without corresponding benefits.

E. Comments on the Proposed Rule

As discussed in Section II *supra,* six comment letters were submitted to the FDIC and the SEC on the proposed rule. Three are from individuals (the ''Individual Letters''), one is from students in a law school financial markets and corporate law clinic (the ''Legal Clinic Letter''), one is from a group that states it is a ''group of concerned citizens, activists, and financial professionals that works to ensure that financial regulators protect the interests of the public'' (the ''OSEC Letter''), and one is a joint letter from three trade groups representing various segments of the financial services industry (the ''Joint Letter'').[263] Three of the letters (Law Clinic Letter, OSEC Letter, and Joint Letter) provided comments that relate to the economic analysis of this rule. This section addresses those comments.

1. The Law Clinic Letter

The Law Clinic Letter addresses two specific situations in which the commenter believes the application of the proposed rule might in some manner or on some facts have the possibility of delaying or obstructing consumer access to property in a Title II liquidation of a covered broker-dealer. First, in this commenter's view, the discretion provided to SIPC under the proposed rule to use estimates for the initial allocation of assets to customer accounts at the bridge broker-dealer is too broad and may result in over-allocations to these accounts to the detriment of other customers when the overpayments are recalled. In particular, the commenter opines that a conservative initial allocation intended to minimize the possibility of an over-allocation to any customer and mitigate potential costs and uncertainty associated with allocation refinements is ''too vague and is not codified in the rule itself.'' Further, the commenter asserts as ''irresponsible'' the Agencies' decision to base customer allocations on the books and records of the covered broker-dealer without fully understanding the potential costs to customers. The commenter also pointed out that the Agencies lack the data demonstrating that delays experienced by customers in accessing their accounts actually constitute an actionable problem. The commenter requests that the Agencies modify the final rule to make it clear that estimates may be used only when the liquidated entity acts in bad faith to impede the reconciliation process.

The Agencies believe the commenter has misunderstood the discussion of anticipated costs as a justification for the provision of the proposed rule. The justification for the provision, as stated in the preamble, is to ensure that customers receive the assets held for their customer accounts, together with SIPC payments, if any, as quickly as is practicable. Returning customer assets to customers as quickly as possible is important for a number of reasons. For example, customers may depend financially on these assets or may need access in order to be able to de-risk positions or re-hedge positions. It is for these and other similar reasons that the trustees in SIPA liquidations have utilized estimates to allow partial access to customer accounts before a final reconciliation is possible. Although the circumstances of a particular orderly liquidation may make this process difficult, the Agencies would endeavor to provide customers prompt access to their accounts to the extent possible based upon estimates while that reconciliation is being completed. As a result, the Agencies have made no changes in the final rule as a result of this comment.

In response to the commenter's concern that the notion of a conservative initial allocation is vague and not codified in the proposed rule, the Agencies believe that the orderly liquidations of different covered broker-dealers would likely occur under different circumstances. A prescriptive definition of conservative initial allocation that is codified may not be appropriate for the orderly liquidations of covered broker-dealers under all circumstances. Therefore, the Agencies have chosen not to define or to codify a conservative initial allocation in the final rule.

The Agencies reject the commenter's assertion that the Agencies decided to allow estimates of customer allocations to be based on the books and records of the covered broker-dealer without fully understanding the potential costs to customers. In the preamble, the Agencies not only addressed the potential costs associated with this allocation approach, but also the mitigation of such costs. Specifically, the Agencies acknowledged that to the extent that initial estimates of allocations to some customers are excessive, it is possible that customer funds may need to be reallocated after customers initially gain access to their accounts, which could result in costs for customers.[264] Further, the Agencies recognized that these costs may vary significantly depending on broker-dealer systems and the specific events and acknowledged that the lack of data

[263] *See* comments to File No. S7–02–16 (available at: *https://www.sec.gov/comments/s7-02-16/s70216.htm*).

[264] *Ibid.*

prevented a quantification of these costs. In the preamble, the Agencies also expressed the preliminary belief that initial allocations would be conservative and would minimize the possibility of an over-allocation to any customer and mitigate potential costs and uncertainty associated with allocation refinements. None of the commenters provided information to support a different conclusion. Therefore, the Agencies believe that due consideration has been given to the potential costs that customers might incur under the allocation approach that is based on the books and records of the covered broker-dealer.

The Agencies disagree with the Law Clinic's suggestion that the Agencies lack the data demonstrating that delays experienced by customers in accessing their accounts constitute an actionable problem. In the preamble,[265] the Agencies relied on experience with SIPA liquidations to ascertain that delays experienced by customers in accessing their accounts are a problem during the liquidation of a broker-dealer. The experience with SIPA liquidations constitutes relevant data that informs the Agencies' deliberations in this rulemaking. While costs incurred by customers who experience delays could also help demonstrate that such delays constitute an actionable problem, the Agencies do not have the data to quantify such costs, which are likely associated with the lost investment and consumption opportunities that would result if customers could not access their accounts quickly. Because customers typically do not report such forgone opportunities, the Agencies do not have the data to quantify the costs incurred by customers who experience delays in accessing their accounts.

2. The OSEC Letter

The OSEC Letter generally supports the proposed rule and outlines several benefits to the proposed rule, recognizing that the proposed rule relied upon the established framework for liquidations under SIPA in describing the orderly liquidation claims process. The commenter highlights one perceived difference between the SIPA process and the process described in the proposed rule, however and suggests that the rule would be improved by increasing the amount of time that customers have to file claims. The OSEC Letter states that the proposed rule tracks section 8(a)(3) of SIPA by mandating that customer claims for net equity be filed within 60 days after the date the notice to creditors to file claims is first published, while general creditors of the covered broker-dealer have up to six months to file their claims and have a good faith exception for late filings. The OSEC Letter also suggests that the proposed rule be used as an opportunity to reduce moral hazard by imposing restrictions on executive compensation at broker-dealers. The OSEC letter states that the proposed rule ''fails to adequately penalize senior management, employees, and advisors who are complicit in producing the covered broker dealer's financial instability.'' The OSEC Letter supports the establishment of a bridge broker-dealer and suggests that the FDIC consider and encourage the establishment of multiple bridge entities to limit over-concentration and interconnectedness risk.

While the Agencies appreciate the comments raised in the OSEC Letter, the Agencies have not made changes in the final rule as a result of these comments. First, the OSEC Letter has misconstrued the proposed rule with respect to the time allowed for claims. The proposed rule provides that all creditors—customers as well as general unsecured creditors—have the opportunity to file claims within time frames consistent with the requirements of SIPA and of the Dodd-Frank Act. Under the proposed rule, customers would have the same six-month period to file claims as all other creditors and have an exception for late filings comparable to the SIPA good faith exception. However, under both SIPA and the proposed rule, if a customer files his claim within 60 days after the date the notice to creditors to file claims is first published, the customer is assured that its net equity claim will be paid, in kind, from customer property or, to the extent such property is insufficient, from SIPC funds. If the customer files a claim after the 60 days, the claim need not be paid with customer property and, to the extent such claim is paid by funds advanced by SIPC, it would be satisfied in cash or securities or both as SIPC determines is most economical to the estate. Therefore, the Agencies have made no changes in the final rule as a result of the comment.

The OSEC Letter also suggests that the proposed rule be used as an opportunity to reduce moral hazard by imposing restrictions on executive compensation at broker-dealers. The OSEC Letter states that the proposed rule ''fails to adequately penalize senior management, employees, and advisors who are complicit in producing the covered broker dealer's financial instability.'' Restrictions on execution compensation are outside the scope of the rulemaking requirement of section 205(h) of the Dodd-Frank Act.[266] Therefore, the Agencies have chosen not to act on the commenter's suggestion. Regarding the commenter's suggestion that the FDIC consider and encourage the establishment of multiple bridge entities to limit over-concentration and interconnectedness risk, the Agencies note that both the Dodd-Frank Act and the proposed rule permit the FDIC to establish multiple bridge broker-dealers in a Title II orderly liquidation and therefore the Agencies have made no changes in the final rule as a result of the comment.

3. The Joint Letter

The Joint Letter is generally supportive of the proposed rule but states that certain portions of the proposed rule would benefit from additional clarification, either through additional rulemaking or interpretive statements.

The Joint Letter states that the proposed rule is likely to have an extremely narrow scope of application and calls into question the necessity of the proposed rule. In the preamble to the proposed rule, the Agencies specifically acknowledged the limited circumstances in which the rule would be applied. However, the Dodd-Frank Act requires the Agencies jointly to issue rules to implement section 205 of the Act. The Agencies believe that the clarifications provided by the final rule will prove valuable should a broker-dealer ever be subject to a Title II orderly liquidation and therefore the Agencies are promulgating this final rule.

The Joint Letter also notes the concern that the proposed rule could create, rather than reduce, uncertainty because the proposed rule does not repeat the full statutory text of section 205(a) that SIPC will act ''as trustee for the liquidation *under the Securities Investor Protection Act* . . .'' [emphasis added.].

The proposed rule clarifies that, although the trustee will make certain determinations, such as the allocation of customer property, in accordance with the relevant definitions under SIPA, the orderly liquidation of the covered broker-dealer is in fact pursuant to a proceeding under the Dodd-Frank Act, rather than a process under SIPA. The Agencies acknowledge that the reference to a liquidation ''under SIPA'' in section 205 of the statute may create

[265] *See* 81 FR at 10804.

[266] Section 956 of the Dodd-Frank Act requires the appropriate Federal regulators to prescribe regulations or guidelines with respect to incentive-based payment arrangements and other matters relating to executive compensation. 12 U.S.C. 5641.

ambiguity. The purpose of the rulemaking required by section 205(h) of the Dodd-Frank Act is to clarify these provisions and provide a framework for implementing a Title II orderly liquidation of a broker-dealer. Thus, in the preamble to the proposed rule, the Agencies explained that the omission of the reference to the appointment of SIPC as a trustee for a liquidation ''under [SIPA]'' is intended to make clear that the rule applies to an orderly liquidation of a covered broker-dealer under the Dodd-Frank Act, not a SIPA proceeding.[267] The proposed rule seeks to eliminate the confusion caused by referring to a ''liquidation under [SIPA]'' in the Dodd-Frank Act when there is, in fact, no proceeding under SIPA and the broker-dealer is being liquidated under Title II, while implementing the statutory objective that the protections afforded to customers under SIPA are recognized in the Title II process. Therefore, the Agencies have made no changes in the final rule as a result of this comment.

VI. Regulatory Analysis and Procedures

A. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''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 proposed rule on small entities.[268] However, a regulatory flexibility analysis is not required if the agency certifies that the proposal will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined ''small entities'' to include broker-dealers if their annual receipts do not exceed $41.5 million.[269] For the reasons described below and under section 605(b) of the RFA, the Agencies certify that the final rule will not have a significant economic impact on a substantial number of small entities. The final rule clarifies rules and procedures for the orderly liquidation of a covered broker-dealer under Title II. A covered broker-dealer is a broker-dealer that is subject to a systemic risk determination by the Secretary pursuant to section 203 of the Dodd-Frank Act, 12 U.S.C. 5383, and thereafter is to be liquidated under Title II. The Agencies do not believe that a broker-dealer that would be considered a small entity for purposes of the RFA would ever be the subject of a systemic risk determination by the Secretary. Therefore, the Agencies are not aware of any small entities that would be affected by the final rule. As such, the final rule would not affect, and would impose no burdens on, small entities.

B. Plain Language

Section 722 of the Gramm-Leach-Bliley Act [270] requires federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the rule in a simple and straightforward manner. The FDIC invited comments on how to make the proposed rule easier to understand. No comments addressing this issue were received.

VII. Other Matters

If any of the provisions of the final rule, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,[271] the Office of Information and Regulatory Affairs (OIRA) has designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

VIII. Statutory Authority

The final rule is being promulgated pursuant to section 205(h) of the Dodd-Frank Act. Section 205(h) of the Dodd-Frank Act requires the Corporation and the Commission, in consultation with SIPC, jointly to issue rules to implement section 205 of the Dodd-Frank Act concerning the orderly liquidation of covered broker-dealers.

List of Subjects

12 CFR Part 380

Holding companies, Insurance.

17 CFR Part 302

Brokers, Claims, Customers, Dealers, Financial companies, Orderly liquidation.

Federal Deposit Insurance Corporation

12 CFR Part 380

Authority and Issuance

For the reasons stated in the preamble, the Federal Deposit Insurance Corporation amends 12 CFR part 380 as follows:

PART 380—ORDERLY LIQUIDATION AUTHORITY

■ 1. The authority citation for part 380 is revised to read as follows:

Authority: 12 U.S.C. 5385(h); 12 U.S.C. 5389; 12 U.S.C. 5390(s)(3); 12 U.S.C. 5390(b)(1)(C); 12 U.S.C. 5390(a)(7)(D); 12 U.S.C. 5381(b); 12 U.S.C. 5390(r); 12 U.S.C. 5390(a)(16)(D).

■ 2. Add subpart D to part 380, consisting of §§ 380.60 through 380.67, to read as follows:

Subpart D—Orderly Liquidation of Covered Brokers or Dealers

Sec.

§ 380.60 Definitions.

For purposes of this subpart D, the following terms are defined as follows:

Appointment date. The term *appointment date* means the date of the appointment of the Corporation as receiver for a covered financial company that is a covered broker or dealer. This date shall constitute the *filing date* as that term is used in SIPA.

Bridge broker or dealer. The term *bridge broker or dealer* means a new financial company organized by the Corporation in accordance with 12 U.S.C. 5390(h) for the purpose of resolving a covered broker or dealer.

Commission. The term *Commission* means the Securities and Exchange Commission.

Covered broker or dealer. The term *covered broker or dealer* means a covered financial company that is a qualified broker or dealer.

Customer. The term *customer* of a covered broker or dealer shall have the same meaning as in 15 U.S.C. 78*lll*(2) *provided that* the references therein to *debtor* shall mean the covered broker or dealer.

Customer name securities. The term *customer name securities* shall have the

[267] *See* Section III.B. *See also* 12 U.S.C. 5383(b)(2).

[268] 5 U.S.C. 601 *et seq.*

[269] The SBA defines a Securities Brokerage (NAICS 523120) as a small entity if it garners annual receipts of $41.5 million or less. See 13 CFR 121.201 as amended by Small Business Size Standards: Adjustment of Monetary-Based Size Standards for Inflation, 84 FR 34261 (July 18, 2019) (effective August 19, 2019).

[270] Public Law 106–102, 113 Stat. 1338, 1471.

[271] 5 U.S.C. 801 *et seq.*

same meaning as in 15 U.S.C. 78*lll*(3) *provided that* the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.

Customer property. The term *customer property* shall have the same meaning as in 15 U.S.C. 78*lll*(4) *provided that* the references therein to *debtor* shall mean the covered broker or dealer.

Net equity. The term *net equity* shall have the same meaning as in 15 U.S.C. 78*lll*(11) *provided that* the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.

Qualified broker or dealer. The term *qualified broker or dealer* means a broker or dealer that:

(1) Is registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)); and

(2) Is a member of SIPC.

SIPA. The term *SIPA* means the Securities Investor Protection Act of 1970, 15 U.S.C. 78aaa–*lll.*

SIPC. The term *SIPC* means the Securities Investor Protection Corporation.

§ 380.61 Appointment of receiver and trustee for covered broker or dealer.

Upon the appointment of the Corporation as receiver for a covered broker or dealer, the Corporation shall appoint SIPC to act as trustee for the covered broker or dealer.

§ 380.62 Notice and application for protective decree for covered broker or dealer.

(a) SIPC and the Corporation, upon consultation with the Commission, shall jointly determine the terms of a notice and application for a protective decree that will be filed promptly with the Federal district court for the district within which the principal place of business of the covered broker or dealer is located; *provided that* if a case or proceeding under SIPA with respect to such covered broker or dealer is then pending, then such notice and application for a protective decree will be filed promptly with the Federal district court in which such case or proceeding under SIPA is pending. If such notice and application for a protective decree is filed on a date other than the appointment date, such filing shall be deemed to have occurred on the appointment date for the purposes of this subpart D.

(b) A notice and application for a protective decree may, among other things, provide for notice:

(1) Of the appointment of the Corporation as receiver and the appointment of SIPC as trustee for the covered broker or dealer; and

(2) That the provisions of Title II of the Dodd-Frank Act and any regulations promulgated thereunder may apply, including without limitation the following:

(i) Any existing case or proceeding with respect to a covered broker or dealer under the Bankruptcy Code or SIPA shall be dismissed effective as of the appointment date and no such case or proceeding may be commenced with respect to a covered broker or dealer at any time while the Corporation is receiver for such covered broker or dealer;

(ii) The revesting of assets in a covered broker or dealer to the extent that they have vested in any entity other than the covered broker or dealer as a result of any case or proceeding commenced with respect to the covered broker or dealer under the Bankruptcy Code, SIPA, or any similar provision of State liquidation or insolvency law applicable to the covered broker or dealer; *provided that* any such revesting shall not apply to assets held by the covered broker or dealer, including customer property, transferred prior to the appointment date pursuant to an order entered by the bankruptcy court presiding over the case or proceeding with respect to the covered broker or dealer;

(iii) The request of the Corporation as receiver for a stay in any judicial action or proceeding (other than actions dismissed in accordance with paragraph (b)(2)(i) of this section) in which the covered broker or dealer is or becomes a party for a period of up to 90 days from the appointment date;

(iv) Except as provided in paragraph (b)(2)(v) of this section with respect to qualified financial contracts, no person may exercise any right or power to terminate, accelerate or declare a default under any contract to which the covered broker or dealer is a party (and no provision in any such contract providing for such default, termination or acceleration shall be enforceable), or to obtain possession of or exercise control over any property of the covered broker or dealer or affect any contractual rights of the covered broker or dealer without the consent of the Corporation as receiver of the covered broker or dealer upon consultation with SIPC during the 90-day period beginning from the appointment date; and

(v) The exercise of rights and the performance of obligations by parties to qualified financial contracts with the covered broker or dealer may be affected, stayed, or delayed pursuant to the provisions of Title II of the Dodd-Frank Act (including 12 U.S.C. 5390(c)) and the regulations promulgated thereunder.

§ 380.63 Bridge broker or dealer.

(a) The Corporation, as receiver for one or more covered brokers or dealers or in anticipation of being appointed receiver for one or more covered broker or dealers, may organize one or more bridge brokers or dealers with respect to a covered broker or dealer.

(b) If the Corporation establishes one or more bridge brokers or dealers with respect to a covered broker or dealer, then, subject to paragraph (d) of this section, the Corporation as receiver for such covered broker or dealer shall transfer all customer accounts and all associated customer name securities and customer property to such bridge brokers or dealers unless the Corporation determines, after consultation with the Commission and SIPC, that:

(1) The customer accounts, customer name securities, and customer property are likely to be promptly transferred to one or more qualified brokers or dealers such that the use of a bridge broker or dealer would not facilitate such transfer to one or more qualified brokers or dealers; or

(2) The transfer of such customer accounts to a bridge broker or dealer would materially interfere with the ability of the Corporation to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States.

(c) The Corporation, as receiver for such covered broker or dealer, also may transfer any other assets and liabilities of the covered broker or dealer (including non-customer accounts and any associated property and any assets and liabilities associated with any trust or custody business) to such bridge brokers or dealers as the Corporation may, in its discretion, determine to be appropriate in accordance with, and subject to the requirements of, 12 U.S.C. 5390(h), including 12 U.S.C. 5390(h)(1) and 5390(h)(5), and any regulations promulgated thereunder.

(d) In connection with customer accounts transferred to the bridge broker or dealer pursuant to paragraph (b) of this section, claims for net equity shall not be transferred but shall remain with the covered broker or dealer. Customer property transferred from the covered broker or dealer, along with advances from SIPC, shall be allocated to customer accounts at the bridge broker or dealer in accordance with § 380.64(a)(3). Such allocations initially

may be based upon estimates, and such estimates may be based upon the books and records of the covered broker or dealer or any other information deemed relevant in the discretion of the Corporation as receiver, in consultation with SIPC, as trustee. Such estimates may be adjusted from time to time as additional information becomes available. With respect to each account transferred to the bridge broker or dealer pursuant to paragraph (b) or (c) of this section, the bridge broker or dealer shall undertake the obligations of a broker or dealer only with respect to property transferred to and held by the bridge broker or dealer, and allocated to the account as provided in § 380.64(a)(3), including any customer property and any advances from SIPC. The bridge broker or dealer shall have no obligations with respect to any customer property or other property that is not transferred from the covered broker or dealer to the bridge broker or dealer. The transfer of customer property to such an account shall have no effect on calculation of the amount of the affected account holder's net equity, but the value, as of the appointment date, of the customer property and advances from SIPC so transferred shall be deemed to satisfy any such claim, in whole or in part.

(e) The transfer of assets or liabilities held by a covered broker or dealer, including customer accounts and all associated customer name securities and customer property, assets and liabilities held by a covered broker or dealer for any non-customer creditor, and assets and liabilities associated with any trust or custody business, to a bridge broker or dealer, shall be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court.

(f) Any succession to or assumption by a bridge broker or dealer of rights, powers, authorities, or privileges of a covered broker or dealer shall be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court, and any such bridge broker or dealer shall upon its organization by the Corporation immediately and by operation of law—

(1) Be established and deemed registered with the Commission under the Securities Exchange Act of 1934;

(2) Be deemed to be a member of SIPC; and

(3) Succeed to any and all registrations and memberships of the covered broker or dealer with or in any self-regulatory organizations.

(g) Except as provided in paragraph (f) of this section, the bridge broker or dealer shall be subject to applicable Federal securities laws and all requirements with respect to being a member of a self-regulatory organization and shall operate in accordance with all such laws and requirements and in accordance with its articles of association; provided, however, that the Commission may, in its discretion, exempt the bridge broker or dealer from any such requirements if the Commission deems such exemption to be necessary or appropriate in the public interest or for the protection of investors.

(h) At the end of the term of existence of a bridge broker or dealer, any proceeds that remain after payment of all administrative expenses of such bridge broker or dealer and all other claims against such bridge broker or dealer shall be distributed to the receiver for the related covered broker or dealer.

§ 380.64 Claims of customers and other creditors of a covered broker or dealer.

(a) *Trustee's role.* (1) SIPC, as trustee for a covered broker or dealer, shall determine customer status, claims for net equity, claims for customer name securities, and whether property of the covered broker or dealer qualifies as customer property. SIPC, as trustee for a covered broker or dealer, shall make claims determinations in accordance with SIPA and with paragraph (a)(3) of this section, but such determinations, and any claims related thereto, shall be governed by the procedures set forth in paragraph (b) of this section.

(2) SIPC shall make advances in accordance with, and subject to the limitations imposed by, 15 U.S.C. 78fff–3. Where appropriate, SIPC shall make such advances by delivering cash or securities to the customer accounts established at the bridge broker or dealer.

(3) Customer property held by a covered broker or dealer shall be allocated as follows:

(i) First, to SIPC in repayment of advances made by SIPC pursuant to 12 U.S.C. 5385(f) and 15 U.S.C. 78fff–3(c)(1), to the extent such advances effected the release of securities which then were apportioned to customer property pursuant to 15 U.S.C. 78fff(d);

(ii) Second, to customers of such covered broker or dealer, or in the case that customer accounts are transferred to a bridge broker or dealer, then to such customer accounts at a bridge broker or dealer, who shall share ratably in such customer property on the basis and to the extent of their respective net equities;

(iii) Third, to SIPC as subrogee for the claims of customers; and

(iv) Fourth, to SIPC in repayment of advances made by SIPC pursuant to 15 U.S.C. 78fff–3(c)(2).

(4) The determinations and advances made by SIPC as trustee for a covered broker or dealer under this subpart D shall be made in a manner consistent with SIPC's customary practices under SIPA. The allocation of customer property, advances from SIPC, and delivery of customer name securities to each customer or to its customer account at a bridge broker or dealer, in partial or complete satisfaction of such customer's net equity claims as of the close of business on the appointment date, shall be in a manner, including form and timing, and in an amount at least as beneficial to such customer as would have been the case had the covered broker or dealer been liquidated under SIPA. Any claims related to determinations made by SIPC as trustee for a covered broker or dealer shall be governed by the procedures set forth in paragraph (b) of this section.

(b) *Receiver's role.* Any claim shall be determined in accordance with the procedures set forth in 12 U.S.C. 5390(a)(2) through (5) and the regulations promulgated by the Corporation thereunder, provided however, that—

(1) *Notice requirements.* The notice of the appointment of the Corporation as receiver for a covered broker or dealer shall also include notice of the appointment of SIPC as trustee. The Corporation as receiver shall coordinate with SIPC as trustee to post the notice on SIPC's public website in addition to the publication procedures set forth in § 380.33.

(2) *Procedures for filing a claim.* The Corporation as receiver shall consult with SIPC, as trustee, regarding a claim form and filing instructions with respect to claims against the Corporation as receiver for a covered broker or dealer, and such information shall be provided on SIPC's public website in addition to the Corporation's public website. Any such claim form shall contain a provision permitting a claimant to claim status as a customer of the broker or dealer, if applicable.

(3) *Claims bar date.* The Corporation as receiver shall establish a claims bar date in accordance with 12 U.S.C. 5390(a)(2)(B)(i) and any regulations promulgated thereunder by which date creditors of a covered broker or dealer, including all customers of the covered broker or dealer, shall present their claims, together with proof. The claims

bar date for a covered broker or dealer shall be the date following the expiration of the six-month period beginning on the date a notice to creditors to file their claims is first published in accordance with 12 U.S.C. 5390(a)(2)(B)(i) and any regulations promulgated thereunder. Any claim filed after the claims bar date shall be disallowed, and such disallowance shall be final, as provided by 12 U.S.C. 5390(a)(3)(C)(i) and any regulations promulgated thereunder, except that a claim filed after the claims bar date shall be considered by the receiver as provided by 12 U.S.C. 5390(a)(3)(C)(ii) and any regulations promulgated thereunder. In accordance with section 8(a)(3) of SIPA, 15 U.S.C. 78fff–2(a)(3), any claim for net equity filed more than sixty days after the date the notice to creditors to file claims is first published need not be paid or satisfied in whole or in part out of customer property and, to the extent such claim is paid by funds advanced by SIPC, it shall be satisfied in cash or securities, or both, as SIPC, as trustee, determines is most economical to the receivership estate.

(c) *Decision period.* The Corporation as receiver of a covered broker or dealer shall notify a claimant whether it allows or disallows the claim, or any portion of a claim or any claim of a security, preference, set-off, or priority, within the 180-day period set forth in 12 U.S.C. 5390(a)(3)(A) and any regulations promulgated thereunder (as such 180-day period may be extended by written agreement as provided therein) or within the 90-day period set forth in 12 U.S.C. 5390(a)(5)(B) and any regulations promulgated thereunder, whichever is applicable. In accordance with paragraph (a) of this section, the Corporation, as receiver, shall issue the notice required by this paragraph (c), which shall utilize the determination made by SIPC, as trustee, in a manner consistent with SIPC's customary practices in a liquidation under SIPA, with respect to any claim for net equity or customer name securities. The process established herein for the determination, within the 180-day period set forth in 12 U.S.C. 5390(a)(3)(A) and any regulations promulgated thereunder (as such 180-day period may be extended by written agreement as provided therein), of claims by customers of a covered broker or dealer for customer property or customer name securities shall constitute the exclusive process for the determination of such claims, and any procedure for expedited relief established pursuant to 12 U.S.C. 5390(a)(5) and any regulations promulgated thereunder shall be inapplicable to such claims.

(d) *Judicial review.* The claimant may seek a judicial determination of any claim disallowed, in whole or in part, by the Corporation as receiver, including any claim disallowed based upon any determination(s) of SIPC as trustee made pursuant to § 380.64(a), by the appropriate district or territorial court of the United States in accordance with 12 U.S.C. 5390(a)(4) or (5), whichever is applicable, and any regulations promulgated thereunder.

§ 380.65 Priorities for unsecured claims against a covered broker or dealer.

Allowed claims not satisfied pursuant to § 380.63(d), including allowed claims for net equity to the extent not satisfied after final allocation of customer property in accordance with § 380.64(a)(3), shall be paid in accordance with the order of priority set forth in § 380.21 subject to the following adjustments:

(a) Administrative expenses of SIPC incurred in performing its responsibilities as trustee for a covered broker or dealer shall be included as administrative expenses of the receiver as defined in § 380.22 and shall be paid *pro rata* with such expenses in accordance with § 380.21(c).

(b) Amounts paid by the Corporation to customers or SIPC shall be included as amounts owed to the United States as defined in § 380.23 and shall be paid *pro rata* with such amounts in accordance with § 380.21(c).

(c) Amounts advanced by SIPC for the purpose of satisfying customer claims for net equity shall be paid following the payment of all amounts owed to the United States pursuant to § 380.21(a)(3) but prior to the payment of any other class or priority of claims described in § 380.21(a)(4) through (11).

§ 380.66 Administrative expenses of SIPC.

(a) In carrying out its responsibilities, SIPC, as trustee for a covered broker or dealer, may utilize the services of third parties, including private attorneys, accountants, consultants, advisors, outside experts, and other third party professionals. SIPC shall have an allowed claim for administrative expenses for any amounts paid by SIPC for such services to the extent that such services are available in the private sector, and utilization of such services is practicable, efficient, and cost effective. The term *administrative expenses of SIPC* includes the costs and expenses of such attorneys, accountants, consultants, advisors, outside experts, and other third party professionals, and other expenses that would be allowable to a third party trustee under 15 U.S.C. 78eee(b)(5)(A), including the costs and expenses of SIPC employees that would be allowable pursuant to 15 U.S.C. 78fff(e).

(b) The term *administrative expenses of SIPC* shall not include advances from SIPC to satisfy customer claims for net equity.

§ 380.67 Qualified Financial Contracts.

The rights and obligations of any party to a qualified financial contract to which a covered broker or dealer is a party shall be governed exclusively by 12 U.S.C. 5390, including the limitations and restrictions contained in 12 U.S.C. 5390(c)(10)(B), and any regulations promulgated thereunder.

Securities and Exchange Commission

17 CFR Part 302

Authority and Issuance

■ For the reasons stated in the preamble, the Securities and Exchange Commission amends 17 CFR Chapter II by adding part 302 to read as follows:

PART 302—ORDERLY LIQUIDATION OF COVERED BROKERS OR DEALERS

Sec.

Authority: 12 U.S.C. 5385(h).

§ 302.100 Definitions.

For purposes of §§ 302.100 through 302.107, the following terms shall have the following meanings:

(a) *Appointment date.* The term *appointment date* means the date of the appointment of the Corporation as receiver for a covered financial company that is a covered broker or dealer. This date shall constitute the *filing date* as that term is used in SIPA.

(b) *Bridge broker or dealer.* The term *bridge broker or dealer* means a new financial company organized by the Corporation in accordance with 12 U.S.C. 5390(h) for the purpose of resolving a covered broker or dealer.

(c) *Commission.* The term *Commission* means the Securities and Exchange Commission.

(d) *Covered broker or dealer.* The term *covered broker or dealer* means a

covered financial company that is a qualified broker or dealer.

(e) *Customer.* The term *customer* of a covered broker or dealer shall have the same meaning as in 15 U.S.C. 78*lll*(2) *provided that* the references therein to *debtor* shall mean the covered broker or dealer.

(f) *Customer name securities.* The term *customer name securities* shall have the same meaning as in 15 U.S.C. 78*lll*(3) *provided that* the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.

(g) *Customer property.* The term *customer property* shall have the same meaning as in 15 U.S.C. 78*lll*(4) *provided that* the references therein to *debtor* shall mean the covered broker or dealer.

(h) *Net equity.* The term *net equity* shall have the same meaning as in 15 U.S.C. 78*lll*(11) *provided that* the references therein to *debtor* shall mean the covered broker or dealer and the references therein to *filing date* shall mean the appointment date.

(i) *Qualified broker or dealer.* The term *qualified broker or dealer* means a broker or dealer that (A) is registered with the Commission under Section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)); and (B) is a member of SIPC.

(j) *SIPA.* The term *SIPA* means the Securities Investor Protection Act of 1970, 15 U.S.C. 78aaa–*lll.*

(k) *SIPC.* The term *SIPC* means the Securities Investor Protection Corporation.

(l) *Corporation.* The term *Corporation* means the Federal Deposit Insurance Corporation.

(m) *Dodd-Frank Act.* The term *Dodd-Frank Act* means the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, enacted July 21, 2010.

§ 302.101 Appointment of receiver and trustee for covered broker or dealer.

Upon the appointment of the Corporation as receiver for a covered broker or dealer, the Corporation shall appoint SIPC to act as trustee for the covered broker or dealer.

§ 302.102 Notice and application for protective decree for covered broker or dealer.

(a) SIPC and the Corporation, upon consultation with the Commission, shall jointly determine the terms of a notice and application for a protective decree that will be filed promptly with the Federal district court for the district within which the principal place of business of the covered broker or dealer is located; *provided that* if a case or proceeding under SIPA with respect to such covered broker or dealer is then pending, then such notice and application for a protective decree will be filed promptly with the Federal district court in which such case or proceeding under SIPA is pending. If such notice and application for a protective decree is filed on a date other than the appointment date, such filing shall be deemed to have occurred on the appointment date for the purposes of §§ 302.100 through 302.107.

(b) A notice and application for a protective decree may, among other things, provide for notice—

(1) Of the appointment of the Corporation as receiver and the appointment of SIPC as trustee for the covered broker or dealer; and

(2) That the provisions of Title II of the Dodd-Frank Act and any regulations promulgated thereunder may apply, including without limitation the following:

(i) Any existing case or proceeding with respect to a covered broker or dealer under the Bankruptcy Code or SIPA shall be dismissed effective as of the appointment date and no such case or proceeding may be commenced with respect to a covered broker or dealer at any time while the Corporation is receiver for such covered broker or dealer;

(ii) The revesting of assets in a covered broker or dealer to the extent that they have vested in any entity other than the covered broker or dealer as a result of any case or proceeding commenced with respect to the covered broker or dealer under the Bankruptcy Code, SIPA, or any similar provision of State liquidation or insolvency law applicable to the covered broker or dealer; *provided that* any such revesting shall not apply to assets held by the covered broker or dealer, including customer property, transferred prior to the appointment date pursuant to an order entered by the bankruptcy court presiding over the case or proceeding with respect to the covered broker or dealer;

(iii) The request of the Corporation as receiver for a stay in any judicial action or proceeding (other than actions dismissed in accordance with paragraph (b)(i) of this section) in which the covered broker or dealer is or becomes a party for a period of up to 90 days from the appointment date;

(iv) Except as provided in paragraph (b)(v) of this section with respect to qualified financial contracts, no person may exercise any right or power to terminate, accelerate or declare a default under any contract to which the covered broker or dealer is a party (and no provision in any such contract providing for such default, termination or acceleration shall be enforceable), or to obtain possession of or exercise control over any property of the covered broker or dealer or affect any contractual rights of the covered broker or dealer without the consent of the Corporation as receiver of the covered broker or dealer upon consultation with SIPC during the 90-day period beginning from the appointment date; and

(v) The exercise of rights and the performance of obligations by parties to qualified financial contracts with the covered broker or dealer may be affected, stayed, or delayed pursuant to the provisions of Title II of the Dodd-Frank Act (including 12 U.S.C. 5390(c)) and the regulations promulgated thereunder.

§ 302.103 Bridge broker or dealer.

(a) The Corporation, as receiver for one or more covered brokers or dealers or in anticipation of being appointed receiver for one or more covered broker or dealers, may organize one or more bridge brokers or dealers with respect to a covered broker or dealer.

(b) If the Corporation establishes one or more bridge brokers or dealers with respect to a covered broker or dealer, then, subject to paragraph (d) of this section, the Corporation as receiver for such covered broker or dealer shall transfer all customer accounts and all associated customer name securities and customer property to such bridge brokers or dealers unless the Corporation determines, after consultation with the Commission and SIPC, that:

(1) The customer accounts, customer name securities, and customer property are likely to be promptly transferred to one or more qualified brokers or dealers such that the use of a bridge broker or dealer would not facilitate such transfer to one or more qualified brokers or dealers; or

(2) The transfer of such customer accounts to a bridge broker or dealer would materially interfere with the ability of the Corporation to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States.

(c) The Corporation, as receiver for such covered broker or dealer, also may transfer any other assets and liabilities of the covered broker or dealer (including non-customer accounts and any associated property and any assets and liabilities associated with any trust or custody business) to such bridge brokers or dealers as the Corporation

may, in its discretion, determine to be appropriate in accordance with, and subject to the requirements of, 12 U.S.C. 5390(h), including 12 U.S.C. 5390(h)(1) and 5390(h)(5), and any regulations promulgated thereunder.

(d) In connection with customer accounts transferred to the bridge broker or dealer pursuant to paragraph (b) of this section, claims for net equity shall not be transferred but shall remain with the covered broker or dealer. Customer property transferred from the covered broker or dealer, along with advances from SIPC, shall be allocated to customer accounts at the bridge broker or dealer in accordance with § 302.104(a)(3). Such allocations initially may be based upon estimates, and such estimates may be based upon the books and records of the covered broker or dealer or any other information deemed relevant in the discretion of the Corporation, as receiver, in consultation with SIPC, as trustee. Such estimates may be adjusted from time to time as additional information becomes available. With respect to each account transferred to the bridge broker or dealer pursuant to paragraph (b) or (c) of this section, the bridge broker or dealer shall undertake the obligations of a broker or dealer only with respect to property transferred to and held by the bridge broker or dealer, and allocated to the account as provided in § 302.104(a)(3), including any customer property and any advances from SIPC. The bridge broker or dealer shall have no obligations with respect to any customer property or other property that is not transferred from the covered broker or dealer to the bridge broker or dealer. The transfer of customer property to such an account shall have no effect on calculation of the amount of the affected accountholder's net equity, but the value, as of the appointment date, of the customer property and advances from SIPC so transferred shall be deemed to satisfy any such claim, in whole or in part.

(e) The transfer of assets or liabilities held by a covered broker or dealer, including customer accounts and all associated customer name securities and customer property, assets and liabilities held by a covered broker or dealer for any non-customer creditor, and assets and liabilities associated with any trust or custody business, to a bridge broker or dealer, shall be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court.

(f) Any succession to or assumption by a bridge broker or dealer of rights, powers, authorities, or privileges of a covered broker or dealer shall be effective without any consent, authorization, or approval of any person or entity, including but not limited to, any customer, contract party, governmental authority, or court, and any such bridge broker or dealer shall upon its organization by the Corporation immediately and by operation of law—

(1) Be established and deemed registered with the Commission under the Securities Exchange Act of 1934;

(2) Be deemed to be a member of SIPC; and

(3) Succeed to any and all registrations and memberships of the covered broker or dealer with or in any self-regulatory organizations.

(g) Except as provided in paragraph (f) of this section, the bridge broker or dealer shall be subject to applicable Federal securities laws and all requirements with respect to being a member of a self-regulatory organization and shall operate in accordance with all such laws and requirements and in accordance with its articles of association; provided, however, that the Commission may, in its discretion, exempt the bridge broker or dealer from any such requirements if the Commission deems such exemption to be necessary or appropriate in the public interest or for the protection of investors.

(h) At the end of the term of existence of a bridge broker or dealer, any proceeds that remain after payment of all administrative expenses of such bridge broker or dealer and all other claims against such bridge broker or dealer shall be distributed to the receiver for the related covered broker or dealer.

§ 302.104 Claims of customers and other creditors of a covered broker or dealer.

(a) *Trustee's role.* (1) SIPC, as trustee for a covered broker or dealer, shall determine customer status, claims for net equity, claims for customer name securities, and whether property of the covered broker or dealer qualifies as customer property. SIPC, as trustee for a covered broker or dealer, shall make claims determinations in accordance with SIPA and with paragraph (a)(3) of this section, but such determinations, and any claims related thereto, shall be governed by the procedures set forth in paragraph (b) of this section.

(2) SIPC shall make advances in accordance with, and subject to the limitations imposed by, 15 U.S.C. 78fff–3. Where appropriate, SIPC shall make such advances by delivering cash or securities to the customer accounts established at the bridge broker or dealer.

(3) Customer property held by a covered broker or dealer shall be allocated as follows:

(i) First, to SIPC in repayment of advances made by SIPC pursuant to 12 U.S.C. 5385(f) and 15 U.S.C. 78fff–3(c)(1), to the extent such advances effected the release of securities which then were apportioned to customer property pursuant to 15 U.S.C. 78fff(d);

(ii) Second, to customers of such covered broker or dealer, or in the case that customer accounts are transferred to a bridge broker or dealer, then to such customer accounts at a bridge broker or dealer, who shall share ratably in such customer property on the basis and to the extent of their respective net equities;

(iii) Third, to SIPC as subrogee for the claims of customers; and

(iv) Fourth, to SIPC in repayment of advances made by SIPC pursuant to 15 U.S.C. 78fff–3(c)(2).

(4) The determinations and advances made by SIPC as trustee for a covered broker or dealer under §§ 302.100 through 302.107 shall be made in a manner consistent with SIPC's customary practices under SIPA. The allocation of customer property, advances from SIPC, and delivery of customer name securities to each customer or to its customer account at a bridge broker or dealer, in partial or complete satisfaction of such customer's net equity claims as of the close of business on the appointment date, shall be in a manner, including form and timing, and in an amount at least as beneficial to such customer as would have been the case had the covered broker or dealer been liquidated under SIPA. Any claims related to determinations made by SIPC as trustee for a covered broker or dealer shall be governed by the procedures set forth in paragraph (b) of this section.

(b) *Receiver's role.* Any claim shall be determined in accordance with the procedures set forth in 12 U.S.C. 5390(a)(2)–(5) and the regulations promulgated by the Corporation thereunder, provided however, that—

(1) *Notice requirements.* The notice of the appointment of the Corporation as receiver for a covered broker or dealer shall also include notice of the appointment of SIPC as trustee. The Corporation as receiver shall coordinate with SIPC as trustee to post the notice on SIPC's public website in addition to the publication procedures set forth in 12 CFR 380.33.

(2) *Procedures for filing a claim.* The Corporation as receiver shall consult with SIPC, as trustee, regarding a claim form and filing instructions with respect to claims against the Corporation as

receiver for a covered broker or dealer, and such information shall be provided on SIPC's public website in addition to the Corporation's public website. Any such claim form shall contain a provision permitting a claimant to claim status as a customer of the broker or dealer, if applicable.

(3) *Claims bar date.* The Corporation as receiver shall establish a claims bar date in accordance with 12 U.S.C. 5390(a)(2)(B)(i) and any regulations promulgated thereunder by which date creditors of a covered broker or dealer, including all customers of the covered broker or dealer, shall present their claims, together with proof. The claims bar date for a covered broker or dealer shall be the date following the expiration of the six-month period beginning on the date a notice to creditors to file their claims is first published in accordance with 12 U.S.C. 5390(a)(2)(B)(i) and any regulations promulgated thereunder. Any claim filed after the claims bar date shall be disallowed, and such disallowance shall be final, as provided by 12 U.S.C. 5390(a)(3)(C)(i) and any regulations promulgated thereunder, except that a claim filed after the claims bar date shall be considered by the receiver as provided by 12 U.S.C. 5390(a)(3)(C)(ii) and any regulations promulgated thereunder. In accordance with section 8(a)(3) of SIPA, 15 U.S.C. 78fff–2(a)(3), any claim for net equity filed more than sixty days after the date the notice to creditors to file claims is first published need not be paid or satisfied in whole or in part out of customer property and, to the extent such claim is paid by funds advanced by SIPC, it shall be satisfied in cash or securities, or both, as SIPC, as trustee, determines is most economical to the receivership estate.

(c) *Decision period.* The Corporation as receiver of a covered broker or dealer shall notify a claimant whether it allows or disallows the claim, or any portion of a claim or any claim of a security, preference, set-off, or priority, within the 180-day period set forth in 12 U.S.C. 5390(a)(3)(A) and any regulations promulgated thereunder (as such 180-day period may be extended by written agreement as provided therein) or within the 90-day period set forth in 12 U.S.C. 5390(a)(5)(B) and any regulations promulgated thereunder, whichever is applicable. In accordance with paragraph (a) of this section, the Corporation, as receiver, shall issue the notice required by this paragraph (c), which shall utilize the determination made by SIPC, as trustee, in a manner consistent with SIPC's customary practices in a liquidation under SIPA, with respect to any claim for net equity or customer name securities. The process established herein for the determination, within the 180-day period set forth in 12 U.S.C. 5390(a)(3)(A) and any regulations promulgated thereunder (as such 180-day period may be extended by written agreement as provided therein), of claims by customers of a covered broker or dealer for customer property or customer name securities shall constitute the exclusive process for the determination of such claims, and any procedure for expedited relief established pursuant to 12 U.S.C. 5390(a)(5) and any regulations promulgated thereunder shall be inapplicable to such claims.

(d) *Judicial review.* The claimant may seek a judicial determination of any claim disallowed, in whole or in part, by the Corporation as receiver, including any claim disallowed based upon any determination(s) of SIPC as trustee made pursuant to § 302.104(a), by the appropriate district or territorial court of the United States in accordance with 12 U.S.C. 5390(a)(4) or (5), whichever is applicable, and any regulations promulgated thereunder.

§ 302.105 Priorities for unsecured claims against a covered broker or dealer.

Allowed claims not satisfied pursuant to § 302.103(d), including allowed claims for net equity to the extent not satisfied after final allocation of customer property in accordance with § 302.104(a)(3), shall be paid in accordance with the order of priority set forth in 12 CFR 380.21 subject to the following adjustments:

(a) Administrative expenses of SIPC incurred in performing its responsibilities as trustee for a covered broker or dealer shall be included as administrative expenses of the receiver as defined in 12 CFR 380.22 and shall be paid *pro rata* with such expenses in accordance with 12 CFR 380.21(c).

(b) Amounts paid by the Corporation to customers or SIPC shall be included as amounts owed to the United States as defined in 12 CFR 380.23 and shall be paid *pro rata* with such amounts in accordance with 12 CFR 380.21(c).

(c) Amounts advanced by SIPC for the purpose of satisfying customer claims for net equity shall be paid following the payment of all amounts owed to the United States pursuant to 12 CFR 380.21(a)(3) but prior to the payment of any other class or priority of claims described in 12 CFR 380.21(a)(4) through (11).

§ 302.106 Administrative expenses of SIPC.

(a) In carrying out its responsibilities, SIPC, as trustee for a covered broker or dealer, may utilize the services of third parties, including private attorneys, accountants, consultants, advisors, outside experts, and other third party professionals. SIPC shall have an allowed claim for administrative expenses for any amounts paid by SIPC for such services to the extent that such services are available in the private sector, and utilization of such services is practicable, efficient, and cost effective. The term *administrative expenses of SIPC* includes the costs and expenses of such attorneys, accountants, consultants, advisors, outside experts, and other third party professionals, and other expenses that would be allowable to a third party trustee under 15 U.S.C. 78eee(b)(5)(A), including the costs and expenses of SIPC employees that would be allowable pursuant to 15 U.S.C. 78fff(e).

(b) The term *administrative expenses of SIPC* shall not include advances from SIPC to satisfy customer claims for net equity.

§ 302.107 Qualified Financial Contracts.

The rights and obligations of any party to a qualified financial contract to which a covered broker or dealer is a party shall be governed exclusively by 12 U.S.C. 5390, including the limitations and restrictions contained in 12 U.S.C. 5390(c)(10)(B), and any regulations promulgated thereunder.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on July 24, 2020.

James P. Sheesley,

Acting Assistant Executive Secretary.

Dated this 24th day of July, 2020.

By the Securities and Exchange Commission.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–16468 Filed 8–28–20; 8:45 am]

BILLING CODE 6714–01–P; 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 210

[Release No. 33–10762A; 34–88307A; File No. S7–19–18]

RIN 3235–AM12

Financial Disclosures About Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities; Correction

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; technical correction.

SUMMARY: This document makes technical corrections to certain amendments to the Commission's disclosure rules and forms adopted in Release No. 33–10762 (March 2, 2020), which was published in the **Federal Register** on April 20, 2020. Specifically, this document conforms the numbering of certain regulatory text to match renumbering set out in a rule published elsewhere in this issue of the **Federal Register**.

DATES: Effective January 4, 2021.

FOR FURTHER INFORMATION CONTACT: Todd E. Hardiman, Associate Chief Accountant, Office of the Chief Accountant, at (202) 551–3516, or Steven G. Hearne, Senior Special Counsel, Office of Rulemaking, at (202) 551–3430, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are making technical corrections to amendatory instruction 4 for § 210.8–01 because a rule published elsewhere in this issue of the **Federal Register** renumbers Notes 3 and 4 as paragraphs (c) and (d).

List of Subjects in 17 CFR Part 210

Reporting and recordkeeping requirements, Securities.

Text of Correction

In FR Doc. 2020–04776, appearing on page 21940 in the **Federal Register** of Monday, April 20, 2020, on page 22000, in the first column, amendatory instruction 4 and the accompanying regulatory text is corrected to read as follows:

■ 4. Amend § 210.8–01 by revising paragraphs (c) and (d) to read as follows:

§ 210.8–01 General requirements for Article 8.

* * * * *

(c) The requirements of § 210.3–10 are applicable to financial statements for a subsidiary of a smaller reporting company that issues securities guaranteed by the smaller reporting company or guarantees securities issued by the smaller reporting company. Disclosures about guarantors and issuers of guaranteed securities registered or being registered must be presented as required by § 210.13–01.

(d) The requirements of § 210.3–16 or § 210.13–02 are applicable if a smaller reporting company's securities registered or being registered are collateralized by the securities of the smaller reporting company's affiliates. Section 210.13–02 must be followed unless § 210.3–16 applies. The periods presented for purposes of compliance with § 210.3–16 are those required by § 210.8–02.

* * * * *

Dated: May 22, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–11480 Filed 8–28–20; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2020–0520]

RIN 1625–AA00

Emergency Safety Zone; Lower Mississippi River, Knowlton Revetment, AR

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for emergency purposes for all waters of the Lower Mississippi River (LMR), between Mile Marker 618 and 622. The emergency safety zone is needed to protect persons, property, infrastructure, and the marine environment from the potential safety hazards associated with the Mat Sinking Unit effort in the vicinity of the Knowlton Revetment, AR. Deviation from the safety zone is prohibited unless specifically authorized by the Captain of the Port Lower Mississippi River or a designated representative.

DATES: This rule is effective without actual notice from August 31, 2020 through August 31, 2020, or until all dredge work is complete, whichever occurs earlier. For the purposes of enforcement, actual notice will be used from August 17, 2020 through August 31, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0520 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MSTC Lindsey Swindle, U.S. Coast Guard; telephone 901–521–4813, email *Lindsey.M.Swindle@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
LMR Lower Mississippi River
MM River Mile Marker
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because shoaling and falling water levels in the vicinity of Knowlton Revetment, AR has greatly reduced the width of the navigable channel, impeding the safe navigation of vessel traffic and immediate action is needed to protect persons and property. Completing the full NPRM process is impracticable because we must establish this safety zone as soon as possible.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with the dredge operations in the vicinity of Knowlton Revetment, AR.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034

(previously 33 U.S.C. 1231). The Captain of the Port (COTP) Lower Mississippi River (LMR) has determined that potential hazards associated with the mat sinking effort will be a safety concern for anyone within a mile radius of the Mat Sinking Unit and machinery. This rule is needed to protect persons, property, infrastructure, and the marine environment in all waters of the LMR within the safety zone while operations are being conducted.

IV. Discussion of the Rule

This rule establishes a temporary emergency safety zone from August 17, 2020 through August 31, 2020, or until all mat sinkng work is complete, whichever occurs earlier. The safety zone will cover all waters of the LMR from MM 618 through MM 622, extending the entire width of the river. The safety zone will only be activated when operations precludes safe navigation of the established channel. The duration of the zone is intended to protect persons, property, infrastructure, and the marine environment in these navigable waters while operations are being conducted. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, and duration of the safety zone. This emergency safety zone will temporarily restrict navigation on the LMR from MM 618 through MM 622 in the vicinity of Knowlton Revetment, AR, from August 17, 2020 through August 31, 2020, or until all mat sinking work is complete, whichever occurs earlier. The Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 informing the public of the times that the zone will be activated, and the rule would allow vessels to seek permission to enter the zone on a case-by-case basis.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a temporary emergency safety zone on the LMR from MM 618 through MM 622, that will prohibit entry into this zone unless permission has been granted by the COTP Lower Mississippi or a designated representative. The safety zone will only be enforced while operations preclude the safe navigation of the established channel. It is categorically excluded from further review under paragraph L60(d) of

Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T08–0520 to read as follows:

§ 165.T08–0520 Emergency Safety Zone; Lower Mississippi River, Knowlton Revetment, AR.

(a) *Location.* The following area is a safety zone: All waters of the Lower Mississippi River from MM 618 through MM 622.

(b) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by telephone or email. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(c) *Enforcement period.* This section will be enforced as needed from August 17, 2020 through August 31, 2020, or until all dredge work is complete, whichever occurs earlier. Periods of activation will be promulgated by Broadcast Notice to Mariners.

Dated: August 24, 2020.

R.S. Rhodes,

Captain, U.S. Coast Guard, Captain of the Port Lower Mississippi River.

[FR Doc. 2020–19139 Filed 8–28–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2020–0503]

RIN 1625–AA00

Emergency Safety Zone; Red River, Avoyelles Parish, LA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for emergency purposes for all waters of the Red River (RR), extending from River Mile Marker (MM) 34 through MM 39. The emergency safety zone is needed to protect persons, property, infrastructure, and the marine environment from the potential safety hazards associated with the dredging operations being conducted on the Red River, in the vicinity of Avoyelles Parish, LA. Deviation from the safety zone is prohibited unless specifically authorized by the Captain of the Port Lower Mississippi River or a designated representative.

DATES: This rule is effective without actual notice from August 31, 2020 through August 31, 2020, or until all dredge work is complete, whichever occurs earlier. For the purposes of enforcement, actual notice will be used from August 13, 2020 through August 31, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0503 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MSTC Lindsey Swindle, U.S. Coast Guard; telephone 901–521–4813, email *Lindsey.M.Swindle@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
MM River Mile Marker
NPRM Notice of proposed rulemaking
RR Red River
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because shoaling and falling water levels in the vicinity of Avoyelles Parish, LA has greatly reduced the width of the navigable channel, impeding the safe navigation of vessel traffic and immediate action is needed to protect persons and property. Completing the full NPRM process is impracticable because we must establish this safety zone as soon as possible.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with the dredge operations in the vicinity of Avoyelles Parish, LA.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port (COTP) Lower Mississippi River (LMR) has determined that potential hazards associated with the dredge effort will be a safety concern for anyone within a mile radius of the dredge vessels and machinery. This rule is needed to protect persons, property, infrastructure, and the marine environment in all waters of the RR within the safety zone while dredge operations are being conducted.

IV. Discussion of the Rule

This rule establishes a temporary emergency safety zone from August 13, 2020 through August 31, 2020, or until all dredge work is complete, whichever occurs earlier. The safety zone will cover all waters of the RR from MM 34

through MM 39, extending the entire width of the river. The safety zone will only be activated when dredge operations precludes safe navigation of the established channel. The duration of the zone is intended to protect persons, property, infrastructure, and the marine environment in these navigable waters while dredging is being conducted. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, and duration of the safety zone. This emergency safety zone will temporarily restrict navigation on the RR from MM 34 through MM 39 in the vicinity of Avoyelles Parish, LA, from August 13, 2020 through August 31, 2020, or until all dredge work is complete, whichever occurs earlier. The Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 informing the public of the times that the zone will be activated, and the rule would allow vessels to seek permission to enter the zone on a case-by-case basis.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a temporary emergency safety zone on the RR from MM 34 through MM 39, that will prohibit entry into this zone unless permission has been granted by the COTP Lower Mississippi or a designated representative. The safety zone will only be enforced while dredge operations preclude the safe navigation of the established channel. It is categorically excluded from further review under paragraph L60(d) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T08–0503 to read as follows:

§ 165.T08–0503 Emergency Safety Zone; Red River, Avoyelles Parish, LA.

(a) *Location.* The following area is a safety zone: All waters of the Red River from MM 34 through MM 39.

(b) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by telephone or email. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(c) *Enforcement period.* This section will be enforced as needed from August 13, 2020 through August 31, 2020, or until all dredge work is complete, whichever occurs earlier. Periods of activation will be promulgated by Broadcast Notice to Mariners.

Dated: August 13, 2020.

R.S. Rhodes,

Captain, U.S. Coast Guard, Captain of the Port Lower Mississippi River.

[FR Doc. 2020–19138 Filed 8–28–20; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 600

[EPA–HQ–OAR–2020–0314; FRL–10012–25–OAR]

RIN 2060–AU89

Technical Correction to the Flex-Fuel Vehicle Provisions in CAFE Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: This direct final rule corrects an error in EPA's regulations for test procedures used in the Corporate Average Fuel Economy (CAFE) program finalized in a 2012 rulemaking. EPA established the procedures under the general provisions of Energy Policy and Conservation Act (EPCA) which authorize EPA to establish test and calculation procedures for CAFE. The correction clarifies the method for how flex-fuel vehicles are accounted for in manufacturer fuel economy calculations in model years 2020 and later. This correction allows the program to be implemented as originally intended in the 2012 rule. This rulemaking action is not expected to result in any significant changes in regulatory burdens or costs.

DATES: This rule is effective on November 30, 2020 without further notice, unless EPA receives adverse comment by October 15, 2020. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule, or the relevant provisions of this rule on which EPA received adverse comment, will not take effect.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2020–0314, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2020–0314 in the subject line of the message.
- *Fax:* (202) 566–9744 Include Docket ID No. EPA–HQ–OAR–2020–0314 on the cover of the fax.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, OAR, Docket EPA–HQ–OAR–2020–0314, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery/Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document. 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.*

FOR FURTHER INFORMATION CONTACT: Christopher Lieske, Office of Transportation and Air Quality (OTAQ), Assessment and Standards Division (ASD), Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor MI 48105; telephone number: (734) 214–4584; email address: *lieske.christopher@epa.gov* fax number: (734) 214–4816.

SUPPLEMENTARY INFORMATION:

I. Why is EPA using a direct final rule?

EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. EPA believes this to be the case because the direct final rule corrects an error in the regulations and the corrections will allow the program to be implemented as originally intended, consistent with the original final rule. However, in the ''Proposed Rules'' section of this issue of the **Federal Register**, we are publishing a separate document that will serve as the proposed rule to correct the regulations if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. If we receive adverse comment on a distinct provision of this rulemaking, we will publish a timely withdrawal in the **Federal Register** indicating which provisions we are withdrawing. The provisions that are not withdrawn will become effective on the date set out above, notwithstanding adverse

comment on any other provision. We would address all public comments in any subsequent final rule based on the proposed rule.

II. Does this action apply to me?

This action affects companies that manufacture or sell passenger automobiles (passenger cars) and non-passenger automobiles (light trucks) as defined under NHTSA's CAFE regulations.[1] Regulated categories and entities include:

Category	NAICS codes [A]	Examples of potentially regulated entities
Industry	336111 336112	Motor Vehicle Manufacturers.
Industry	811111 811112 811198 423110	Commercial Importers of Vehicles and Vehicle Components.
Industry	335312 811198	Alternative Fuel Vehicle Converters.

[A] North American Industry Classification System (NAICS).

This list is not intended to be exhaustive, but rather provides a guide regarding entities likely to be regulated by this action. To determine whether particular activities may be regulated by this action, you should carefully examine the regulations. You may direct questions regarding the applicability of this action to the person listed in **FOR FURTHER INFORMATION CONTACT**.

III. Public Participation

EPA will keep the record open until October 15, 2020. All information will be available for inspection at the EPA Air Docket No. EPA–HQ–OAR–2020–0314. Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2020–0314, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, 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/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

IV. Direct Final Rule Provisions

This direct final rule corrects a technical error in EPA regulations pertaining to the treatment of model year (MY) 2020 and later E85 flex-fuel vehicles (FFVs) in the Corporate Average Fuel Economy (CAFE) program. These provisions were established in the 2012 final rule ''2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards,'' where EPA adopted new test procedures for weighting the measured fuel economy of MY 2020 and later FFVs when the vehicles are tested on both E85 and gasoline test fuels.[2] EPA established the procedures under the general provisions of Energy Policy and Conservation Act (EPCA) which authorize EPA to establish test and calculation procedures for CAFE.[3]

49 U.S.C. 32905 specifies how the fuel economy of dual fuel vehicles is to be calculated for the purposes of CAFE through the 2019 model year. The basic calculation includes a 50/50 harmonic average weighting of the fuel economy for the alternative fuel and the conventional fuel, irrespective of the actual usage of each fuel. In a related provision, 49 U.S.C. 32906, the amount by which a manufacturer's CAFE value (for domestic passenger cars, import passenger cars, or light-duty trucks) can be improved by the statutory incentive for dual fuel vehicles is limited by EPCA to 1.2 mpg through 2014, and then gradually reduced until it is phased out entirely starting in model year 2020.[4]

Recognizing the expiration of the special calculation procedures in 49 U.S.C. 32905 for dual fuel vehicles, EPA established in the 2012 rule, calculation procedures for model years 2020 and later FFVs under the general provisions of EPCA noted above authorizing EPA to establish CAFE testing and calculation procedures. EPA regulations at 40 CFR 600.510–12(c)(2)(v) specify weighting the fuel economy measured when an FFV is tested on E85 and gasoline test fuel using the same weighting factor as is used in the greenhouse gas program for weighting CO_2 emissions measured on the two fuels.[5] As part of the 2012 rule, NHTSA modified its regulations at Part 536.10 to limit the applicability of the EPCA limits to MYs 2019 and earlier and to state that for MYs 2020 and beyond a manufacturer must calculate the fuel economy of dual-fuel vehicles in accordance with EPA's regulations at 40 CFR 600.510–12(c)(2)(v).

The preamble for the 2012 rule summarized EPA's approach for MY 2020 and later as follow: ''EPA is finalizing its proposal, under its EPCA authority, to use the ''utility factor'' methodology for PHEV and CNG vehicles described above to determine how to apportion the fuel economy when operating on gasoline or diesel fuel and the fuel economy when operating on the alternative fuel. For FFVs under the CAFE program, EPA is using the same methodology it uses for the GHG program to apportion the fuel economy, namely based on actual usage of E85. As proposed, EPA is continuing to use Petroleum Equivalency Factors and the 0.15 divisor used in the MY 2012–2016 rule for the alternative fuels, however with no cap on the amount of fuel economy increase allowed.'' [6]

EPA noted in the 2012 preamble ''[i]n a related provision, 49 U.S.C. 32906, the amount by which a manufacturer's CAFE value (for domestic passenger cars, import passenger cars, or light-duty trucks) can be improved by the statutory incentive for dual fuel vehicles is limited by EPCA to 1.2 mpg through 2014, and then gradually reduced until it is phased out entirely starting in model year 2020. With the expiration of the special calculation procedures in 49

[1] ''Passenger car'' and ''light truck'' are defined in 49 CFR part 523.

[2] See 77 FR 62830 and 63127, October 15, 2012.

[3] 49 U.S.C. 32904(a), (c).

[4] 49 U.S.C. 32906.

[5] This weighting factor is commonly referred to as the ''F-factor.'' The F-factor is a value specified by EPA in accordance with 40 CFR 600.510–12(k) based on EPA's assessment of the real-world use of E85 over the life of the FFVs.

[6] 77 FR 62653.

U.S.C. 32905 for dual fueled vehicles, the CAFE calculation procedures for model years 2020 and later vehicles need to be set under the general provisions authorizing EPA to establish testing and calculation procedures.'' [7] The 2012 rule preamble also notes ''NHTSA interprets section 32906(a) as not limiting the impact of duel fueled vehicles on CAFE calculations after MY2019.'' [8] The 2012 rule preamble states ''we interpret Congress' statement in section 32906(a)(7) that the maximum increase in fuel economy attributable to dual-fueled automobiles is '0 miles per gallon for model years after 2019' within the context of the introductory language of section 32906(a) and the language of section 32906(b), which, again, refers clearly to the statutory credit, and not to dual-fueled automobiles generally. It would be an unreasonable result if the phaseout of the credit meant that manufacturers would be effectively penalized, in CAFE compliance, for building dual-fueled automobiles . . .'' [9] EPA believes all of these statements from the 2012 final rule make clear EPA's intent not to apply the 49 U.S.C. 32906 credit limits to CAFE calculations for model year 2020 and later vehicles.

A discrepancy in EPA's regulations exists in section 40 CFR 600.510–12(h), where prior to the 2012 rule, EPA codified the EPCA limits in EPA's regulations. These regulations specify that the impact of certain dual-fuel vehicles on a manufacturer's fleet CAFE calculations is limited to 0.0 for MY 2020 and later. EPA inadvertently did not revise the regulations at 40 CFR 600.510–12(h) to account for the 2012 rule's treatment of MY 2020 and later FFVs. The existing 40 CFR 600.510–12(h) provisions may be read as applying the EPCA limits to MY 2020 and later FFVs, inconsistent with the clear intent of the 2012 rule. This direct final rule corrects this error by making narrow revisions to this section of the regulations to clarify that the limits do not apply to MY 2020 and later FFVs, where the emissions of those vehicles are calculated in accordance with 40 CFR 600.510–12(c)(2)(v), consistent with the intent of the 2012 final rule.

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

[7] 77 FR 62830.

[8] 77 FR 62830.

[9] 77 FR 63020.

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

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

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

C. Paperwork Reduction Act

This action does not impose any new information collection burden under the PRA, since it merely clarifies and corrects existing regulatory language. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number of 2060–0104.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This rule merely clarifies and corrects existing regulatory language. We therefore anticipate no costs and therefore no regulatory burden associated with this rule.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments. Requirements for the private sector do not exceed $100 million in any one year.

F. Executive Order 13132: Federalism

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

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

This action does not have tribal implications as specified in Executive Order 13175. This rule only corrects and clarifies regulatory provisions that apply to light-duty vehicle manufacturers. Tribal governments would be affected only to the extent they purchase and use regulated vehicles. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This direct final rule merely corrects and clarifies previously established regulatory provisions.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs agencies to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action modifies existing regulations to correct an error in the regulations and therefore involves technical standards previously established by EPA. The amendments to the regulations do not involve the application of new technical standards. EPA is continuing to use the technical

standards previously established in its rules regarding the light-duty vehicle GHG standards for MYs 2017–2025. See 77 FR 62960 and 85 FR 25265.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). This regulatory action merely corrects previously established provisions that auto manufacturers use to demonstrate compliance for light-duty vehicles.

L. Congressional Review Act (CRA)

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

List of Subjects in 40 CFR Part 600

Environmental protection, Administrative practice and procedure, Electric power, Fuel economy, Labeling, Reporting and recordkeeping requirements.

Andrew Wheeler,

Administrator.

For the reasons set forth in the preamble, the Environmental Protection Agency is amending part 600 of title 40, Chapter I of the Code of Federal Regulations as follows:

PART 600—FUEL ECONOMY AND GREENHOUSE GAS EXHAUST EMISSIONS OF MOTOR VEHICLES

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 49 U.S.C. 32901–23919q, Pub. L. 109–58.

Subpart F—Procedures for Determining Manufacturer's Average Fuel Economy and Manufacturer's Average Carbon-Related Exhaust Emissions

■ 2. Section 600.510–12 is amended by revising paragraphs (h) introductory text and (h)(1) to read as follows:

§ 600.510–12 Calculation of average fuel economy and average carbon-related exhaust emissions.

* * * * *

(h) The increase in average fuel economy determined in paragraph (c) of this section attributable to dual fueled automobiles is subject to a maximum value through model year 2019 that applies separately to each category of automobile specified in paragraph (a)(1) of this section. The increase in average fuel economy attributable to vehicles fueled by electricity or, for model years 2016 and later, by compressed natural gas, is not subject to a maximum value. The increase in average fuel economy attributable to alcohol dual fuel model types calculated under paragraph (c)(2)(v) of this section is also not subject to a maximum value. The following maximum values apply under this paragraph (h):

Model year	Maximum increase (mpg)
1993–2014	1.2
2015	1.0
2016	0.8
2017	0.6
2018	0.4
2019	0.2

(1) The Administrator shall calculate the increase in average fuel economy to determine if the maximum increase provided in this paragraph (h) has been reached. The Administrator shall calculate the increase in average fuel economy for each category of automobiles specified in paragraph (a)(1) of this section by subtracting the average fuel economy values calculated in accordance with this section, assuming all alcohol dual fueled automobiles subject to the provisions of paragraph (c)(2)(iv) of this section are operated exclusively on gasoline (or diesel fuel), from the average fuel economy values determined in paragraph (c) of this section. The difference is limited to the maximum increase specified in this paragraph (h).

* * * * *

[FR Doc. 2020–17217 Filed 8–28–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 418

[CMS–1629–F2]

RIN–0938–AS39

Medicare Program; FY 2016 Hospice Wage Index and Payment Rate Update and Hospice Quality Reporting Requirements; Correcting Amendment

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule; correcting amendment.

SUMMARY: In the August 6, 2015 issue of the **Federal Register**, we published a final rule that provided hospice quality reporting program updates, including finalizing the proposal to codify the Hospice Quality Reporting Program Submission Extension and Exemption Requirements. The effective date of the final rule was October 1, 2015. This correcting amendment corrects an omission identified in the August 6, 2015 final rule.

DATES: *Effective date:* August 31, 2020.

Applicability dates: This correcting amendment is applicable beginning October 1, 2015.

FOR FURTHER INFORMATION CONTACT: Cindy Massuda, (443) 570–9589.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2015–19033 (80 FR 47142), the final rule entitled ''FY 2016 Hospice Wage Index and Payment Rate Update and Hospice Quality Reporting Requirements'' (hereinafter referred to as the FY 2016 final rule), there were technical errors that are identified and corrected in the regulations text of this correcting amendment. The provisions of this correcting amendment are applicable beginning October 1, 2015.

II. Summary of Errors

A. Summary of Errors in the Preamble

On page 47194, in the first paragraph of the second column states, ''Final Action: After consideration of comments, and given the clarification above, CMS is finalizing our proposal to codify the HQRP Submission Extension and Exemption Requirements at § 418.312.'' The revision needs to be added to the regulations text and the Code of Federal Regulations (CFR).

B. Summary of Errors in the Regulations Text

On page 47207 of the FY 2016 final rule, we made technical errors in the regulations text of § 418.312. In this section, we inadvertently omitted language on our extension and exemption requirements policy. Accordingly, we are adding § 418.312(i) to accurately reflect our policy on extension and exemption requirements for the hospice quality reporting program (HQRP).

C. Summary and Corrections of Errors in the Addenda on the CMS Website

We inadvertently omitted language on our extension and exemption requirements policy. Accordingly, we are adding § 418.312(i) to accurately reflect our policy on extension and exemption requirements for the HQRP.

III. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). However, we can waive this notice and comment procedure if the Secretary of the Department of Health and Human Services (Secretary) finds, for good cause, that the notice and comment process is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons therefore in the notice.

Section 553(d) of the APA ordinarily requires a 30-day delay in effective date of final rules after the date of their publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued.

Our policy on HQRP Submission Extension and Exemption Requirements at § 418.312 in the FY 2016 final rule has previously been subjected to notice and comment procedures. These corrections are consistent with the discussion of this policy in the FY 2016 final rule and do not make substantive changes to this policy as referenced at 80 FR 47193, ''in order to be considered, a request for an exemption or extension must contain all of the finalized requirements as outlined on our website at *https://wayback.archive-it.org/2744/20150127181435/http:/www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/index.html.*''

This correcting amendment merely corrects technical errors in the regulations text of the FY 2016 final rule. As a result, this correcting amendment is intended to ensure that the FY 2016 final rule accurately reflects the policy adopted in the final rule. Therefore, we find that undertaking further notice and comment procedures to incorporate these corrections into the final rule is unnecessary and contrary to the public interest.

For the same reasons, we are also waiving the 30-day delay in effective date for this correcting amendment. We believe that it is in the public interest to ensure that the FY 2016 final rule accurately states our policy on HQRP Submission Extension and Exemption Requirements at § 418.312. Thus delaying the effective date of these corrections would be contrary to the public interest. Therefore, we also find good cause to waive the 30-day delay in effective date.

List of Subjects in 42 CFR Part 418

Health facilities, Hospice care, Medicare, Reporting and recordkeeping requirements.

Accordingly, 42 CFR chapter IV is corrected by making the following correcting amendments:

PART 418—HOSPICE CARE

■ 1. The authority citation for part 418 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 2. Section 418.312 is amended by adding paragraph (i) to read as follows:

§ 418.312 Data submission requirements under the hospice quality reporting program.

* * * * *

(i) *Exemptions and extensions requirements.* (1) A hospice may request and CMS may grant exemptions or extensions to the reporting requirements under paragraph (b) of this section for one or more quarters, when there are certain extraordinary circumstances beyond the control of the hospice.

(2) A hospice requesting an exemption or extension must do so within 90 days of the date that the extraordinary circumstances occurred by sending an email to CMS Hospice QRP Reconsiderations at *HospiceQRPReconsiderations@cms.hhs.gov* that contains all of the following information:

(i) Hospice CMS Certification Number (CCN).

(ii) Hospice Business Name.

(iii) Hospice Business Address.

(iv) CEO or CEO-designated personnel contact information including name, title, telephone number, email address, and mailing address (the address must be a physical address, not a post office box).

(v) Hospice's reason for requesting the exemption or extension.

(vi) Evidence of the impact of extraordinary circumstances beyond the hospice's control, including, but not limited to photographs, newspaper, other media articles, or independent sources attesting to the incident that can be reasonably corroborated. Include dates of occurrence and other documentation that may support the rationale for seeking extension or exemption.

(vii) Date when the hospice believes it will be able to again submit data under paragraph (b) of this section and a justification for the proposed date.

(3) CMS may grant exemptions or extensions to hospices without a request if it determines that one or more of the following has occurred:

(i) An extraordinary circumstance, such as an act of nature including a pandemic, affects an entire region or locale.

(ii) A systemic problem with one of CMS' data collection systems directly affect the ability of a hospice to submit data under paragraph (b) of this section.

Dated: August 24, 2020.

Wilma M. Robinson,

Deputy Executive Secretary to the Department, Department of Health and Human Services.

[FR Doc. 2020–18905 Filed 8–28–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 202

[Docket DARS–2019–0068]

RIN 0750–AK17

Defense Federal Acquisition Regulation Supplement: Definition of ''Micro-Purchase Threshold'' (DFARS Case 2018–D056)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement to implement a section of the National Defense Authorization Act for Fiscal

Year 2019 that increases the micro-purchase threshold for DoD from $5,000 to $10,000 and repeals a section in the United States Code.

DATES: Effective August 31, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Ziegler, telephone 571–372–6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to remove the definition of ''micro-purchase threshold'' at DFARS 202.101. Section 821 of the National Defense Authorization Act for Fiscal Year 2019 amends 10 U.S.C. 2338 by increasing the micro-purchase threshold for DoD from $5,000 to $10,000 and repealing 10 U.S.C. 2339. An exception to the $5,000 micro-purchase threshold is provided at 10 U.S.C. 2339 for basic research and activities of DoD science and technology reinvention laboratories with a micro-purchase threshold of $10,000 for those activities. The DFARS definition at 202.101, which includes a micro-purchase threshold of $5,000 for DoD with the exception of $10,000 for basic research and activities of DoD science and technology reinvention laboratories, is now obsolete. The Federal Acquisition Regulation (FAR) definition of micro-purchase threshold now applies to DoD, so the outdated DFARS coverage is being removed.

II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule only removes the obsolete DFARS ''micro-purchase threshold'' definition at 202.101. Therefore, the rule does not impose any new requirements on contracts at or below the simplified acquisition threshold and for commercial items, including commercially available off-the-shelf items.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is the Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a new regulation; rather, this rule merely removes an obsolete definition from the DFARS.

IV. Executive Orders 12866 and 13563

Executive Order (E.O.) 12866, Regulatory Planning and Review; and E.O. 13563, Improving Regulation and Regulatory Review, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA), has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

V. Executive Order 13771

This rule is not an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), 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.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 202

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 202 is amended as follows:

PART 202—DEFINITIONS OF WORDS AND TERMS

■ 1. The authority citation for 48 CFR part 202 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

202.101 [Amended]

■ 2. Amend section 202.101 by removing the definition of ''Micro-purchase threshold''.

[FR Doc. 2020–18634 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216 and 252

[Docket DARS–2020–0028]

RIN 0750–AL10

Defense Federal Acquisition Regulation Supplement: Repeal of DFARS Clause ''Ordering'' (DFARS Case 2020–D024)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove a clause that is no longer necessary.

DATES: Effective August 31, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DFARS clause 252.216–7006, Ordering, is included in DoD solicitations and contracts when an indefinite-delivery/definite-quantity, requirements, or indefinite-delivery/indefinite-quantity contract type is contemplated. The clause notifies contractors of the ordering period for the contract, that orders are subject to the terms and conditions of the contract, and that an order is considered issued by the Government if sent via fax, U.S. mail, or electronic commerce. The

DFARS clause is used in lieu of FAR clause 52.216–18, Ordering.

The FAR clause is included in the same solicitations and contracts as the DFARS clause and advises contractors of most of the information included in the DFARS clause, except for when an order is considered issued by the Government if sent to the contractor via fax or electronic commerce. In an effort to reflect current business practices and maintain speed and efficiency in the ordering process, a final rule (85 FR 40075) issued under FAR case 2018–022 amended FAR clause 52.216–18 to automatically authorize the use of fax and electronic commerce methods to issue orders under the contract and clarify when an order is considered issued by the Government if sent to the contractor via these methods. As the FAR clause now includes the same information as the DFARS clause, DFARS clause 252.216–7006 is duplicative and no longer necessary and can be removed from the DFARS.

The removal of this DFARS clause implements a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, ''Enforcing the Regulatory Reform Agenda,'' which established a Federal policy ''to alleviate unnecessary regulatory burdens'' on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the **Federal Register** at 82 FR 35741 on August 1, 2017, and requested public input. No public comments were received on this clause. The DoD Task Force reviewed the requirements of DFARS clause 252.216–7006, Ordering, and determined that the DFARS coverage was not necessary and recommended removal, contingent upon similar language being implemented in FAR clause 52.216–18.

II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule only removes obsolete DFARS clause 252.216–7006, Ordering. The rule does not impose any new requirements on contracts at or below the simplified acquisition threshold and for commercial items, including commercially available off-the-shelf items.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is the Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a new regulation; rather, this rule is merely removing an obsolete clause from the DFARS.

IV. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), 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.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 216 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 216 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 216 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 216—TYPES OF CONTRACTS

216.506 [Amended]

■ 2. Amend section 216.506 by removing paragraph (a).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.216–7006 [Removed and Reserved]

■ 3. Remove and reserve section 252.216–7006.

[FR Doc. 2020–18637 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 219 and 252

[Docket DARS–2020–0001]

Defense Federal Acquisition Regulation Supplement: Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making needed technical amendments to update the Defense Federal Acquisition Regulation Supplement (DFARS).

DATES: Effective August 31, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer L. Hawes, Defense Acquisition Regulations System, OUSD (A&S) DPC (DARS), Room 3B938, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 571–372–6115.

SUPPLEMENTARY INFORMATION: This final rule amends the DFARS as follows to:

1. Remove section 219.303 to align with the Federal Acquisition Regulation

(FAR). Section 219.303 is now reserved in the FAR and appropriate coverage is located at FAR 19.102(b), Determining the appropriate NAICS codes for the solicitation. *https://www.govinfo.gov/content/pkg/FR-2020-02-27/pdf/2020-02028.pdf#page=23.*

2. Update the 219.5 subpart heading to align with the FAR subpart heading.

3. Revise the section 219.502–2 heading to align with the FAR coverage and renumber the section paragraph. Paragraph (a) in FAR 19.502–2 addresses acquisitions below the simplified acquisition threshold (SAT). The DFARS text addresses specific types of acquisitions at dollar values below, at, and above the SAT. The section is being renumbered to reflect implementation of the whole section (*i.e.,* FAR 19.502–2(a) and (b)), not just a single paragraph.

4. Redesignate section 219.505 as 219.502–8 to align with the FAR.

5. Update the section 219.808 heading to align with the FAR.

6. Correct cross references in the introductory text for the following clauses: 252.245–7000, 252.245–7001, 252.245–7002, and 252.245–7003.

List of Subjects in 48 CFR Parts 219 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 219 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 219 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 219—SMALL BUSINESS PROGRAMS

219.303 [Removed]

■ 2. Remove section 219.303.

■ 3. Revise the heading for subpart 219.5 to read as follows:

Subpart 219.5—Small Business Total Set-Asides, Partial Set-Asides, and Reserves

■ 4. Revise section 219.502–2 to read as follows:

219.502–2 Total small business set-asides.

Unless the contracting officer determines that the criteria for set-aside cannot be met, set aside for small business concerns acquisitions for—

(1) Construction, including maintenance and repairs, under $2.5 million;

(2) Dredging under $1.5 million; and

(3) Architect-engineer services for military construction or family housing projects under $1 million (10 U.S.C. 2855).

219.505 [Redesignated as 219.502–8]

■ 5. Redesignate section 219.505 as section 219.502–8.

219.808 [Amended]

■ 6. Amend the heading for section 219.808 by removing ''negotiations'' and adding ''negotiation'' in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.245–7000 [Amended]

■ 7. Amend section 252.245–7000 introductory text by removing ''245.107(1)'' and adding ''245.107(2)'' in its place.

252.245–7001 [Amended]

■ 8. Amend section 252.245–7001 introductory text by removing ''245.107(2)'' and adding ''245.107(3)'' in its place.

252.245–7002 [Amended]

■ 9. Amend section 252.245–7002 introductory text by removing ''245.107(3)'' and adding ''245.107(4)'' in its place.

252.245–7003 [Amended]

■ 10. Amend section 252.245–7003 introductory text by removing ''245.107(4)'' and adding ''245.107(5)'' in its place.

[FR Doc. 2020–18635 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 251

[Docket DARS–2020–0029]

RIN 0750–AK90

Defense Federal Acquisition Regulation Supplement: Use of Defense Logistics Agency Energy as a Source of Fuel (DFARS Case 2020–D003)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to permit the use Defense Logistics Agency Energy as a source of fuel for contractors performing under certain contracts.

DATES: Effective August 31, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to permit contracting officers to authorize contractors to use Defense Logistics Agency (DLA) Energy as a source for Defense Working Capital Fund fuel in the performance of other than cost-reimbursement contracts. Supplemental guidance and information, on the internal procedures a contracting officer must follow to provide this authorization, are being implemented in DFARS Procedures, Guidance, and Information.

DoD contractors provide supplies and services that require the use of ground, aviation, or marine fuels in performance of their contracts. In some instances, these supplies and services are required in locations where there are no commercial fuel sources available, the quality of fuel is degraded, or the commercial fuel supply is inadequate. As a result, the availability of reliable and quality fuel becomes critical for contract performance.

DLA Energy has a worldwide bulk-fuel supply chain that can provide military specification fuels, as well as most commercial specification ground fuels (*e.g.,* gasoline, diesel, and heating fuel), on military bases. As an acquisition policy, Federal Acquisition Regulation (FAR) 51.1 permits contracting officers to authorize contractors to use Government supply sources in the performance of cost-reimbursement contracts.

The use of fixed-price contracts has increased as a result of statutory and policy acquisition requirements that attempt to reduce risk to the Government. For example, 41 U.S.C. 3307(e)(4)(A)(i) requires commercial supplies and services to be acquired via fixed-price or time-and-materials contracts. As a result, many of the requirements that need to use DLA Energy ground, aviation, or marine fuels are now being awarded as fixed-price contracts and, therefore, are not eligible to authorize the use Government supply sources in performance of the contract, in accordance with FAR 51.1.

DoD mission-critical supplies and services are provided by contractors

under fixed-price contracts that rely on the ability to utilize fuels for successful contract performance. As a result, this rule intends to help stabilize contractor's fuel costs and supply chain for fuel, as well as reduce contract performance risk by providing contractors with an adequate and reliable source of fuel, when applicable and necessary.

II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not create new provisions or clauses or impact any existing provisions or clauses.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is the Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a new regulation; rather, this rule is updating internal operating procedures to permit and advise contracting officers on the procedures to follow when authorizing contractors, as necessary, to use DLA Energy as a source of fuel in performance of certain contracts.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), 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.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 251

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 251 is amended as follows:

PART 251—USE OF GOVERNMENT SOURCES BY CONTRACTORS

■ 1. The authority citation for 48 CFR part 251 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Section 252.101 is added to read as follows:

251.101 Policy.

(a)(1) Notwithstanding the restriction at FAR 51.101(a)(1), contracting officers may authorize contractors to use Defense Logistics Agency Energy as a source of fuel in performance of other than cost-reimbursement contracts, when the fuel is funded by the Defense Working Capital Fund. When providing this authorization to contractors, follow the procedures at PGI 251.101.

[FR Doc. 2020–18642 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

[Docket No. 200731–0203]

RIN 0648–BI91

2020 Annual Determination To Implement the Sea Turtle Observer Requirement

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

ACTION: Final determination.

SUMMARY: The National Marine Fisheries Service (NMFS) publishes the final Annual Determination (AD) for 2020, pursuant to its authority under the Endangered Species Act (ESA or Act). Through the AD, NMFS identifies U.S. fisheries operating in the Atlantic Ocean, Gulf of Mexico, and Pacific Ocean that will be required to take fisheries observers upon NMFS' request. The purpose of observing identified fisheries is to learn more about sea turtle bycatch in a given fishery, evaluate measures to prevent or reduce sea turtle bycatch, and implement the prohibition against sea turtle takes. Fisheries identified on the 2020 AD (see Table 1) will remain on the AD for a five-year period from the effective date of the final determination and will be required to carry observers upon NMFS' request.

DATES: This final determination is effective September 30, 2020.

ADDRESSES: Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Jaclyn Taylor, Office of Protected Resources, 301–427–8402; Ellen Keane, Greater Atlantic Region, 978–282–8476; Dennis Klemm, Southeast Region, 727–824–5312; Dan Lawson, West Coast Region, 206–526–4740; Irene Kelly, Pacific Islands Region, 808–725–5141. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

Purpose of the Sea Turtle Observer Requirement

Under the ESA, 16 U.S.C. 1531 *et seq.,* NMFS has the responsibility to

implement programs to conserve marine life listed as endangered or threatened. All sea turtles found in U.S. waters are listed as either endangered or threatened under the ESA. Kemp's ridley (*Lepidochelys kempii*), loggerhead (*Caretta caretta;* North Pacific distinct population segment), leatherback (*Dermochelys coriacea*), green (*Chelonia mydas;* Central West Pacific and Central South Pacific distinct population segments), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. Loggerhead (Northwest Atlantic distinct population segment), green (North Atlantic, South Atlantic, Central North Pacific and East Pacific distinct population segments), and olive ridley (*Lepidochelys olivacea*) sea turtles are listed as threatened, except for breeding colony populations of olive ridleys on the Pacific coast of Mexico, which are listed as endangered. Due to the inability to distinguish between populations of olive ridley turtles away from the nesting beach, NMFS considers these turtles endangered wherever they occur in U.S. waters. While some sea turtle populations have shown signs of recovery, many populations continue to decline.

Incidental take, or bycatch, in fishing gear is the primary anthropogenic source of sea turtle injury and mortality in U.S. waters. Section 9 of the ESA prohibits the take (including harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting or attempting to engage in any such conduct), including incidental take, of endangered sea turtles. Pursuant to section 4(d) of the ESA, NMFS has issued regulations extending the prohibition of take, with exceptions, to threatened sea turtles (50 CFR 223.205 and 223.206). Section 11 of the ESA provides for civil and criminal penalties for anyone who violates the Act or a regulation issued to implement the Act. NMFS may grant exceptions to the take prohibitions with an incidental take statement or an incidental take permit issued pursuant to ESA section 7 or 10, respectively. To do so, NMFS must determine the activity that will result in incidental take is not likely to jeopardize the continued existence of the affected listed species. For some Federal fisheries and most state fisheries, NMFS has not granted an exception for incidental takes of sea turtles primarily because we lack information about bycatch in these fisheries.

The most effective way for NMFS to learn more about bycatch in order to implement the take prohibitions and prevent or minimize take is to place observers aboard fishing vessels. In 2007, NMFS issued a regulation (50 CFR 222.402) establishing procedures to annually identify, pursuant to specified criteria and after notice and opportunity for comment, those fisheries in which the agency intends to place observers (72 FR 43176; August 3, 2007). This regulation specifies that NMFS may place observers on U.S. fishing vessels, commercial or recreational, operating in U.S. territorial waters, the U.S. exclusive economic zone (EEZ), or on the high seas or on vessels that are otherwise subject to the jurisdiction of the United States. Failure to comply with the requirements under this regulation may result in civil or criminal penalties under the ESA.

NMFS will pay the direct costs for vessels to carry the required observers. These include observer salary and insurance costs. NMFS may also evaluate other potential direct costs, should they arise. Once selected, a fishery will be required to carry observers, if requested, for a period of five years without further action by NMFS. This will enable NMFS to develop appropriate observer coverage and sampling protocol to investigate whether, how, when, where, and under what conditions sea turtle bycatch is occurring; to evaluate whether existing measures are minimizing or preventing bycatch; and to implement ESA take prohibitions and conserve and recover turtles.

Sea Turtle Distribution

NMFS uses information on sea turtle distribution and habitat use to inform the development of the final AD. A summary of this information was included in the proposed AD (85 FR 3880, January 23, 2020) and was considered in developing the final 2020 AD.

Process for Developing the Annual Determination (AD)

In March, in recognition of the issuance of numerous travel or social distancing restrictions and other recommended actions related to travel and social distancing requirements in response to the COVID–19 pandemic, NMFS issued an emergency action to provide the authority to waive observer coverage, some training, and other program requirements while meeting conservation needs and providing an ongoing supply of fish to markets (85 FR 17285; March 27, 2020). Under this emergency action, NMFS regional administrators, office directors, or science center directors have the ability to waive observer requirements in three specific circumstances, after consulting with observer providers. This annual determination process, as discussed below, and the AD authority continue to apply in conjunction with the current observer programs' requirements and emergency actions. We will continue to monitor all local public health notifications, as well as notifications of the Centers for Disease Control and Prevention for updates. We are committed to the public health and safety of fishermen, observers, and others, and also to fulfilling our mission to maintain our nation's seafood supply and conserving marine life.

Pursuant to 50 CFR 222.402, NOAA's Assistant Administrator for Fisheries (AA), in consultation with Regional Administrators and Fisheries Science Center Directors, develops a proposed AD identifying which fisheries are required to carry observers, if requested, to monitor potential bycatch of sea turtles. NMFS provided an opportunity for public comment on the proposed determination (85 FR 3880; January 23, 2020). The determination is informed by the best available scientific, commercial, or other information regarding sea turtle bycatch; sea turtle distribution; sea turtle strandings; fishing techniques, gears used, target species, seasons and areas fished; and/or qualitative data from logbooks or fisher reports. Specifically, fisheries identified on the AD are based on the extent to which:

(1) The fishery operates in the same waters and at the same time as sea turtles are present;

(2) The fishery operates at the same time or prior to elevated sea turtle strandings; or

(3) The fishery uses a gear or technique that is known or likely to result in incidental take of sea turtles based on documented or reported takes in the same or similar fisheries; and

(4) NMFS intends to monitor the fishery and anticipates that it will have the funds to do so.

For the 2020 AD, the AA used the most recent version of the annually published Marine Mammal Protection Act (MMPA) List of Fisheries (LOF) as the comprehensive list of commercial fisheries for consideration. The LOF includes all known state and Federal commercial fisheries that occur in U.S. waters and on the high seas. However, in preparing the AD, we do not rely on the three-part MMPA LOF classification scheme. In addition, unlike the LOF, the AD may include recreational fisheries likely to interact with sea turtles based on the best available information.

NMFS consulted with appropriate state and Federal fisheries officials to identify which fisheries, both commercial and recreational, to

consider. NMFS carefully considered all recommendations and information available for developing the AD. The AD is not an exhaustive or comprehensive list of all fisheries with documented or suspected bycatch of sea turtles; rather it is intended as a mechanism to fill critical data gaps, where observer data is not currently sufficient for turtle data collection needs. NMFS will not include a fishery on the AD if that fishery does not meet the criteria for inclusion on the AD (50 CFR 222.402(a)).

For many fisheries, NMFS may already be addressing bycatch through another mechanism (*e.g.,* rulemaking to implement modifications to fishing gear and/or practices), may be observing the fishery under a separate statutory authority, or will consider including them in future ADs based on the four previously noted criteria (50 CFR 222.402(a)). The fisheries not included on the 2020 AD may still be observed by NOAA fisheries observers under authorities different than the ESA (*e.g.,* MMPA, Magnuson-Stevens Fishery Conservation and Management Act (MSA)), if applicable.

NMFS publishes the final determination in the **Federal Register** and will notify in writing those individuals permitted for each fishery identified on the AD. NMFS will also notify state agencies. Once included in the final determination, a fishery will remain eligible for observer coverage for a period of five years to enable the design of an appropriate sampling program and to ensure collection of sufficient scientific data for analysis. If NMFS determines a need for more than five years to obtain sufficient scientific data, NMFS will include the fishery in a subsequent proposed AD, prior to the end of the fifth year.

On the 2015 AD, NMFS identified 14 fisheries, 11 of which were previously listed and three of which were newly listed. The 14 fisheries were required to carry observers for a period of 5 years, through December 31, 2019. The 2018 AD identified two additional fisheries and required them to carry observers through December 31, 2022. The fisheries included on the current AD are available at *https://www.fisheries.noaa.gov/national/bycatch/sea-turtle-observer-requirement-annual-determination.*

Comments and Responses

NMFS received nine comment letters on the proposed AD (85 FR 3880, January 23, 2020) from members of the public and one organization, Turtle Island Restoration Network. Many commenters expressed general support of the rule or fishery observer programs, and others provided suggestions and requests for including particular fisheries. All substantive comments are addressed below. Comments on issues outside the scope of the AD were noted, but are not responded to in this final determination.

General Comments

Comment 1: Seven commenters expressed general support for the determination.

Response: NMFS agrees and has included four fisheries on the 2020 AD to allow for increased data collection on sea turtle bycatch to accomplish the purposes of the determination.

Comment 2: Turtle Island Restoration Network supports NMFS' proposal to include four fisheries on the 2020 AD. The commenter additionally requests NMFS include the two fisheries from the 2018 AD, mid-Atlantic gillnet fishery and Gulf of Mexico menhaden purse seine fishery, in a future AD when the 2018 AD timeframe expires on December 31, 2022.

Response: NMFS agrees and has included four fisheries on the 2020 AD. As the commenter noted, the mid-Atlantic gillnet fishery and Gulf of Mexico menhaden purse seine fishery were included on the 2018 AD and are required to carry observers if requested through December 31, 2022. The AD is published annually, and NMFS will continue to assess these and other fisheries for inclusion on future ADs.

Comment 3: A commenter recommended NMFS take advantage of the opportunity to observe fisheries identified on the AD and find creative ways to prevent sea turtle bycatch. The commenter urges the publication and application of sea turtle bycatch data collected through the AD determination.

Response: The four fisheries included on the 2020 AD will remain on the AD for a five-year period and will be required to carry observers upon NMFS' request. This will enable NMFS to develop appropriate observer coverage and sampling protocols to investigate whether, how, when, where, and under what conditions bycatch is occurring; to evaluate whether existing measures are minimizing or preventing bycatch; and to implement ESA take prohibitions and conserve turtles. Observer data collected under the ESA AD authority are generally used to estimate and/or characterize bycatch in a particular fishery. These data and resulting analyses are made available in NMFS publications, as appropriate, given data confidentiality considerations.

Gillnet Fisheries

Comment 4: One commenter noted that the proposed rule does not provide a specific plan with evaluation criteria for how NMFS will monitor the Chesapeake Bay inshore gillnet fishery for sea turtle bycatch.

Response: The purpose of the AD is to identify commercial and recreational fisheries that are required to carry observers upon NMFS' request under the authority of the ESA. As stated in the preamble, sampling designs for all NMFS observer programs are developed to provide statistically valid information and to produce results that will contribute to the body of best available science. The sampling design will vary depending on many factors, including the fishery to be observed, the spatial and temporal variability in the fishery and species observed, and the overall goals of the observer program. Once a fishery is selected for observer coverage, a sampling design will be developed to yield statistically valid results (72 FR 43176; August 3, 2007). Sampling designs for all regional observer programs are published in many different forums, including peer reviewed journals and NMFS stock assessment reports. For new observer programs, a pilot study is often initiated to provide information on variability of bycatch species within a fishery. The information collected during this pilot study is then used to more accurately determine the target observer coverage necessary to provide accurate bycatch estimates (typically measured as a coefficient of variation around the bycatch estimate).

Recommendations for Fisheries To Include on the 2020 AD

Comment 5: Turtle Island Restoration Network requests NMFS include all fisheries from the 2015 AD in its 2020 AD. These fisheries are: California halibut, white seabass and other species set gillnet (>3.5 in mesh), California yellowtail, barracuda, and white seabass drift gillnet (mesh size >3.5 in. and <14 in.), Gulf of Mexico gillnet, North Carolina inshore gillnet, Atlantic blue crab trap/pot, Atlantic mixed species trap/pot, Northeast/mid-Atlantic American lobster trap/pot, mid-Atlantic haul/beach seine, mid-Atlantic menhaden purse seine, and Rhode Island floating trap. The commenter notes that these fisheries meet the criteria to be included on the AD because they operate in the same waters and at the same time as sea turtles are present, operate at the same time or prior to elevated sea turtle strandings, or the fishery uses a gear or technique that

is known or likely to result in incidental take of sea turtles based on documented or reported takes in the same or similar fisheries.

Response: NMFS acknowledges that there are other fisheries, in addition to those included on the 2020 AD, that are known to take sea turtles. The 2020 AD is not meant to be a comprehensive list of fisheries that have sea turtle bycatch or fisheries that require monitoring, but rather a focused list, based on specific inclusion criteria, one of which is based on available funding (see Purpose of the Sea Turtle Observer Requirement section). NMFS is not including these 10 fisheries recommended by Turtle Island Restoration Network on the 2020 AD but will continue existing observer coverage for these fisheries under other authorities. NMFS will continue to assess these and other fisheries for inclusion on future ADs.

Observer Coverage

Comment 6: Turtle Island Restoration Network requests NMFS provide 100 percent observer coverage on all AD fisheries, to ensure accurate bycatch reporting. The commenter notes that in 2015 the Pacific Fishery Management Council recommended increasing observer coverage to 100 percent for all drift gillnet fisheries, and states that issuing ''hard caps'' without 100 percent observer coverage will not meet the goal of issuing such hard caps. Turtle Island Restoration Network states that NMFS must strive for 100 percent observer coverage in every observed fishery in order to accurately assess bycatch of protected species.

Response: The AD does not prescribe a specific level of observer coverage for any fishery; rather it identifies fisheries for which NMFS intends to collect additional information. As described above, the sampling design of any observer program for fisheries identified through the AD process is determined on a fishery-by-fishery basis.

Fisheries Included on the 2020 Annual Determination

NMFS includes four fisheries in the Atlantic Ocean/Gulf of Mexico on the 2020 AD. The four fisheries, described below and listed in Table 1, are the Southeastern U.S. Atlantic and Gulf of Mexico shrimp trawl, Gulf of Mexico mixed species fish trawl, Chesapeake Bay inshore gillnet, and Long Island inshore gillnet. These four fisheries were listed previously on the 2015 AD for a five-year period ending December 31, 2019. Two other fisheries (Mid-Atlantic gillnet and Gulf of Mexico menhaden purse seine), which were listed in the 2018 AD for a five-year period ending December 31, 2022, will remain on the AD.

NMFS used the 2018 MMPA LOF (83 FR 5349; February 7, 2018) as the comprehensive list of commercial fisheries to evaluate for fisheries to include on the AD. The fishery name, definition, and number of vessels/persons for fisheries listed in the AD are taken from the most recent MMPA LOF. Additionally, the fishery descriptions below include a particular fishery's current classification on the MMPA LOF (*i.e.,* Category I, II, or III); Category I and II fisheries are required to carry observers under the MMPA if requested by NMFS. As noted previously, NMFS also has authority to observe fisheries in Federal waters under the MSA and collect sea turtle bycatch information. The AD authority will work within the current observer programs and allow NMFS the flexibility to further consider sea turtle data collection needs when allocating observer resources.

Trawl Fisheries

Bycatch in trawl fisheries are of particular concern for sea turtles because forced submergence in trawl nets or any type of restrictive gear can lead to lack of oxygen and subsequent death by drowning. Metabolic changes that can impair a sea turtle's ability to function can occur within minutes of forced submergence (Lutcavage *et al.,* 1997).

Turtle excluder devices (TEDs) are metal grids that fit into the cod end of the trawl net, with a top or bottom escape opening covered by a flap. TEDs are intended to allow sea turtles to escape the net, while retaining the target catch, reducing incidences of sea turtle forced submergence. Currently, only otter trawl fisheries capable of catching shrimp and operating south of Cape Charles, Virginia, and in the Gulf of Mexico, as well as trawl fisheries targeting summer flounder south of Cape Charles, Virginia, in the summer flounder fishery-sea turtle protection area (50 CFR 222.102), are required to use TEDs.

Southeastern U.S. Atlantic, Gulf of Mexico Shrimp Trawl Fishery

NMFS includes the Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl fishery on the 2020 AD. This fishery has an estimated 4,950 vessels/persons and targets shrimp using various types of trawls. Skimmer trawls are used primarily in inshore/inland shallow waters (typically less than 20 ft. (6.1 m)) to target shrimp. The skimmer trawl has a rigid ''L''-shaped or triangular metal frame with the inboard portion of the frame attached to the vessel and the outboard portion attached to a skid that runs along the seabed.

Skimmer trawl use increased in response to turtle excluder device (TED) requirements for shrimp bottom otter trawls. On December 20, 2019, NMFS published a final rule (84 FR 70048) amending the alternative tow time restriction to require all skimmer trawl vessels 40 feet and greater in length to use TEDs designed to exclude small sea turtles in their nets. The rule is effective on April 1, 2021. Skimmer trawls are used in North Carolina, Florida (Gulf Coast), Alabama, Mississippi, and Louisiana. There is documented bycatch of sea turtles in skimmer trawls in North Carolina and the Gulf of Mexico. All Gulf of Mexico states, except Texas, include skimmer trawls as an allowable gear. In recent years, the skimmer trawl has become a major gear in the inshore shrimp fishery in the Northern Gulf and also has some use in inshore North Carolina. Louisiana hosts the vast majority of skimmer boats, with 3,651 licenses issued to skimmer trawlers in 2015. In 2015, Mississippi had approximately 150 active licensed skimmer trawlers and North Carolina had 75 licensed skimmer vessels in 2014 (NMFS 2016).

Skimmer trawl effort overlaps with sea turtle distribution, and, as noted above, sea turtle bycatch in skimmer trawls has been documented. The magnitude of sea turtle takes in this fishery are not well understood. In response to high numbers of sea turtle strandings since 2010, fishery observer efforts shifted from otter trawls to the inshore skimmer trawl fishery in the northern Gulf of Mexico during 2012 through 2015. A total of 2,699 hours were observed during that period. Despite this extremely low level of observer effort, a total of 41 sea turtles were observed captured; we excluded two sea turtles, however, as their condition conclusively indicated they were previously dead before being observed in the skimmer trawl. NMFS has had limited observer coverage on skimmer trawl vessels in subsequent years.

Continued observer coverage to understand the scope and impact of sea turtle bycatch in this fishery is needed to implement the prohibitions of take, inform management decisions on what actions may be necessary to minimize and prevent sea turtle bycatch, and further sea turtle conservation and recovery.

The Southeastern U.S. Atlantic/Gulf of Mexico shrimp trawl fishery is classified as Category II on the MMPA LOF, and mandatory observer coverage in Federal waters began in 2007 under

the MSA. The fishery is currently observed at approximately 1–2 percent of total fishing effort. The fishery was previously included in the 2010 AD and the 2015 AD, which allowed for observer coverage to be shifted to skimmer trawls to specifically investigate bycatch of sea turtles. NMFS includes this fishery on the AD pursuant to the criteria identified at 50 CFR 222.402(a)(1), because sea turtles are known to occur in the same areas where the fishery operates, takes have been previously documented and NMFS intends to monitor in this fishery.

Gulf of Mexico Mixed Species Fish Trawl Fishery

NMFS includes the Gulf of Mexico mixed species trawl fishery on the 2020 AD. This fishery has an estimated 20 vessels/persons and targets fish using various types of trawl gear, including bottom otter trawl gear targeting sheepshead. The Gulf of Mexico mixed species trawl fishery operates in state waters and is classified as Category III on the MMPA LOF. This fishery was included in the 2015 AD but was not observed due to lack of resources. NMFS includes this fishery in the 2020 AD pursuant to the criteria identified at 50 CFR 222.402(a)(1) for including a fishery in the AD. This is because sea turtles are known to occur in the same areas where the fishery operates, bycatch has been documented in similar gear types, mainly the shrimp trawl fishery, and NMFS intends to monitor this fishery.

Gillnet Fisheries

Sea turtles are vulnerable to entanglement and drowning in gillnets, especially when gear is unattended. The main risk to sea turtles from capture in gillnet gear is forced submergence. Sea turtle entanglement in gillnets can also result in severe constriction wounds and/or abrasions. Large mesh gillnets (*e.g.,* 7 inch (in) stretched mesh or greater) have been documented as particularly effective at capturing sea turtles. However, sea turtles are prone to and have been commonly documented entangled in smaller mesh gillnets as well.

Chesapeake Bay Inshore Gillnet Fishery

NMFS includes the Chesapeake Bay inshore gillnet fishery on the 2020 AD. This fishery has an estimated 248 vessels/persons and targets menhaden and croaker using gillnet gear with mesh sizes ranging from 2.75–5 in (6.9–12.7 cm), depending on the target species. The fishery operates inshore of the Chesapeake Bay Bridge-Tunnel and is managed by the Atlantic States Marine Fisheries Commission under the Interstate Fishery Management Plans for Atlantic menhaden and Atlantic croaker. Gillnets in Chesapeake Bay also target striped bass and spot.

This fishery is classified as Category II on the MMPA LOF and was included in the 2010 AD and the 2015 AD. To date, observer coverage in gillnet fisheries has primarily focused on federally-managed fisheries. There has been limited observer coverage in this fishery since 2010, with between 6 and 124 trips observed annually. Most recently, there were 14 trips observed in 2014, 39 in 2015, 49 in 2016, 124 in 2017, and 71 in 2018. This sample size is small, in terms of timing and areas that overlap with sea turtles, and additional information is needed to better understand sea turtle bycatch in this fishery. In addition, Virginia continues to have the highest level of strandings for hard-shelled sea turtles in the Greater Atlantic Region. There is a need to better understand the gear fished in state waters and the extent to which this gear interacts with sea turtles. Given the risk of bycatch and the limited data currently available on interactions, NMFS includes this fishery pursuant to the criteria identified at 50 CFR 222.402(a)(1) for listing a fishery on the AD. This is because sea turtles are known to occur in the same areas where the fishery operates, takes have been previously documented in similar gear, the fishery operates during a period of high sea turtle strandings, and NMFS intends to monitor this fishery.

Long Island Inshore Gillnet Fishery

NMFS includes the Long Island Sound inshore gillnet fishery on the 2020 AD. This fishery includes all gillnet fisheries operating west of a line from the north fork of the eastern end of Long Island, New York (Orient Point to Plum Island to Fishers Island) to Watch Hill, Rhode Island (59 FR 43703, August 25, 1994). The estimated vessels/persons operating in the fishery is unknown. Target species include bluefish, striped bass, weakfish, and summer flounder.

This fishery is classified as Category III on the MMPA LOF and was included in the 2010 AD and the 2015 AD. There has been limited observer coverage in this fishery since 2010. To date, observer coverage in gillnet fisheries has primarily focused on federally-managed fisheries. However, the NMFS Northeast Fisheries Observer Program has observed a very limited number of trips in this fishery. There were four trips observed in 2014, three in 2015, 11 in 2016, six in 2017, and seven in 2018. This sample size is small, in terms of timing and areas that overlap with sea turtles, and additional information is needed to better understand sea turtle bycatch in this fishery and the nature of the gear fished in state waters. Given the risk of bycatch and the limited data currently available on such interactions, NMFS includes this fishery pursuant to the criteria identified at 50 CFR 222.402(a)(1) for listing a fishery on the AD. This is because sea turtles are known to occur in the same areas where the fishery operates, bycatch has been previously documented in similar gear, the fishery operates during a period of high sea turtle strandings, and NMFS intends to monitor this fishery.

Implementation of Observer Coverage in a Fishery Listed on the 2020 AD

As part of the 2020 AD, NMFS has included, to the extent practicable, information on the fisheries and gear types to observe, geographic and seasonal scope of coverage, and any other relevant information. NMFS intends to monitor the fisheries and anticipates that it will have the funds to support observer activities. After publication of the final determination, there will be a 30-day delay in the date of effectiveness for implementing observer coverage, except for those fisheries where the AA has determined that there is good cause pursuant to the Administrative Procedure Act to make the determination effective upon publication of the final determination. For the 2020 AD, the AA has not made this determination; therefore, this determination is effective 30 days after publication of this notification, see **DATES**.

The design of any observer program for fisheries identified through the AD process, including how observers will be allocated to individual vessels, will vary among fisheries, fishing sectors, gear types, and geographic regions, and will ultimately be determined by the individual NMFS Regional Office, Science Center, and/or observer program. Pursuant to 50 CFR 222.404, during the program design, NMFS will follow the standards below for distributing and placing observers among fisheries identified in the AD and among vessels in those fisheries:

(1) The requirement to obtain the best available scientific information;

(2) The requirement that observers be assigned fairly and equitably among fisheries and among vessels in a fishery;

(3) The requirement that no individual person or vessel, or group of persons or vessels, be subject to inappropriate, excessive observer coverage; and

(4) The need to minimize costs and avoid duplication, where practicable.

Vessels subject to observer coverage under the AD must comply with observer safety requirements specified in 50 CFR 600.725 and 600.746. Specifically, 50 CFR 600.746(c) requires vessels subject to observer coverage to provide adequate and safe conditions for carrying an observer and conditions that allow for operation of normal observer functions. To provide such conditions, a vessel must comply with the applicable regulations regarding observer accommodations (see 50 CFR parts 229, 300, 600, 622, 635, 648, 660, and 679) and possess a current United States Coast Guard (USCG) Commercial Fishing Vessel Safety Examination decal or a USCG certificate of examination. A vessel that fails to meet these requirements at the time an observer is to be deployed is prohibited from fishing (50 CFR 600.746(f)), unless NMFS determines that an alternative platform (*e.g.,* a second vessel) may be used or that the vessel is not required to take an observer under 50 CFR 222.404(b). All fishermen on a vessel must cooperate in the operation of observer functions. Observer programs designed or carried out in accordance with 50 CFR 222.404 are consistent with existing NOAA observer policies and applicable Federal regulations, such as those under the Fair Labor and Standards Act (29 U.S.C. 201 *et seq.*), the Service Contract Act (41 U.S.C. 351 *et seq.*), and the Observer Health and Safety regulations (50 CFR part 600).

Additional information on observer programs in commercial fisheries is located on the NMFS National Observer Program's website: *https://www.fisheries.noaa.gov/topic/fishery-observers.*

TABLE 1—STATE AND FEDERAL COMMERCIAL FISHERIES INCLUDED ON THE 2020 ANNUAL DETERMINATION

Fishery	Years eligible to carry observers
Trawl Fisheries:	
Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl	2020–2025
Gulf of Mexico mixed species fish trawl	2020–2025
Gillnet Fisheries:	
Chesapeake Bay inshore gillnet	2020–2025
Long Island inshore gillnet	2020–2025

Classification

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. No comments were received on that certification, and no new information has been discovered to change that conclusion. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

This determination contains existing collection-of-information (COI) requirements subject to the Paperwork Reduction Act and would not impose additional or new COI requirements. The information collection for the AD is approved under Office of Management and Budget (OMB) under OMB control number 0648–0593.

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.

This determination has been determined to be not significant for the purposes of Executive Order 12866. This determination is not an Executive Order 13771 regulatory action because this determination is not significant under Executive Order 12866.

In accordance with the Companion Manual for NOAA Administrative Order (NAO) 216–6A, NMFS determined that publishing the AD qualifies to be categorically excluded from further National Environmental Policy Act (NEPA) review, consistent with categories of activities identified in Categorical Exclusion G7 (''Preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or on a case-by-case basis'') of the Companion Manual, and we have not identified any extraordinary circumstances listed in Chapter 4 of the Companion Manual for NAO 216–6A that would preclude application of this categorical exclusion. If NMFS takes a management action for a specific fishery, for example, requiring fishing gear modifications, NMFS would first prepare any environmental document specific to that action that is required under NEPA.

This determination would not affect species listed as threatened or endangered under the ESA or their associated critical habitat. The impacts of numerous fisheries have been analyzed in various biological opinions, and this determination would not affect the conclusions of those opinions. The inclusion of fisheries on the AD is not considered a management action that would adversely affect threatened or endangered species. If NMFS takes a management action, for example, requiring modifications to fishing gear and/or practices, NMFS would review the action for potential adverse effects to listed species under the ESA.

This determination would have no adverse impacts on sea turtles, and information collected from observer programs may have a positive impact on sea turtles by improving knowledge of sea turtles and the fisheries interacting with sea turtles.

This determination would not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

References

Lutcavage, M.E. and P.L. Lutz. 1997. Diving Physiology. In: P.L. Lutz and J. Musick (eds.) The Biology of Sea Turtles. ERC Press, Boca Raton, F.L. 432 pp.

Dated: August 3, 2020.

Donna S. Wieting,

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

[FR Doc. 2020–17201 Filed 8–28–20; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 169
Monday, August 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM–50–123; NRC–2020–0155]

Public Protective Actions During a General Emergency

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; notice of docketing and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has received a petition for rulemaking from Thomas McKenna, dated June 1, 2020. The petitioner requests that the NRC revise its regulations so that protective actions implemented during a General Emergency at a nuclear power plant will most likely do more good than harm when the possible physical health effects of radiation exposure and protective actions are taken into consideration. The petition was docketed by the NRC on June 24, 2020, and has been assigned Docket No. PRM–50–123. The NRC is examining the issues raised in PRM–50–123 to determine whether they should be considered in rulemaking. The NRC is requesting public comment on this petition at this time.

DATES: Submit comments by November 16, 2020. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure 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–2020–0155. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications 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: Pamela Noto, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6795; email: *Pamela.Noto@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0155 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–2020–0155.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.
- *Attention:* The Public Document Room (PDR), where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

B. Submitting Comments

Please include Docket ID NRC–2020–0155 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. The Petitioner

The petition for rulemaking (PRM) was filed by Thomas McKenna, who stated in his petition that he has worked in emergency preparedness and response at both the NRC and the International Atomic Energy Agency and is one of the authors of the NRC's 1996 draft guidance on initial protective actions in the event of a severe accident. The draft guidance, NUREG–0654/FEMA–REP–1, Rev. 1, Supp. 3, ''Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants: Criteria for Protective Action Recommendations for Severe Accidents,'' dated July 1996, may be found in ADAMS at Accession No. ML051120480.

III. The Petition

The petitioner requests that the NRC amend part 50 of title 10 of the *Code of Federal Regulations* (10 CFR) such that public protective actions implemented during a General Emergency at a nuclear power plant will most likely do more good than harm when the possible physical health effects of radiation exposure and protective actions are taken into consideration. The petition may be found in ADAMS at Accession No. ML20176A313.

IV. Discussion of the Petition

The petitioner asserts that protective actions taken in accordance with NRC guidance during a General Emergency may cause 12 times more excess deaths among the public and 15 times more excess deaths among elderly residents of care facilities than caused by radiation exposure due to the General Emergency. The petitioner states that an objective of emergency response plans has been to provide dose savings and that the NRC's requirements were not established on a risk-informed basis that justifies protective actions will do more good than harm. The petitioner states that the NRC requirements are based on analyses that are 40 or more years old in some cases and do not reflect the latest studies of nuclear power plant emergencies, which project much smaller releases and thus result in smaller radiation-induced health consequences. The petitioner asks that the NRC carefully reexamine the agency's regulations and implementing guidance on protective actions during a General Emergency.

V. Conclusion

The NRC has determined that the petition meets the sufficiency requirements for docketing a PRM under 10 CFR 2.803, ''Petition for rulemaking–NRC action.'' The NRC will examine the issues raised in PRM–50–123 and any comments received in response to this comment request to determine whether these issues should be considered in rulemaking.

Dated: August 21, 2020.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2020–18746 Filed 8–28–20; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[EERE–2019–BT–CE–0015]

RIN 1904–AE34

Enforcement for Consumer Products and Commercial and Industrial Equipment

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Energy (''DOE'' or the ''Department'') proposes to revise its existing enforcement regulations for certain consumer products and commercial and industrial equipment covered under the Energy Policy and Conservation Act of 1975, as amended (EPCA or the ''Act''). The proposal, if adopted, would provide the regulated industry with further clarity and transparency about DOE's enforcement process, including enforcement sampling procedures and test notice requirements. The proposal provides for a process to petition DOE for reexamination of a pending determination of noncompliance, and for DOE to have the discretion to consider third-party certification program testing as official enforcement test data. Ultimately, the proposal will further align DOE's regulations with its statutory authority, foster communication between DOE and the regulated industry, and promote the effective and systematic enforcement of DOE's regulations.

DATES: DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) no later than October 30, 2020. See section V, ''Public Participation,'' for details.

ADDRESSES: You may submit comments using any of the below methods.

(1) *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

(2) *Email: Enforcement2019CE0015@ee.doe.gov.* Include the docket number and/or RIN in the subject line of the message.

(3) *Postal Mail:* Office of the Assistant General Counsel for Enforcement, U.S. Department of Energy, Mailstop GC–32, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–5997. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

(4) *Hand Delivery/Courier:* Office of the Assistant General Counsel for Enforcement, U.S. Department of Energy, Mailstop GC–32, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–5997. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Instructions: In any comment, include the words ''Enforcement NOPR'' and provide docket number EERE–2019–BT–CE–0015 and/or regulatory information number (RIN) number RIN 1904–AE34. For detailed instructions on submitting comments and additional information on the rulemaking process, see section V of this document (Public Participation).

Docket: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *https://www.regulations.gov.* All documents in the docket are listed in the *https://www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at *https://www.regulations.gov/docket?D=EERE-2019-BT-CE-0015.* The docket web page will contain simple instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Smitha Vemuri, U.S. Department of Energy, Office of the General Counsel, GC–32, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–3421. Email: *smitha.vemuri@hq.doe.gov.*

For further information on how to submit a comment, review other public comments and the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Authority and Background

Title III of the Energy Policy and Conservation Act of 1975, as amended (''EPCA'' or, in context, ''the Act'') [1] sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291–6309) provides for the Energy Conservation Program for Consumer Products Other Than Automobiles. The National Energy Conservation Policy Act (NECPA), Public Law 95–619, amended EPCA to add Part A–1 of Title III, which established an energy conservation program for certain industrial equipment. (42 U.S.C. 6311–6317) Under the Act, the regulatory program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, which include performance and design standards, and (4) certification and enforcement procedures. Provisions of the Act include definitions (42 U.S.C. 6291, 6311), energy efficiency standards (42 U.S.C. 6295, 6313), test procedures (42 U.S.C. 6293, 6314), labeling provisions (42 U.S.C. 6294, 6315), and the authority to require information and reports from manufacturers, as well as enforcement authority (42 U.S.C. 6296, 6316).

The Federal Trade Commission (FTC) is primarily responsible for labeling consumer products, and DOE implements the remainder of the program. The testing requirements consist of test procedures prescribed under the authority of EPCA, which are used to aid in the development of standards for covered products or covered equipment, to make representations about equipment efficiency, and to determine whether covered products or covered equipment comply with standards promulgated under EPCA.

Sections 6298–6305, and 6316 of EPCA authorize DOE to enforce compliance with the energy conservation standards established for covered products and covered equipment. To ensure that all covered products and covered equipment distributed in the United States comply with DOE's conservation standards and certification requirements, DOE promulgated enforcement regulations in 10 CFR part 429. On September 16, 2010, the Department published in the **Federal Register** a notice of proposed rulemaking regarding Certification, Compliance, and Enforcement for Consumer Products and Commercial and Industrial Equipment (September 2010 NOPR). 75 FR 56796. The September 2010 NOPR proposed to revise, consolidate and streamline the Department's existing certification, compliance, and enforcement regulations for certain consumer products and commercial and industrial equipment covered under EPCA. On March 7, 2011, DOE published in the **Federal Register** a final rule on the matter that revised the Department's regulations to, amongst other things, allow the Department to enforce applicable conservation standards in a proactive and fair manner based on the circumstances of each case (March 2011 Final Rule). 76 FR 12422. Some issues addressed by the rule included DOE-witnessed testing; the selection of units for enforcement testing from retail, distribution, or manufacturer sources, depending on the circumstances, to ensure enforcement test results that are as unbiased, accurate, and representative as possible; and alternative approaches to enforcement testing in certain circumstances, such as when the requested model is low-volume. DOE subsequently published two correction notices in May 2011 and August 2011. 76 FR 24762; 76 FR 46202.

Separate from other covered products and equipment, the enforcement provisions for electric motors are currently located at 10 CFR part 431, subpart U. On June 24, 2016, DOE published a notice of proposed rulemaking proposing a variety of changes to the current compliance, certification, and enforcement regulations for electric motors and small electric motors. (June 2016 NOPR) 81 FR 41378. No final rule was promulgated in that rulemaking, and this proposal does not address each of the previously proposed changes. Instead, in this rulemaking, DOE is only proposing to apply the enforcement procedures found at subpart C of part 429 to electric motors and small electric motors.

II. Summary of the Proposal

DOE remains committed to establishing a systematic and fair approach to enforcement that will allow the Department to enforce standards and certification requirements effectively and ensure a level playing field in the marketplace without unduly burdening regulated entities. In this document, based on experience and a greater understanding of the challenges faced in the enforcement process by both DOE and the regulated industry, DOE proposes to again revise its enforcement regulations to ensure they convey a clear and comprehensive enforcement process. The document proposes revisions to existing enforcement procedures applicable to both covered products and covered equipment. Revising the current enforcement procedures will afford further certainty and clarity to the regulated industry, facilitate communication between DOE and the regulated industry, and advance the effective enforcement of DOE's regulations. In addition to minor edits throughout the regulation for clarity and readability, DOE's proposal is summarized below.

To provide additional process in instances where DOE is planning to make a finding of noncompliance, DOE proposes to provide manufacturers and private labelers with a letter of intent stating DOE's intent to issue a notice of noncompliance determination for a basic model. DOE also proposes a petition process to ask DOE (within 30 days after issuance of a letter of intent) to reexamine the pending determination.

To reduce manufacturer burden, DOE proposes to no longer require within its regulations that manufacturers inform customers of DOE's determination of noncompliance. Further, to ensure clarity and consistency regarding how to attain a notice of allowance to distribute a redesigned or modified basic model after a finding of noncompliance, DOE also proposes to provide the full notice of allowance process explicitly within its regulations.

DOE is also proposing regulations to make clear the extent of the Department's enforcement authority under EPCA and the Department's process for exercising that authority. DOE desires to make more transparent the process by which it may exercise its statutory authority to: (1) Make a determination of noncompliance for a basic model subject to a design requirement; (2) request from any party information concerning the certification

[1] All references to EPCA refer to the statute as amended through the Energy Efficiency Improvement Act of 2015, Public Law 114–11 (April 30, 2015), the Power and Security Systems (PASS) Act, Public Law 115–78 (November 2, 2017), and the Ceiling Fan Energy Conservation Harmonization Act, Public Law 115–161 (April 3, 2018).

of or compliance of a basic model with an applicable conservation standard; (3) make a finding of noncompliance based on information received through the course of an investigation, which may include information other than DOE's own test data; (4) pursue or settle enforcement actions, with adherence to statutory timeframes set forth in EPCA; (5) request and attain test units via the issuance of a test notice; and (6) seek injunctive relief.

In response to feedback from various industry associations, DOE proposes within its regulations to have the discretion to consider third-party certification program testing as official enforcement test data.

DOE proposes to restructure and clarify its regulations pertaining to DOE's sampling provisions. To provide manufacturers with a better understanding of how DOE's sampling plans apply, the proposal also explicitly provides that in addition to DOE enforcement testing, there are other bases upon which DOE may make a finding of noncompliance (*e.g.,* in whole or part on DOE's own enforcement testing, testing from another Federal agency, or a manufacturer's own test report).

DOE also proposes updates to current enforcement regulations to account for prohibited actions prescribed by Congress that are not reflected within DOE's enforcement regulations.

DOE proposes that it may make a finding of noncompliance based on a single test where the results of the assessment test are so far from an applicable standard (*i.e.,* at least 25% worse) that a finding of compliance is extremely unlikely.

DOE also notes in this proposal that the Department expects to address administrative law judge hearing procedures in a subsequent rulemaking.

DOE proposes to move the enforcement provisions for electric motors from 10 CFR part 431, subpart U, to 10 CFR 429.110 with corresponding revisions, and to move the enforcement sampling provisions unchanged to a new appendix E to subpart C of part 429. DOE also proposes to explicitly adopt for small electric motors the proposed enforcement provisions in subpart C to part 429.

III. Discussion of Revisions

In this section, DOE provides a detailed analysis of its proposed rule.

A. Enforcement for Electric Motors and Small Electric Motors

As a part of this comprehensive proposed rule regarding DOE's enforcement procedures, DOE proposes that the enforcement provisions in subpart C to part 429 that apply to all other types of covered products and equipment apply to electric motors and small electric motors. DOE proposes to transition the enforcement provisions currently in place for electric motors from 10 CFR part 431, subpart U to 10 CFR part 429, subpart C, and to move the enforcement sampling provisions to a new appendix E in subpart C of part 429. DOE proposes to reserve subpart U.

The enforcement provisions for electric motors are currently located at 10 CFR part 431, subpart U. As for other types of covered products and equipment, these regulations prescribe an enforcement process through which DOE determines whether an electric motor manufacturer is in violation of the energy conservation requirements of EPCA. The current regulations, amongst other things, identify various prohibited acts that may subject a manufacturer to civil penalties. Subpart U also details remedies for addressing cases of noncompliance and a process for the assessment and recovery of civil penalties.

Harmonizing the enforcement process for motors with the process for all other types of covered products and equipment would ensure that electric motors and small electric motors manufacturers are afforded the same processes (*e.g.,* the petition for reexamination process discussed in Section III.I.) as manufacturers of all other covered products and equipment. The enforcement process provided in 10 CFR part 429 is significantly more developed than the current procedures for electric motors, so transitioning motors to the Part 429 process will provide greater clarity to manufacturers. The proposal provides that enforcement testing for motors would only be conducted by a laboratory that is accredited to the International Organization for Standardization (ISO)/International Electrotechnical Commission (IEC), ''General requirements for the competence of testing and calibration laboratories,'' ISO/IEC 17025:2005(E). Further, the proposal would remove the regulatory provision allowing electric motors manufacturers to request additional DOE testing after DOE makes a noncompliance determination, and permit DOE to use its discretion to conduct additional testing due to a defective unit in the initial sample.

There are also several proposed prohibited acts regarding electric motors and small electric motors that reflect the unique statutory provisions for each type of equipment, and that are proposed to be relocated to 10 CFR part 429. Those prohibited acts are discussed in more detail in Section III.B. of this proposed rulemaking.

B. Prohibited Acts

DOE proposes to remove the prohibited act currently at 10 CFR 429.102(a)(7) (*i.e.,* distribution in commerce by a manufacturer or private labeler of a basic model of a covered product or covered equipment after a notice of noncompliance determination (NND) has been issued to the manufacturer or private labeler). DOE understands that this regulatory language suggests that it is a separate violation to distribute a noncompliant product after DOE issues a notice of noncompliance determination. However, pursuant to EPCA, it is a prohibited act to distribute in commerce in the U.S. any covered product or equipment not in compliance with an applicable energy conservation standard, regardless of whether DOE has issued an NND or not. 42 U.S.C. 6302(a)(5) Thus, the prohibited act intended to be covered by 10 CFR 429.102(a)(7) is currently covered under 10 CFR 429.102(a)(6).

DOE proposes to add prohibited acts to 10 CFR 429.102(a) for distribution of rough service lamps and vibration service lamps that do not meet the applicable standard(s) and to codify at 10 CFR 429.102(a) the prohibited acts related to grid-enabled water heaters. DOE also proposes to amend 10 CFR 429.102(a)(9) to clarify that DOE interprets the provision as prohibiting the distribution of an adapter designed to allow the use of a non-medium screw base lamp in a medium screw base socket. Because the term ''incandescent lamp,'' which is used in the current text, is defined to include only lamps with a medium screw base, the provision would lead to the absurd result of prohibiting distribution of an adapter for only medium screw base lamps that do not have a medium screw base, which renders the provision a nullity.

DOE proposes to move certain prohibited acts to 10 CFR 429.102, and adjust two of these acts to reflect that the prohibitions apply (by statute) to all covered equipment for which DOE has promulgated a labeling rule. Specifically, DOE proposes to move and adjust the prohibited acts from 10 CFR 431.382(a)(1), (2), and (4) to 10 CFR 429.102 as follows: (1) Manufacturers and private labelers are prohibited from distributing in commerce any covered equipment that is not labeled in accordance with part 431; (2) Manufacturers, distributors, retailers, and private labelers are prohibited from removing or rendering illegible from any

covered equipment any label required to be provided under part 431; and (3) Manufacturers, distributors, retailers, and private labelers are prohibited from advertising electric motors in a catalog from which the equipment may be purchased, without including in the catalog all information as required by 10 CFR 431.31(b), provided, however, that this shall not apply to an advertisement of an electric motor in a catalog if distribution of the catalog began before the effective date of the labeling rule applicable to that motor. DOE requests comment on whether the last clause of the third prohibited act (*i.e.,* ''provided, however, that this shall not apply to an advertisement of an electric motor in a catalog if distribution of the catalog began before the effective date of the labeling rule applicable to that motor'') provides any value given that the labeling provision for electric motors has been in effect for motors manufactured since October 5, 2000.

The inclusion of electric motors in 10 CFR 429.102 would also clarify that certain additional prohibited acts not currently specified in 10 CFR 431.382 also apply to electric motor manufacturers.[2] As discussed in the March 7, 2011 CCE final rule (see 76 FR 12422, 12440), these prohibited acts are within the scope of the prohibited acts specified in EPCA at 42 U.S.C. 6302 (See 42 U.S.C. 6316(a)).

EPCA provides in 42 U.S.C. 6317(f)(1)(A) prohibited acts that apply to small electric motors (and distribution transformers and HID lamps) identical in effect to those found at section 6302(a)(1) and (2); however, DOE has not adopted labeling provisions for small electric motors and is not proposing in this rule to do so. Accordingly, the prohibited acts related to labeling would not apply to small electric motors or any other type of covered equipment for which DOE has not established labeling provisions.

C. Design Standards

DOE proposes edits to 10 CFR 429.106 in order to clarify that design requirements are energy conservation standards that are subject to DOE investigation and enforcement. EPCA explicitly provides that energy conservation standards include design requirements for certain enumerated products, and that DOE may enforce such standards. (42 U.S.C. 6291, 6311, 6303, and 6316). Nevertheless, DOE believes that the proposed edits to DOE's regulations are necessary, as it has received some questions from manufacturers as to whether manufacturers and private labelers of products are subject to design standards are also subject to the enforcement process set forth in 10 CFR part 429, subpart C. To provide the regulated industry with an explicit understanding of how DOE may make its determination of noncompliance for models subject to a design standard, DOE's proposal explicitly states that a test unit of a basic model subject to a design requirement may be selected for enforcement testing or examination. In such an instance, DOE will make a determination of noncompliance for the basic model based on an examination of whether a single unit of the basic model fails to comply with the applicable design requirements, as the standard applies to a design—not the measured performance of individual units—such that one unit can demonstrate noncompliance.

D. DOE Investigation and Basis of Noncompliance

Pursuant to EPCA, DOE has authority to initiate enforcement actions to ensure compliance with, amongst other things, its certification requirements and energy conservation standards. Current DOE regulations already provide that DOE may request any information relevant to determining compliance. DOE proposes to revise its procedures to provide that the Department retains the discretion to request data, underlying the certification of a basic model or belief as to whether a basic model is compliant with an applicable standard, from any party. DOE has historically requested this information from manufacturers of covered products and equipment. DOE proposes to revise its regulations to include explicitly that DOE may request the information from a party other than the manufacturer of the covered equipment, such as a third-party certification program or other manufacturer with independent test data. This proposal ensures that DOE can enforce its regulations in instances where relevant information is retained by parties other than the manufacturer. Parties other than the manufacturer often conduct independent testing to determine compliance with applicable standards. In such instances, DOE's ability to retrieve that test information could save government testing resources, and ensure that DOE can enforce in a timely manner, which will further DOE's goals of maintaining a level playing field for all parties and encouraging compliance.

Should DOE obtain information from any party demonstrating that a basic model does not comply with a certification requirement or energy conservation standard, DOE may make a finding of noncompliance and impose civil penalties pursuant to its authority under EPCA. (42 U.S.C. 6303) To provide transparency within the regulation and further align its regulations with its statutory authority, DOE also proposes regulatory text at 10 CFR 429.112, explicitly setting forth that DOE's determination of noncompliance may be based on test data from a variety of sources: The manufacturer or private labeler, another Federal agency, or a third-party certification program; testing pursuant to §§ 429.104 and 429.110; and/or an admission. Stating the various bases upon which DOE may make a determination of noncompliance provides clarity for all parties.

E. Third-Party Certification Program Testing

DOE proposes that test data (for units tested in accordance with the applicable DOE test procedure) from a third-party certification program may be considered official enforcement test data upon which DOE may make a finding of noncompliance. Various industry associations have asked DOE to consider their test results as a part of DOE's enforcement process. DOE understands that reliance on a third-party certification program test in lieu of, or in addition to, testing conducted by DOE pursuant to a test notice may save resources for all parties and may lead to a more expedient enforcement process in some circumstances. Thus, this proposal provides DOE the opportunity to contemplate and potentially rely on test data obtained under a third-party certification test program as an official enforcement test.

F. Test Notice

DOE's proposal is intended to provide more specificity and transparency regarding DOE's current test notice process, and to make consistent with all other enforcement actions the test notice process for electric motors and small electric motors.

[2] These entail prohibitions against the following actions: Failure to test any covered product or covered equipment subject to an applicable energy conservation standard in conformance with the applicable test requirements prescribed in 10 CFR part 430 or 431; deliberate use of controls or features in a covered product or covered equipment to circumvent the requirements of a test procedure to produce test results that are unrepresentative of a product's energy or water consumption if measured pursuant to DOE's required test procedure; and knowing misrepresentation by a manufacturer or private labeler by certifying an energy use or efficiency rating of any covered product or covered equipment distributed in commerce in a manner that is not supported by test data.

1. Test Notice Information

DOE seeks to provide manufacturers with more specific information about the units requested in a test notice. Unfortunately, in various enforcement actions, DOE has often received units that are not responsive to a test notice (*e.g.,* units with varied designs or features as compared to the assessment test unit, units with similar nameplates but that are in fact different (in design, components, materials, etc.) from the assessment test unit). DOE's request in a test notice does not constitute a flexible request for units that a manufacturer may fulfill at its own discretion. In instances where DOE has already conducted an assessment test, the requested units are meant to be equivalent to the assessment test unit. Thus, in addition to identifying in the test notice the basic model selected for enforcement testing, DOE proposes that it may also include other characteristics or specifications of the requested units (*e.g.,* individual model numbers, serial numbers, manufacturer date ranges, manufacture location). DOE anticipates that additional identifying information within the test notice will alleviate any confusion about exactly what units DOE is requesting. This additional communication will result in clarity and saved resources for all parties.

Current regulations state that DOE will identify in the test notice the exact date DOE is scheduled to begin testing the requested units. The proposed edits provide instead that DOE will identify in the test notice the approximate date of testing. The proposal accounts for the fact that the test laboratory's schedule can fluctuate such that it is not realistic to assure that testing will begin on one specific day. DOE is, however, able to schedule an approximate date for testing that is usually within a one- to two-week range. Therefore, an approximate date in the test notice is more realistic and reliable.

2. Availability of Units

Current regulations state that DOE will work with the manufacturer to create an enforcement plan for testing when the requested units are low volume or built to order. In current practice, DOE in fact works with manufacturers to create an enforcement plan in other instances as well, such as when the manufacturer does not have the exact requested units and is unable to produce them, but can produce similar units. DOE proposes various edits to address scenarios where fewer than the requested number of units in the test notice are available for shipment.

In instances where manufacturers believe that test units are unavailable, DOE has found that the manufacturers often send alternate units (*i.e.,* units that are different than those requested in the test notice) without communicating the circumstances of the potential unavailability to DOE. In some cases, DOE has learned that the manufacturer provided alternate units only upon the DOE laboratory inspection or test of the units. To foster communication and avoid wasted resources for both parties, the proposed edits address both DOE and the manufacturer's next steps when the manufacturer believes that the requested units are unavailable for shipment. Specifically, the manufacturer must inform DOE if it believes that the requested units in the test notice are unavailable and must provide details regarding the unavailability. The manufacturer must also inform DOE if it does not have the requested units but has similar ones, along with details about the similar units.

If DOE determines that the requested units are in fact unavailable, DOE will contact the manufacturer to develop a plan for enforcement testing. In such instances, DOE may test the available units, which may include testing of similar units identified by the manufacturer and/or may test units that become available within 30 days. Although these options are not novel to the test notice process, DOE proposes to restructure the options within the regulations to ensure applicability to all scenarios of test unit unavailability (as opposed to only when the units are low volume or built to order).

3. Selection of Units

The proposed edits provide that a test notice will specify whether DOE or the manufacturer will select units for testing. When DOE finalized existing regulations in 2011, DOE was in the practice of selecting all test units. However, over time the process has changed such that manufacturers often select units. Thus, the proposed edits capture both scenarios.

In addition, the proposed text further explains and clarifies the process of randomly selecting units in response to a test notice. Although the random selection of units has been discussed by DOE previously in the September 2010 NOPR and March 2011 Final Rule (75 FR 56804; 76 FR 12430), DOE finds that manufacturers continue to be uncertain about how to make selections, particularly in regards to how a batch sample is selected when the units are sourced from the manufacturer's warehouse, distributor, or other facility affiliated with the manufacturer. In order to provide clarification, in this proposal, DOE explains that the batch sample must be selected at random from all units of the specified model that are in inventory on the date of the test notice, including all units that have not yet been shipped. From that batch sample, the initial test sample should be randomly selected. DOE expects that the clarifying edits to the regulatory text will alleviate confusion about how to make the required random selection of units.

DOE also proposes to explicitly provide within its regulations the current practice regarding documentation required after issuance of a test notice. Specifically, the proposed text provides that DOE may ask for documentation demonstrating the location from which each unit is selected, and that the unit was in inventory at such location on the date the test notice was issued. DOE typically asks manufacturers to provide this information as it provides assurance that the units are from inventory as required and ensures that DOE understands the source of the test units.

4. Preparation of Units

Current regulatory text provides that a test unit provided in response to a test notice shall not be prepared, modified, or adjusted in any manner unless such preparation, modification, or adjustment is allowed by the applicable DOE test procedure. DOE has received inquiries as to whether these restrictions on preparation, modification, and adjustment also apply to DOE, or if DOE is permitted to alter test units. Thus, DOE proposes edits to current regulations in order to clarify that upon receipt of a test unit, DOE will only prepare, modify, or adjust a unit if allowable under the DOE test procedure or authorized by the manufacturer. Further, DOE will also notify the manufacturer if a test unit is received by the test lab in a condition that may impact performance. In such an instance, DOE may decide to test another unit depending on the condition of the particular unit. DOE may also determine that it can rectify the condition easily to continue with the test, for example, by replacing a commonly available part. However, in such an instance, DOE would still discuss the matter with the manufacturer prior to any modification.

G. Basic Model Compliance

1. General Applicability of Enforcement Sampling Procedures

DOE proposes restructuring and clarifying edits to regulations pertaining to DOE's enforcement sampling procedures. A significant portion of the information contained within DOE's proposal is currently contained at 10 CFR 429.110(e), and is restructured in DOE's proposed 10 CFR 429.111, but the current applicable sample sizes and references to the applicable appendices remain unchanged. DOE also proposes some new provisions to 10 CFR 429.111, which are discussed in further detail below. DOE also proposes to move the current enforcement sampling plan for electric motors, which is at appendix A to subpart U of part 431, to a new appendix E to subpart C of part 429 without change.

To provide the regulated industry with a better understanding of how DOE's sampling plans apply, as noted previously, DOE's proposal explicitly provides that in addition to DOE enforcement testing, there are other bases upon which DOE may make a finding of noncompliance (*e.g.,* in whole or part on DOE's own enforcement testing, testing from another Federal agency, or a manufacturer's own test report.)

2. Sample Size

a. Reduced Sample Size

Current regulations at 10 CFR 429.110 indicate that, in an instance where units are unavailable for testing, DOE may make a determination of noncompliance based on a sample size of less than the otherwise required number of units. DOE's current regulations at 10 CFR 429.110(e)(7) also state that a reduced sample size may be used when testing is impractical or where a basic model has unusual testing requirements. To provide a more fulsome understanding of when DOE may rely on a reduced sample size, DOE also proposes 10 CFR 429.111(a)(7), which provides that a reduced sample size may also apply in other circumstances, such as when DOE makes a determination of noncompliance for a basic model subject to design requirements, or based on the manufacturer's test data.

b. Sample Comprised of a Single Unit

DOE also proposes to explicitly state that for all products, if the sample size is comprised of a single unit, DOE will determine noncompliance for the basic model based solely on the results of the single test. In such an instance, the sampling plans in the appendices do not apply. Although DOE believes that it is inherently understood that sampling statistics would not be applicable to a single unit, explicit inclusion within regulations provides transparency in the compliance determination process.

c. Noncompliance Determined by Single Assessment Test

DOE proposes that if the results of an assessment test show that the basic model performed at least 25% worse than the applicable energy conservation standard, DOE may make a determination of noncompliance for the basic model based solely on the results of such test. In such an instance, the sampling plans would not apply, as the determination is based on a single unit. This new process would avoid unnecessary expenditure of resources by both the manufacturer and DOE and would permit DOE to make a finding of noncompliance based on a single test where the results of the assessment test were so far below an efficiency standard or above a conservation standard that compliance is extremely unlikely.

3. Addition of Walk-In Cooler and Freezer Doors & Panels

DOE's proposal adds walk-in cooler and freezer doors and panels to the list of equipment subject to the low-volume enforcement sampling procedures (*i.e.,* the Sampling Plan for Enforcement Testing of Covered Equipment and Certain Low-Volume Covered Products in Appendix B to Subpart C of Part 429). This equipment is not currently included within DOE's list because at the time the current regulations were drafted, only design standards applied to such equipment (versus the now also applicable performance standards), and thus, sampling provisions were not necessary at that time.

4. Design Standards

In line with the above discussion regarding models that are subject to design standards, in this proposal DOE explicitly states that the sampling plans in the appendices do not apply in instances where DOE is evaluating whether a basic model complies with an applicable design requirement, as the determination is based on a single unit.

H. Notification of Obligations

Current regulations at 10 CFR 429.114 address notification to the manufacturer of certain obligations and requirements of the manufacturer upon issuance of a notice of noncompliance determination. To this section, DOE proposes various clarifying edits for readability and proposes to remove the requirement that manufacturers must inform their customers of DOE's noncompliance determination.

I. Petitions for Reexamination

DOE proposes to add new § 429.115 to 10 CFR part 429. This addition to the enforcement regulations provides the manufacturer or private labeler with a formal process to ask DOE to reexamine a pending determination of noncompliance. Historically, DOE has always accepted any information from parties both before and after the issuance of a test notice or notice of noncompliance determination. However, in order to provide manufacturers and private labelers with a specific process to request DOE to consider certain information and arguments prior to DOE's issuance of a notice of noncompliance determination, DOE proposes to adopt regulations detailing a specific procedure and substance for such a request.

The proposal states that, at least 30 calendar days prior to the issuance of a notice of noncompliance determination, DOE will issue to the manufacturer or private labeler a letter of intent stating DOE's intent to issue a notice of noncompliance determination for the basic model. Within 30 days of DOE's issuance of a letter of intent, DOE will accept a petition for reexamination of the pending determination, which must include a variety of information: The material issue(s) that the manufacturer or private labeler has with the assessment and/or enforcement testing of the basic model; complete test reports or alternative efficiency determination methods (AEDM) information (if applicable) the manufacturer or private labeler believes demonstrate the basic model meets the applicable standard; all legal and other arguments that the manufacturer or private labeler wishes to make in support of its position; and information/test data regarding any previous representations of the basic model's energy consumption. The process as proposed provides the petitioner and DOE with a clear understanding of the information DOE requires to inform its reexamination of the pending determination, while still allowing the petitioner to submit any other information it deems pertinent.

The proposed process also serves to ensure that the petitioner, in support of its request, provides DOE with test data that is in fact relevant to the finding of noncompliance. As such, all test reports must demonstrate that the applicable DOE test procedure was followed. In addition, petitioners must inform DOE if the units it tested are different (in design, components, materials, etc.) from the units that are the basis of the

pending finding of noncompliance, or if the units were modified prior to or during the test. In addition, for any testing completed after the issuance of the letter of intent, the manufacturer must provide DOE with documentation, such as the source of the units, how they were selected, and if relevant, whether and how many units were available in inventory or from a retailer on the date of testing.

Upon review of a petition, DOE may modify or leave unchanged its pending determination. In any case, the process ensures that DOE considered the petitioner's submission of relevant materials. DOE also notes that although the petition must be submitted within 30 days of issuance of the letter of intent, the petitioner may always compile and share information at any earlier date, such as upon DOE's issuance of a test notice.

DOE also notes that the proposed petition for reexamination process addresses DOE's obligations under Section 6 of Executive Order 13892, ''Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication,'' which requires that DOE, before issuing a notice of noncompliance determination, must afford the manufacturer or private labeler an opportunity to be heard regarding the pending determination.

J. Notice of Allowance

The Department proposes to provide within its regulations the complete process for attaining a notice of allowance after DOE has made a finding of noncompliance for a basic model. DOE has received feedback from various respondents indicating that the process, as currently explained within 10 CFR part 429 and the body of the notice of noncompliance determination, is not intuitive and deserves clarification. After review of current regulations at § 429.114(d), DOE also believes that further clarity and explanation of the process within its regulations would be helpful to all parties. The proposal clarifies and captures various aspects of the notice of allowance process, including that a manufacturer or private labeler must, prior to distribution in commerce of a modified model, receive a notice of allowance from DOE for that modified model. The proposal also explicitly states that the manufacturer or private labeler must, prior to receipt of a notice of allowance, provide DOE with a detailed explanation of all modifications and test data demonstrating that the modified basic model meets the applicable standard(s). If the manufacturer chooses to modify the noncompliant basic model, DOE also proposes that, as a part of its records, the manufacturer or private labeler maintain records of serial numbers of and the modifications made to any units of the noncompliant basic model in existing stock.

DOE regulations currently permit in-house or independent testing for determining compliance with DOE's performance based conservation standards. Currently, § 429.116 provides that DOE may require testing by an independent third-party if DOE determines it is necessary to ensure compliance. Third-party testing may be essential to ensuring compliance in some circumstances, such as with manufacturers who are routinely found to violate standards, or in instances where DOE believes that the manufacturer's in-house testing is inaccurate or unreliable. Although DOE may rely on 10 CFR 429.116, for the sake of transparency and clarity of process, DOE proposes that the regulations pertaining to the notice of allowance process also explicitly incorporate this requirement—that the manufacturer or private labeler's testing in support of the request for a notice of allowance be performed at an independent, third-party testing facility.

K. Injunctions

DOE proposes minor edits to clarify that, in instances where a person fails to cease engaging in a prohibited act, DOE may either immediately seek an injunction or allow the person an opportunity to first implement a corrective action plan.

L. Response to a Notice of Proposed Civil Penalty in Writing

DOE proposes that a respondent's election of procedures in response to a notice of proposed civil penalty be made to the Department in writing. This is an established practice, and DOE believes that explicitly requiring the response to be in writing ensures that the respondent's election is made without miscommunication or misinterpretation.

M. Settlement

The respondent's election to settle a case, while available in every enforcement case, is not explicitly stated within current regulations. Thus, the proposed text explicitly provides a respondent in an enforcement action with the option of settlement. Further, DOE's proposal explains in greater detail the settlement process, including that the compromise agreement will set forth the terms of the agreement, and that DOE's General Counsel will sign an order adopting the agreement and assessing the civil penalty. The proposal as a whole completes the comprehensive list of the respondent's election of procedures, and provides clarity of the settlement process.

N. Administrative Law Judge Hearing and Appeal

DOE's proposal includes some minor edits to 10 CFR 429.126 for clarity and readability. In addition, the proposal includes a reference to a new subpart D, for which DOE plans to propose administrative law judge hearing procedures in the future.

O. Immediate Issuance of Order Assessing Civil Penalty

DOE proposes edits to ensure that DOE's regulations clearly convey the statutory requirement that an election to have the procedures of 10 CFR 429.128 apply (*i.e.,* in lieu of an administrative law judge hearing, the respondent elects to have DOE immediately issue an order assessing the civil penalty) must be made by the respondent within 30 days of the notice of proposed civil penalty. The 30-day window within which this option is available is a timeframe mandated by EPCA and is currently captured within DOE regulations at 10 CFR 429.122. Nevertheless, DOE has found that there is confusion over the timeframe to elect this option and believes that further clarification and additional references to the 30-day window will help create a better understanding of the statutory requirement.

Further, current regulations provide that, in instances where the respondent takes the maximum 30 days allowable to make a selection for the immediate issuance of an adopting order, the General Counsel must issue such order on that very same day. In order to create a more reasonable and realistic timeline, DOE also proposes edits to current regulations such that the General Counsel will not sign an adopting order sooner than 60 days after the issuance of the notice of proposed civil penalty.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This regulatory action is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (E.O.) 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' E.O. 13771 stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. E.O. 13771 stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued E.O. 13777, ''Enforcing the Regulatory Reform Agenda.'' E.O. 13777 required the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

(i) Eliminate jobs, or inhibit job creation;

(ii) Are outdated, unnecessary, or ineffective;

(iii) Impose costs that exceed benefits;

(iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

DOE initially concludes that this rulemaking is consistent with the directives set forth in these executive orders.

As discussed in this NOPR, DOE is proposing to revise its enforcement regulations to ensure they convey a clear and comprehensive enforcement process and to revise existing enforcement procedures applicable to both covered products and covered equipment. The following section provides an overview of the costs and burdens discussed previously in this document.

TABLE IV.1—SUMMARY OF COST IMPACTS FOR ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

Category	Present value *(thousands 2016$)*	Discount rate *(percent)*
Cost Savings		
Reduction in Notification Costs	109 42	3 7
Total Net Cost Impact		
Total Net Cost Impact	(109) (42)	3 7

TABLE IV.2—SUMMARY OF ANNUALIZED COST IMPACTS FOR ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

Category	Annualized value *(thousands 2016$)*	Discount rate *(percent)*
Annualized Cost Savings		
Reduction in Notification Costs	3.3 2.9	3 7
Total Net Annualized Cost Impact		
Total Net Cost Impact	(3.3) (2.9)	3 7

As discussed in section III.H, DOE proposes to remove the requirement that manufacturers must inform their customers of DOE's noncompliance determination. DOE estimates that this will reduce manufacturer burden when manufacturers are issued a noncompliance determination by DOE, resulting in costs savings for manufactures. Based on a review of previous noncompliance determinations spanning the previous five years, DOE estimates there are on average 14.8 noncompliance determinations each year.

To estimate the cost savings manufacturers would experience due to the proposal to remove the requirement to notify consumers of noncompliance determinations, DOE first estimated the cost savings of drafting a notification letter and then of identifying all customers that purchased noncompliant units.

DOE assumes manufacturers currently incur costs to write a noncompliance letter to their customers. DOE estimates

that an average noncompliance determination would result in a general and operations manager spending one hour writing a letter and an executive spending 30 minutes reviewing the letter that would be sent to all customers that purchased noncompliant units. DOE estimated that the average hourly rate to employ a general and operations manager is $77.67 and the average hourly rate to employ an executive is $125.48.[3] Therefore, the average cost to draft a noncompliance notification letter to all customers is approximately $140 per basic model that is found to be noncompliant. This proposal is estimated to result in approximately $2,078 of costs savings annually for all manufacturers to forgo drafting on average 14.8 notifications of noncompliance each year.

DOE assumes manufacturers currently incur costs to identify customers that have purchased noncompliant units. DOE assumes there are two types of basic models that are found to be noncompliant, low-volume basic models with less than 100 units sold and, high-volume basic models with 100 or more units sold. DOE assumes low-volume basic models are typically sold individually, with each customer only purchasing one unit on average, while high-volume basic models are typically sold in a group of 50 units per customer, with each customer purchasing 50 units as a single purchase on average. DOE assumes that it takes manufacturers approximately 5 minutes to identify a single customer's contact information. This equally applies to customers of low-volume and high-volume basic models. Therefore, it takes manufacturers an equal amount of time to identify the low-volume customer that purchased one unit and the high-volume customer that purchased 50 units.

Based on previous noncompliance findings, DOE estimates that typically 31 units are sold for a low-volume basic model and 600 units are sold for a high-volume basic model. Therefore, a low-volume basic model manufacturer would have to identify 31 customers on average and a high-volume basic model manufacturer would have to identify 12 customers on average (600 divided by 50).

Again, DOE assumes that a general and operations manager would be responsible for identifying customers and the average hourly rate for this employee is $77.67.[4] Therefore, on average it costs approximately $201 to identify all customers of low-volume basic models and $78 to identify all customers of high-volume basic models.[5] Based on the weighted average of low-volume and high-volume basic models found noncompliant,[6] this proposal is estimated to result in cost savings of approximately $1,640 annually for all manufacturers to forgo identifying customers of noncompliant basic models.

Overall, this proposal is estimated to result in cost savings of approximately $3,718 annually for all manufacturers to forgo drafting on average 14.8 notifications of noncompliance each year, identifying customers of noncompliant models, and sending noncompliance letters to customers.

DOE anticipates that the remainder of the amendments proposed in this document would not impact manufacturers' burden during the enforcement process. Most of the proposed amendments will provide additional certainty and clarity to the regulated industry, facilitate communication between DOE and the regulated industry, and advance the effective enforcement of DOE's regulations.

This proposed rule is estimated to result in cost savings. The proposed rule would yield an annualized cost saving of approximately $2,926 (2016$) using a perpetual time horizon discounted to 2016 at a 7 percent discount rate. Therefore, if finalized as proposed, this rule is expected to be an E.O. 13771 deregulatory action.

DOE requests comment on its understanding of the impact and associated costs of these proposed amendments.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IFRA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website: *http://energy.gov/gc/office-general-counsel.*

Under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003, DOE reviewed this proposal. DOE certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis of this certification is set forth in the following paragraphs.

The Small Business Administration (SBA) considers a business entity to be a small business, if, together, with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121. These size standards and codes established by the North American Industry Classification System (NAICS) and are available at *https://www.sba.gov/document/support—table-size-standards.*

This proposal impacts manufacturers of all covered products and covered equipment subject to DOE's energy conservation, water conservation, and design standards. DOE estimates that the manufacturing of all these covered products and covered equipment includes approximately 20 unique NAICS codes. The SBA threshold number of employees for these 20 NAICS codes ranges from 500 to 1,500 total employees. DOE estimates there are several hundred small businesses that manufacture the products and equipment covered by this proposal.

DOE is attempting to revise the current enforcement procedures on manufacturers of covered products and covered equipment to give certainty and clarity to the regulated industries, to facilitate communication between DOE

[3] The Bureau of Labor Statistics mean hourly wage rate ''General and Operations Manager'' is $59.56 (May 2018: *https://www.bls.gov/oes/current/oes111021.htm*) and the mean hourly wage for ''Chief Executives'' is $96.22 (May 2018: *https://www.bls.gov/oes/current/oes111011.htm*).

Additionally, according to the Annual Survey of Manufacturers for NAICS code 31–33, all manufacturing, wages represent approximately 77 percent of the total cost of employment. (AMS 2016, NAICS code 31–33; *https://www.census.gov/programs-surveys/asm.html*).

[4] The Bureau of Labor Statistics mean hourly wage rate ''General and Operations Manager'' is $59.56 (May 2018: *https://www.bls.gov/oes/current/oes111021.htm*).

Additionally, according to the Annual Survey of Manufacturers for NAICS code 31–33, all manufacturing, wages represent approximately 77 percent of the total cost of employment. (AMS 2016, NAICS code 31–33; *https://www.census.gov/programs-surveys/asm.html*).

[5] There are on average 31 customers of low-volume models and on average 122 customers of high-volume models. The hour employment cost is $77.67, and each customer take approximately 10 minutes to identify ($77.67 * ⅙ hr * 31 = $401; $77.67 * ⅙ hr * 122 = $1,579).

[6] Based on previous noncompliance findings over the past five years, DOE estimated that approximately 27 percent of noncompliant models had less than 100 units sold, and 73 percent of noncompliant models had 100 or more units sold.

and the regulated industries, to reduce burden, and to advance the effective enforcement of DOE's regulations. Since this proposal would reduce burden and result in cost savings, as described in section IV.B, on all manufacturers, including small businesses, DOE tentatively concludes that the impacts of this proposal would not have a ''significant economic impact on a substantial number of small entities,'' and that the preparation of an IRFA is not warranted. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

DOE requests comment on its finding that this proposal would not present a significant economic impact on the several hundred small businesses that manufacture products and equipment covered by this proposal.

D. Review Under the Paperwork Reduction Act of 1995

The Paperwork Reduction Act (PRA) of 1995 requires that U.S. Federal Government agencies obtain Office of Management and Budget (OMB) approval prior to collecting data in any situation where 10 or more respondents, within a 12 month period, are involved and the questions are standardized in nature. This proposed rule does not seek to collect any information or data in such a manner; accordingly, DOE has determined that neither review nor approval by OMB under the PRA is required.

E. Review Under the National Environmental Policy Act

We are analyzing this proposed regulation in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). We invite the public to comment on the extent to which this proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this regulation.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it 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. No further action is required by Executive Order 13132.

G. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause 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), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://energy.gov/gc/office-general-counsel.* DOE examined this proposed rule according to UMRA and its statement of policy and determined that its requirements do not apply because the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859

(March 18, 1988) that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB to maximize the quality, objectivity, utility, and integrity of information. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has reviewed this proposed rule under the Executive Order 13211, and has concluded that it is not a significant regulatory action under Executive Order 12866; would not have a significant adverse effect on the supply, distribution, or use of energy; and that the Administrator of OIRA has not designated it as a significant energy action. Accordingly, DOE has concluded that it is not necessary to prepare a Statement of Energy Affects.

M. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

Because this proposed rulemaking does not authorize or require use of any commercial standard, the FEAA requirements do not apply.

N. Description of Materials Incorporated by Reference

In this NOPR, DOE is not proposing to incorporate by reference any new industry standard. The incorporation by reference of ISO/IEC 17025:2005(E) in § 429.110 has already been approved by the Director of the Federal Register and there are no proposed changes in this NOPR.

V. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this proposed rule.

Submitting comments via https://regulations.gov. The *https://www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *https://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through *https://www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *https://www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *https://www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to *https://www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE

electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors DOE considers when evaluating requests to treat submitted information as confidential include (1) a description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is generally known by or available from other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

B. Requests for Comment

DOE welcomes written comments from the public on all aspects of its proposal, and any subject related to DOE's enforcement process, including topics not specifically raised in this proposed rule. DOE continues to seek views from all interested parties on how DOE's enforcement rules can best be developed to ensure effective enforcement. DOE requests comment on its finding that this proposal would not present a significant economic impact on the several hundred small businesses that manufacture products and equipment covered by this proposal.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects

10 CFR Part 429

Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on July 28, 2020, by William S. Cooper III, General Counsel and Daniel R. Simmons, Assistant Secretary for Energy Efficiency, 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.

For the reasons stated in the preamble, DOE is proposing to amend parts 429 and 431 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317, 28 U.S.C. 2461 note.

■ 2. Revise § 429.1 to read as follows:

§ 429.1 Purpose and scope.

This part sets forth the procedures to be followed for certification, determination and enforcement of compliance of covered products and covered equipment with the applicable conservation standards set forth in parts 430 and 431 of this subchapter.

■ 3. Section 429.2(a) is revised to read as follows:

§ 429.2 Definitions.

(a) The definitions found in 10 CFR parts 430 and 431 of this chapter apply for purposes of this part.

* * * * *

■ 4. Revise § 429.100 to read as follows:

§ 429.100 Purpose and scope.

This subpart describes the enforcement authority of DOE to ensure compliance with the conservation standards regulations in 10 CFR parts 429, 430 and 431.

■ 5. Section 429.102 is amended by:

■ a. Revising paragraphs (a)(1), and (5) through (10);

■ b. Adding paragraphs (a)(11) through (14); and

■ c. Revising paragraph (c)(4)(iii).

The revisions and additions read as follows:

§ 429.102 Prohibited acts subjecting persons to enforcement action.

(a) * * *

(1) Failure of a manufacturer to provide, maintain, permit access to, or copying of records required to be supplied under the Act or this part or failure to make reports or provide other information required to be supplied under the Act or this part, including but not limited to failure to properly certify covered products and covered equipment in accordance with subpart B of this part;

* * * * *

(5) Failure of a manufacturer to permit a DOE representative to observe any testing required by the Act, this part, or 10 CFR part 430 or part 431 of this chapter, or to inspect the results of such testing;

(6) Distribution in commerce by a manufacturer or private labeler of any new covered product or covered

equipment that is not in compliance with an applicable energy conservation standard;

(7) Knowing misrepresentation by a manufacturer or private labeler by certifying an energy use or efficiency rating of any covered product or covered equipment distributed in commerce in a manner that is not supported by test data;

(8) For any manufacturer, distributor, retailer, or private labeler to distribute in commerce an adapter that—

(i) Is designed to allow a lamp that does not have a medium screw base to be installed into a fixture or lamp holder with a medium screw base socket; and

(ii) Is capable of being operated at a voltage range at least partially within 110 and 130 volts;

(9) For any manufacturer or private labeler to knowingly sell a product to a distributor, contractor, or dealer with knowledge that the entity routinely violates any regional standard applicable to the product; or

(10) For any person to sell at retail a rough service lamp or vibration service lamp in a package containing more than one lamp; or

(11) For any person—

(i) To activate an activation lock for a grid-enabled water heater with knowledge that such water heater is not used as part of an electric thermal storage or demand response program;

(ii) To distribute an activation key for a grid-enabled water heater with knowledge that such activation key will be used to activate a grid-enabled water heater that is not used as part of an electric thermal storage or demand response program;

(iii) To otherwise enable a grid-enabled water heater to operate at its designed specification and capabilities with knowledge that such water heater is not used as part of an electric thermal storage or demand response program; or

(iv) To knowingly remove or render illegible the required label of a grid-enabled water heater; or

(12) Distribution in commerce by a manufacturer or private labeler of any covered equipment that is not labeled in accordance with 10 CFR part 431 of this chapter; or

(13) Removal from any covered equipment or rendering illegible, by a manufacturer, distributor, retailer, or private labeler, any label required to be provided under 10 CFR part 431 of this chapter; or

(14) Advertisement of an electric motor, by a manufacturer, distributor, retailer, or private labeler, in a catalog from which the equipment may be purchased, without including in the catalog all information as required by § 431.31(b) of this chapter, provided, however, that this shall not apply to an advertisement of an electric motor in a catalog if distribution of the catalog began before the effective date of the labeling rule applicable to that motor.

* * * * *

(c) * * *

(4) * * *

(iii) An outdoor unit that is part of any combination certified at less than the standard applicable in the region in which it is installed.

■ 6. Section 429.106(b) is revised to read as follows:

§ 429.106 Investigation of compliance.

* * * * *

(b) DOE may, at any time, request any information relevant to determining compliance with any requirement under 10 CFR parts 429, 430 and 431, including data from any party that underlies the certification of a basic model and/or demonstrates whether a basic model complies with an applicable conservation standard (including any applicable design requirements).

■ 7. Section 429.110 is revised to read as follows:

§ 429.110 Enforcement testing.

(a) DOE may determine that test data for units tested in accordance with the applicable test procedure specified in 10 CFR part 430 or part 431 of this chapter by DOE pursuant to this section or § 429.104, another Federal agency pursuant to other provisions or programs, or a third-party certification program is official enforcement test data upon which DOE may make a finding of noncompliance.

(b) If DOE has reason to believe that a basic model does not comply with an applicable standard, it may select and test units as follows.

(1) *Test location.* DOE testing will be conducted at a laboratory accredited to the International Organization for Standardization (ISO)/International Electrotechnical Commission (IEC), ''General requirements for the competence of testing and calibration laboratories,'' ISO/IEC 17025:2005(E) (incorporated by reference; see § 429.4). If testing cannot be completed at an independent laboratory, DOE, at its discretion, may allow enforcement testing at a manufacturer's laboratory, so long as the lab is accredited to ISO/IEC 17025:2005(E) and DOE representatives witness the testing. In addition, for commercial packaged boilers with rated input greater than 5,000,000 Btu/h, DOE, at its discretion, may allow enforcement testing of a commissioned commercial packaged boiler in the location in which it was commissioned for use, pursuant to the test provisions at § 431.86(c) of this chapter, for which accreditation to ISO/IEC 17025:2005(E) would not be required.

(2) *Test notice.* To obtain units for enforcement testing to determine compliance with an applicable standard, DOE will issue a test notice addressed to the manufacturer in accordance with the following requirements:

(i) DOE will send the test notice to the manufacturer.

(ii) The test notice will specify the basic model selected for testing, and may include other characteristics or specifications of the requested units (*e.g.,* individual or nameplate model numbers, serial number or manufacture date range(s), manufacture location). In addition, for electric motors with non-standard endshields or flanges and partial electric motors, the test notice may specify that the manufacturer provide a general purpose electric motor of equivalent electrical design and enclosure.

(iii) The test notice will specify the method of selecting the test sample, the maximum size of the sample and the size of the initial test sample, the approximate date testing is to be started, and the facility at which testing will be conducted. The test notice may also provide for situations in which the selected basic model is unavailable for testing and may include alternative models or basic models.

(iv) DOE will state in the test notice whether DOE or the manufacturer will select the units for testing.

(v) The test notice will specify whether the units selected must be from the manufacturer's inventory, from one or more distributors, and/or from one or more retailers. DOE may ask for documentation demonstrating the location from which each unit was selected, and that the unit was in inventory at such location on the date the test notice was issued. If any unit is selected from a distributor or retailer, the manufacturer shall make arrangements with the distributor or retailer for compensation for or replacement of any such units.

(vi) DOE may require in the test notice that the manufacturer of a basic model ship or cause to be shipped from a retailer or distributor at the manufacturer's expense the requested number of units of a basic model specified in such test notice to the testing laboratory specified in the test notice. The manufacturer shall ship or cause to be shipped the specified test unit(s) of the basic model to the testing

laboratory within 5 working days from the date of the test notice.

(3) *Test Unit Availability.* (i) If the manufacturer believes that it is unable to provide DOE with units of the basic model as specified in the test notice (*e.g.,* having the same design, components, materials, manufacture date or date range, manufacture location, and nameplate or individual model number), the manufacturer must immediately notify DOE in writing, and include details of why the units are unavailable and what efforts the manufacturer has taken to secure them. If the manufacturer believes that it has similar, but not exactly the same, units that should satisfy the test notice, it must immediately notify DOE in writing, and include details about the specific units available and an explanation of how such units differ from the units requested. If DOE determines that the requested units are unavailable, DOE will contact the manufacturer to develop a plan for enforcement testing, which may include testing of similar units identified by the manufacturer.

(ii) If DOE determines that fewer than the requested units of a basic model are available for testing when the manufacturer receives the test notice, then DOE may test the available unit(s) (which may, under paragraph (b)(3)(i) of this section, include testing of similar units identified by the manufacturer) and/or one or more other units of the basic model if expected to become available within 30 calendar days.

(iii) For the purposes of this section, available units are those that are available for distribution in commerce within the United States.

(4) *Test unit selection.* As specified by DOE in the test notice, either DOE or the manufacturer will select units for testing from one of the following sources:

(i) *Manufacturer's warehouse, distributor, or other facility affiliated with the manufacturer.* DOE or the manufacturer will select a batch sample at random in accordance with the provisions in § 429.111 and the conditions specified in the test notice. The batch sample must be selected at random from all units of the specified model that are in inventory on the date of the test notice, including all units that have not yet been shipped. From that batch sample, DOE or the manufacturer will randomly select an initial test sample of units for testing in accordance with the instructions in the test notice.

(ii) *Retailer or other party not affiliated with the manufacturer.* DOE, the retailer, or other party not affiliated with the manufacturer will select an initial test sample of units at random from the inventory of the retailer or other party. This sample must provide the minimum units necessary for testing in accordance with the instructions in the test notice. Depending on the results of the testing, DOE may select additional units for testing from the retailer or other facility.

(iii) *Previously commissioned commercial packaged boilers with a rated input greater than 5,000,000 Btu/h.* DOE may test a sample of at least one unit in the location in which it was commissioned for use.

(5) *Test unit preparation.* (i) Prior to and during testing, a test unit selected for enforcement testing will not be prepared, modified, or adjusted in any manner by DOE unless such preparation, modification, or adjustment is allowed by the applicable DOE test procedure, or is authorized by the manufacturer in response to a specific modification request by DOE. One test shall be conducted for each test unit in accordance with the applicable test procedure prescribed in 10 CFR part 430 or part 431 of this chapter.

(ii) Prior to and during testing, a test unit selected for enforcement testing shall not be prepared, modified, or adjusted in any manner by the manufacturer. No quality control, testing or assembly procedures shall be performed by the manufacturer on a test unit, or any parts and subassemblies thereof, that is not performed during the production and assembly of all other units included in the basic model.

(iii) DOE may consider a test unit to be defective if such unit is inoperative or is found to be in noncompliance due to failure of the unit to operate according to the manufacturer's operating instructions. DOE will notify the manufacturer if a test unit is received by the test lab in a condition that may impact its performance. DOE may authorize testing of an additional unit on a case-by-case basis.

(c) A test unit of a basic model subject to a design requirement may be selected in accordance with the procedures under paragraph (b) of this section. In such an instance, DOE will make a determination of noncompliance for the basic model based on an examination of whether a single unit of the basic model fails to comply with the applicable design requirements.

■ 8. Section 429.111 is added to read as follows:

§ 429.111 Basic model compliance.

(a) DOE will evaluate whether a basic model complies with an applicable performance standard(s) based on testing conducted in accordance with the applicable test procedure specified in 10 CFR part 430 or 431 of this chapter, and with the following sampling procedures:

(1) For all products, if the sample size is comprised of a single unit, DOE will determine noncompliance for the basic model based solely on the results of the single test. In such an instance, the sampling plans in the appendices of this subpart do not apply.

(2) For products with applicable energy conservation standard(s) in § 430.32 of this chapter, and commercial pre-rinse spray valves, illuminated exit signs, traffic signal modules and pedestrian modules, commercial clothes washers, dedicated-purpose pool pumps, and metal halide lamp fixtures, and compressors:

(i) If the sample size is comprised of two or three units, DOE will apply appendix B of this subpart (Sampling Plan for Enforcement Testing of Covered Equipment and Certain Low-Volume Covered Products) using a sample size (n_i) equal to the number of units tested to determine if the basic model is noncompliant.

(ii) If the sample size is comprised of four or more units (up to 21), DOE will apply appendix A of this subpart (Sampling Plan for Enforcement Testing of Covered Consumer Products and Certain High-Volume Commercial Equipment) using a sample size equal to the total number of units tested to determine if the basic model is noncompliant.

(3) For automatic commercial ice makers; commercial refrigerators, freezers, and refrigerator-freezers; refrigerated bottled or canned vending machines; commercial HVAC & WH products; walk-in cooler and walk-in freezer panels, and walk-in cooler and walk-in freezer doors; and walk-in cooler and walk-in freezer refrigeration systems, if the sample size is comprised of two or more units (up to four), DOE will apply appendix B of this subpart (Sampling Plan for Enforcement Testing of Covered Equipment and Certain Low-Volume Covered Products) using a sample size (n_i) equal to the number of units tested to determine if the basic model is noncompliant.

(4) For distribution transformers, if the sample size is comprised of two or more units (up to five), DOE will apply appendix C of this subpart (Sampling Plan for Enforcement Testing of Distribution Transformers).

(5) For pumps subject to the standards specified in § 431.465(a) of this chapter, DOE will determine if the basic model is noncompliant based on the arithmetic mean of the sample (up to four units).

(6) For uninterruptible power supplies, if a basic model is certified for compliance to the applicable energy conservation standard(s) in § 430.32 of this chapter according to the sampling plan in § 429.39(a)(2)(iv)(A) or is not certified, DOE will make a determination of noncompliance using a sample size of not more than 21 units and follow the sampling plan in appendix A of this subpart (Sampling Plan for Enforcement Testing of Covered Consumer Products and Certain High-Volume Commercial Equipment). If a basic model is certified for compliance to the applicable energy conservation standard(s) in § 430.32 of this chapter according to the sampling plan in § 429.39(a)(2)(iv)(B), DOE will make a determination of noncompliance using a sample size of at least one unit (up to four) and follow the sampling plan in appendix D of this subpart (Sampling Plan for Enforcement Testing of Uninterruptible Power Supplies).

(7) For electric motors and small electric motors, if the sample size is comprised of five or more units (up to 20) DOE will apply appendix E of this subpart (Sampling Plan for Enforcement Testing of Electric Motors and Small Electric Motors) using a sample size (n_1) equal to the number of units tested to determine if the basic model is noncompliant.

(8) DOE may make a determination of noncompliance based on a sample size of less than four units (five for distribution transformers, electric motors, and small electric motors) in limited circumstances (*e.g.,* when DOE makes a determination of noncompliance for a basic model subject to design requirements; when DOE's test notice process pursuant to § 429.110(a)(3) results in a reduced sample size).

(b) DOE will evaluate whether a basic model complies with an applicable design requirement(s) based on examination of a single unit of the basic model, on design information, or pursuant to a test notice issued under § 429.110(b). In such an instance, the sampling plans in the appendices of this subpart do not apply.

(c) If the results of any assessment test conducted pursuant to § 429.104 provides results that the basic model performed 25% or worse than the applicable energy conservation standard, DOE may make a determination of noncompliance for the basic model based solely on the results of such test. In such an instance, the sampling plans in the appendices of this subpart do not apply.

■ 9. Section 429.112 is added to read as follows:

§ 429.112 Basis of noncompliance determination.

DOE may make a determination that a basic model does not comply with an applicable energy conservation standard based on test data from manufacturer or private labeler, another Federal agency, or a third-party certification program; testing pursuant to §§ 429.104 and 429.110 of this part; and/or an admission.

■ 10. Section 429.114 is revised to read as follows:

§ 429.114 Notice of noncompliance determination and notice to cease distribution of a basic model.

(a) In the event that a basic model is determined to be noncompliant with an applicable energy conservation standard, DOE may issue a notice of noncompliance determination to the manufacturer or private labeler.

(1) The notice of noncompliance determination will notify the manufacturer or private labeler that it is a prohibited act to distribute in commerce a basic model that does not meet applicable standards.

(2) The manufacturer or private labeler must, within 30 calendar days of the issuance of the notice of noncompliance determination, submit to DOE records, reports and other documentation pertaining to the acquisition, ordering, storage, shipment, or sale of the basic model(s) determined to be in noncompliance.

(b) In the event that DOE determines a manufacturer has failed to comply with an applicable certification requirement with respect to a particular basic model, DOE may issue a notice of noncompliance determination to the manufacturer.

(1) The notice of noncompliance determination will notify the manufacturer of its obligation to immediately comply with the applicable certification requirement.

(2) The manufacturer must, within 30 calendar days of the issuance of the notice of noncompliance determination, submit to DOE records, reports and other documentation pertaining to the acquisition, ordering, storage, shipment, or sale of the basic model.

(c) At least 30 calendar days prior to the issuance of a notice of noncompliance determination, DOE will issue to the manufacturer or private labeler a letter of intent stating DOE's intent to issue a notice of noncompliance determination for the basic model.

■ 11. Section 429.115 is added to read as follows:

§ 429.115 Petitions for reexamination.

(a) Within 30 calendar days after issuance of DOE's letter of intent to issue a notice of noncompliance determination under § 429.114, the manufacturer or private labeler may petition DOE to reexamine such determination. Such petitions must be submitted to DOE in writing, and must contain:

(1) The material issue(s) that the manufacturer or private labeler has with the assessment and/or enforcement testing of the basic model;

(2) Complete test reports or AEDM information (if applicable) the manufacturer or private labeler believes demonstrate the basic model meets the applicable standard;

(3) All legal and other arguments that the manufacturer or private labeler wishes to make in support of its position;

(4) Information regarding any previous representations of the basic model's energy consumption, and if different than paragraph (a)(3) of this section, the complete test reports or AEDM information in support of such representations; and

(5) Any other pertinent material.

(b) Test reports submitted as a part of a petition must demonstrate that the applicable DOE test procedure specified in 10 CFR part 430 or part 431 of this chapter was followed in its entirety.

(c) The manufacturer or private labeler must, for each test report submitted as a part of the petition, inform DOE if the tested units' design, components, materials, manufacture date or date range, or manufacture location differ in any way from the unit(s) of the basic model (specified in the letter of intent) tested pursuant to § 429.104 or 429.110. If no units of the basic model specified in the letter of intent were tested pursuant to § 429.104 or 429.110, the manufacturer or private labeler must, for each test report submitted as a part of the petition, inform DOE if the tested unit's design, components, or materials differ in any way from the least efficient model within such basic model.

(d) The manufacturer or private labeler must, for each test report submitted as a part of the petition, inform DOE whether the tested units were prepared, modified, or adjusted in any manner prior to and during testing.

(e) In the event that, as a part of its petition, a manufacturer or private labeler submits test reports for testing completed after the date of issuance of the letter of intent, the manufacturer or private labeler must provide DOE with documentation identifying the source of the tested units and an explanation of

how the units were selected for testing. If the tested units were built subsequent to the date of issuance of the letter of intent, the manufacturer or private labeler must provide documentation demonstrating whether and how many units were available in inventory or from a retailer on the date of testing.

(f) Failure to submit a petition as specified in this section constitutes a waiver of the right to petition DOE to reexamine the pending determination.

(g) DOE will only consider validly submitted petitions, as required in paragraphs (a) through (e) of this section.

(h) DOE may require that the manufacturer or private labeler provide information or documentation to supplement its petition.

(i) Upon review of a validly submitted petition, DOE may modify or leave unchanged DOE's pending determination of noncompliance of the basic model.

■ 12. Section 429.116 is revised to read as follows:

§ 429.116 Additional certification testing requirements.

If DOE determines that independent, third-party testing is necessary to ensure compliance with the rules of this part, 10 CFR part 430, or part 431, a manufacturer must base its certification of a basic model under subpart B of this part on independent, third-party laboratory testing.

■ 13. Section 429.117 is added to read as follows:

§ 429.117 Notice of allowance.

(a) After issuance of a noncompliance determination under § 429.114(a), a manufacturer or private labeler may modify a noncompliant basic model in such manner as to make it comply with the applicable standard(s).

(b) Prior to distribution in commerce in the United States of the modified model, the manufacturer or private labeler must request in writing a notice of allowance from DOE.

(c) The manufacturer or private labeler's request to DOE for a notice of allowance must include:

(1) A detailed explanation of all modifications made, including a clear explanation of all features removed or added to make the model comply with the applicable standard(s).

(2) Complete test data, which satisfy the sampling requirements under § 429.11 and the product-specific sections in subpart B of this part, and demonstrate that:

(i) The applicable DOE test procedure specified in 10 CFR part 430 or part 431 of this chapter was followed in its entirety; and

(ii) The modified basic model meets the applicable standard when applying the appropriate sampling provisions under subpart B of this part.

(d) DOE may require that the manufacturer or private labeler's testing in support of the request for a notice of allowance be performed at an independent, third-party testing facility.

(e) The manufacturer or private labeler must treat the modified basic model as a new basic model, to include:

(1) The modified basic model must be assigned a new basic model number;

(2) Any model within the new basic model must be assigned a new individual model number; and

(3) Such new basic model must be certified in accordance with the provisions of this part.

(f) The manufacturer or private labeler must maintain records for the modified basic model, including records of serial numbers of and the modifications made to any units of the noncompliant basic model in existing stock.

(g) Such records shall be organized and indexed in a fashion that makes them readily accessible for review by DOE upon request.

(h) The manufacturer or private labeler must retain these records consistent with § 429.71.

■ 14. Section 429.118 is revised to read as follows:

§ 429.118 Injunctions.

(a) If a manufacturer, private labeler or any other person as required fails to cease engaging in a prohibited act, DOE may immediately seek an injunction. In such instance, DOE will notify the manufacturer, private labeler or any other person as required, of the prohibited act(s) at issue and DOE's intent to seek a judicial order enjoining the prohibited act(s).

(b) DOE may, in its discretion, provide the manufacturer, private labeler or other person, an opportunity to deliver to DOE, within 15 calendar days of the notification provided pursuant to paragraph (a) of this section, a corrective action and compliance plan detailing the steps it will take to ensure that the prohibited act(s) cease(s). DOE will review the plan and, if satisfactory, monitor implementation of such plan. If DOE determines the manufacturer, private labeler or other person is not effectively implementing such plan, DOE may seek an injunction immediately upon notifying the manufacturer, private labeler or other person of this decision and DOE's renewed intent to seek an injunction.

■ 15. Section 429.120 is revised to read as follows:

§ 429.120 Maximum civil penalty.

Any person who knowingly commits a prohibited action listed in § 429.102(a) may be subject to assessment of a civil penalty of no more than $460 for each violation. As to § 429.102(a)(1) with respect to failure to certify, and as to § 429.102(a)(2), and (5) through (12), each unit of a basic model of a covered product or covered equipment distributed shall constitute a separate violation. For violations of § 429.102(a)(1), (3), and (4), each day of noncompliance shall constitute a separate violation for each basic model at issue.

■ 16. Section 429.122 is revised to read as follows:

§ 429.122 Notice of proposed civil penalty.

(a) The General Counsel (or delegee) shall provide notice of any proposed civil penalty.

(b) The notice of proposed civil penalty shall:

(1) Include the amount of the proposed civil penalty;

(2) Include a statement of the material facts constituting the alleged violation; and

(3) Inform the person of the opportunity to elect in writing within 30 calendar days of receipt of the notice to have the procedures of § 429.128 (in lieu of those of § 429.126) apply with respect to the penalty.

■ 17. Section 429.124 is revised to read as follows:

§ 429.124 Election of procedures.

(a) In responding to a notice of proposed civil penalty, the respondent may:

(1) Request, in writing, an administrative hearing before an Administrative Law Judge (ALJ) under § 429.126;

(2) Within 30 calendar days of issuance of such notice, elect in writing to have the procedures of § 429.128 apply; or

(3) Submit a signed compromise agreement (provided by DOE pursuant to § 429.132), to settle the matter for the civil penalty amount and conditions provided by DOE within such agreement.

(b) Any election to have the procedures of § 429.128 apply may not be revoked except with the consent of the General Counsel (or delegee).

(c) If the respondent fails to respond to a notice issued under § 429.120 or otherwise fails to indicate its election of procedures, DOE shall refer the civil penalty action to an ALJ for a hearing under § 429.126.

■ 18. Section 429.126 is revised to read as follows:

§ 429.126 Administrative law judge hearing and appeal.

(a) Pursuant to § 429.124, DOE shall refer a civil penalty action brought under § 429.122 to an Administrative law judge (ALJ), who shall afford the respondent an opportunity for an agency hearing on the record in accordance with the procedures of subpart D of this part.

(b) After consideration of all matters of record in the proceeding, the ALJ will issue a recommended decision and, if appropriate, recommend a civil penalty. The decision will include a statement of the findings and conclusions, and the reasons therefore, on all material issues of fact, law, and discretion.

(c)(1) The General Counsel (or delegee) shall adopt, modify, or set aside the conclusions of law or discretion contained in the ALJ's recommended decision and shall issue a final order, which may assess a civil penalty. The General Counsel (or delegee) shall include in the final order the ALJ's findings of fact and the reasons for the final agency actions.

(2) Any person against whom a penalty is assessed under this section may, within 60 calendar days after the date of the final order assessing such penalty, institute an action in the United States Court of Appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of title 5, United States Code. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in part, the final order, or the court may remand the proceeding to the Department for such further action as the court may direct.

■ 19. Section 429.128 is revised to read as follows:

§ 429.128 Immediate issuance of order assessing civil penalty.

(a) A respondent may elect within 30 calendar days of issuance of a notice of proposed civil penalty for DOE to issue an order assessing the civil penalty. In such case, the General Counsel (or delegee) shall issue an order assessing the civil penalty proposed in the notice of proposed penalty under § 429.122, not sooner than 60 calendar days after the respondent's receipt of the notice of proposed penalty.

(b) If within 60 calendar days of receiving the assessment order in paragraph (a) of this section the respondent does not pay the civil penalty amount, DOE shall institute an action in the appropriate United States District Court for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

■ 20. Section 429.132 is amended by adding paragraph (e) to read as follows:

§ 429.132 Compromise and settlement.

* * * * *

(e) If a settlement is agreed to by the parties, a compromise agreement setting forth the terms of the agreement shall be signed by the respondent and DOE, and the General Counsel (or delegee) shall set forth a final order adopting the compromise agreement and assessing any civil penalty. The case shall be closed in accordance with the terms of the settlement.

Appendix A to Subpart C of Part 429 [Amended]

■ 21. Appendix A to subpart C of part 429, paragraph (a), is amended by removing the reference ''§ 429.57(e)(1)(i)'' and adding in its place, ''§ 429.111''.

Appendix B to Subpart C of Part 429 [Amended]

■ 22. Appendix B to subpart C of part 429, paragraph (a), is amended by removing the reference ''§ 429.57(e)(1)(ii)'' and adding in its place, ''§ 429.111''.

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 23. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 24. Appendix A to subpart U of part 431 is redesignated as appendix E to subpart C of part 429.

■ 25. Revise the heading to newly redesignated appendix E to subpart C of part 429 to read as follows:

Appendix E to Subpart C of Part 429—Sampling Plan for Enforcement Testing of Electric Motors and Small Electric Motors

* * * * *

Subpart U—[Removed and Reserved]

■ 26. Remove and reserve subpart U of part 431, consisting of §§ 431.381 through 431.387.

[FR Doc. 2020–16690 Filed 8–28–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2020–BT–TP–0002]

RIN 1904–AE85

Energy Conservation Program: Test Procedures for Showerheads

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notification of public meeting (webinar) and extension of comment period.

SUMMARY: On August 13, 2020, the U.S. Department of Energy (''DOE'') published in the **Federal Register** a notice of proposed rulemaking (''NOPR'') regarding proposals to amend the test procedures for showerheads and to request comment on the proposals. That NOPR also announced a webinar but did not announce a webinar date. DOE is announcing that the webinar will be held on September 3, 2020, from 12 p.m. to 4 p.m. Additionally, on August 18, 2020, DOE received a request from Plumbing Manufacturers International (PMI) to extend the comment period for the NOPR by 30 days. DOE is announcing the comment period is extended to September 30, 2020.

DATES: *Meeting:* DOE will hold a webinar on Thursday, September 3, 2020, from 12 p.m. to 4 p.m. See the ''Public Participation'' section of this notice for webinar registration information, participant instructions, and information about the capabilities available to webinar participants. The comment period for this NOPR published on August 13, 2020 (85 FR 49284) is extended to September 30, 2020.

ADDRESSES: *Docket:* The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at *http://www.regulations.gov/docket?D=EERE-2020-BT-TP-0002* and *https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=2&action=viewlive.* The docket web page contains simple instructions on how to access all

documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Mr. John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1692. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

For further information on how to submit a comment, review other public comments and the docket, or participate in the webinar, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: On August 13, 2020, DOE published in the **Federal Register** a NOPR and request for comment regarding proposals to amend the test procedures for showerheads, specifically proposals to amend the definition of a showerhead consistent with the most recent standard developed by the American Society of Mechanical Engineers in 2018. 85 FR 49284 (August 2020 NOPR). The August 2020 NOPR also announced a webinar but did not announce a webinar date.

This notice announces that DOE will hold a webinar to discuss the proposed amendments to the showerheads test procedures on Thursday, September 3, 2020. Additionally, on August 18, 2020, DOE received a request from PMI to extend the comment period for the NOPR by 30 days (*http://www.regulations.gov/docket?D=EERE-2020-BT-TP-0002-0011*). DOE announces that it is extending the comment period until September 30, 2020.

Public Participation

See section IV, ''Public Participation,'' of the August 2020 NOPR for additional information on submitting written comments. *Id.* at 85 FR 49295.

A. Participation in the Public Meeting (Webinar)

The time and date of the webinar are listed in the **DATES** section at the beginning of this document. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: *https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=2&action=viewlive.* If you plan to attend the webinar, please notify the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *Appliance_Standards_Public_Meetings@ee.doe.gov.*

Please note that foreign nationals participating in the public meeting are subject to advance security screening procedures which require advance notice prior to attendance at the public meeting. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Regina Washington at (202) 586–1214 or by email: *Regina.Washington@ee.doe.gov* so that the necessary procedures can be completed.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, by email to: *Appliance_Standards_Public_Meetings@ee.doe.gov.* The request and advance copy of statements must be received at least one week before the public meeting via email. Please include a telephone number to enable DOE staff to make a follow-up contact, if needed.

A transcript of the public meeting will be included in the docket, which can be viewed as described in the Docket section at the beginning of this document. In addition, any person may buy a copy of the transcript from the transcribing reporter.

Signing Authority

This document of the Department of Energy was signed on August 25, 2020, by Alexander N. Fitzsimmons, Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy, 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 August 25, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–19015 Filed 8–28–20; 8:45 am]

BILLING CODE 6450–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133–AF24

Fees Paid by Federal Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA Board (Board) proposes to amend its regulation governing assessment of an annual operating fee to federal credit unions (FCUs). First, for purposes of calculating the annual operating fee, the proposed rule would amend the current rule to exclude from total assets any loan an FCU reports under the Small Business Administration's Paycheck Protection Program (PPP) or similar future programs approved for exclusion by the NCUA Board. Second, the proposed rule would delete from the current regulation references to the Credit Union System Investment Program and the Credit Union Homeowners Affordability Relief Program, both of which no longer exist. Third, the proposed rule would amend the period used for the calculation of an FCU's total assets. Currently, total assets are calculated using the FCU's December 31st Call Report of the preceding year. Under the proposed rule, total assets would be calculated as the average total assets reported on the FCU's previous four Call Reports available at the time the NCUA Board approves the agency's budget for the upcoming year, adjusted for any excludable programs as determined by the Board. Finally, the proposed rule also would make some minor technical changes.

The Board has separately published a document and requested public comment about the methodologies it uses for computing the Overhead Transfer Rate and setting the annual operating fee schedule for fees charged to FCUs. Members of the public are encouraged to comment about these methodologies by responding to the appropriate **Federal Register** document.

The notice relating to National Credit Union Administration Overhead Transfer Rate Methodology and Operating Fee Schedule Methodology is published elsewhere in this issue of the **Federal Register**.

DATES: Comments must be received on or before October 30, 2020.

ADDRESSES: You may submit written comments, identified by RIN 3133–AF24, by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (703) 518–6319. Include ''[Your Name]—Comments on Proposed Rule: Fees Paid by Federal Credit Unions'' in the transmittal.
- *Mail:* Address to Gerard S. Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

Public Inspection: You may view all public comments on the Federal eRulemaking Portal at *http://www.regulations.gov* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: James Holm, Supervisory Budget Analyst, Office of the Chief Financial Officer, at (703) 518–6570; Kevin Tuininga, Associate General Counsel, or John H. Brolin, Senior Staff Attorney, Office of General Counsel, at (703) 518–6540; or by mail at 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION:

I. Background

A. The NCUA Annual Budget and Fees Paid by FCUs

The NCUA charters, regulates, and insures deposits in FCUs and insures deposits in state-chartered credit unions that have their shares insured through the National Credit Union Share Insurance Fund (Share Insurance Fund). To cover expenses related to the NCUA's tasks, the Board adopts an annual budget in the fall of each year. The Federal Credit Union Act (FCU Act) provides two primary sources to fund the budget: (1) Requisitions from the Share Insurance Fund; [1] and (2) operating fees charged against FCUs.[2] The Board uses an allocation formula, the Overhead Transfer Rate (OTR), to determine the amount of the budget that it will requisition from the Share Insurance Fund.[3] Remaining amounts needed to fund the annual budget are charged to FCUs in the form of operating fees, based on each FCU's total assets.[4]

The FCU Act requires each FCU to, ''in accordance with rules prescribed by the Board [. . .] pay to the [NCUA] an annual operating fee which may be composed of one or more charges identified as to the function or functions for which assessed.'' [5] The fee must ''be determined according to a schedule, or schedules, or other method determined by the Board to be appropriate, which gives due consideration to the expenses of the [NCUA] in carrying out its responsibilities under the [FCU Act] and to the ability of [FCUs] to pay the fee.'' [6] The statute requires the Board to, among other things, ''determine the periods for which the fee shall be assessed and the date or dates for the payment of the fee or increments thereof.'' [7]

Section 701.6 of the NCUA's regulations governs operating fee processes.[8] The regulation establishes the following: (i) The basis for charging operating fees (*i.e.,* total assets of the FCU, with certain exclusions, as of December 31st of the preceding year); (ii) the notice the NCUA must provide to FCUs regarding the fees; (iii) coverage provisions providing certain exceptions for new FCU charters, conversions, mergers, and liquidations; and (iv) the assessment of administrative fees and interest for late payment, among other principles and processes.[9] Certain aspects of and adjustments to the operating fee process, such as the multipliers used to determine fees applicable to designated asset tiers, are not included in the NCUA's regulations. Instead, the Board generally adopts an operating fee schedule at an open meeting each year and publishes the schedule in the agency's annual budget and on its website.[10]

Section 701.6(a) sets out the basis on which the NCUA assesses the operating fee. Paragraph (a) provides that FCUs must pay the NCUA an annual operating fee based on the credit union's total assets.[11] The NCUA calculates an FCU's operating fee by multiplying the dollar amount of its total assets by a percentage set by the Board based on asset tiers after considering the expenses of the NCUA and the ability of FCUs to pay the fee. The term ''total assets'' for purposes of the operating fee presently includes all assets, with certain exclusions, reported on an FCU's Call Report as of December 31st of the previous fiscal year.

Operating fee payments are due from FCUs in April each year, and the NCUA prepares invoices using reported assets from the prior year's December Call Report.[12] In order to provide clarity to FCUs about their operating fee charges for the upcoming year, the Board typically approves the budget and sets the associated operating fee rates in November of the year before the operating fee is billed. Because the budget and operating fee rates are approved before December Call Report data is available, the Chief Financial Officer uses projected FCU asset growth to set the operating fee rates. Therefore, if actual total assets reported in December Call Reports are below the projected asset growth used for setting the operating fee rates, the NCUA will collect less in operating fee revenue than it requires to fund the budget. Conversely, if total assets reported in December Call Reports are greater than projected growth, the NCUA may collect more than is required.

[1] *See, e.g.,* 12 U.S.C. 1783(a) (making the Share Insurance Fund available ''for such administrative and other expenses incurred in carrying out the purpose of [Subchapter II of the FCU Act] as [the Board] may determine to be proper.'').

[2] 12 U.S.C. 1755(a) (''In accordance with rules prescribed by the Board, each Federal credit union shall pay to the Administration an annual operating fee which may be composed of one or more charges identified as to the function or functions for which assessed.'').

[3] *See, e.g.,* Request for Comment Regarding Revised Overhead Transfer Rate Methodology, 82 FR 29935 (June 30, 2017).

[4] 12 CFR 701.6(a).

[5] 12 U.S.C. 1755(a).

[6] 12 U.S.C. 1755(b).

[7] *Id.*

[8] 12 CFR 701.6.

[9] *Id.*

[10] In November 2015, the Board delegated authority to the Chief Financial Officer to administer the Board-approved methodology and to set the operating fees as calculated per the approved methodology each annual budget cycle beginning with 2016. *See* Board Action Memorandum on 2016 Operating Fee (Nov. 19, 2015), *https://www.ncua.gov/About/Documents/Agenda%20Items/AG20151119Item6a.pdf.* Since that time, the operating fee schedule has been published in the NCUA's annual budget. *See* 2020–2021 Budget Justification (December 12, 2019), *https://www.ncua.gov/files/agenda-items/AG20191212Item1b.pdf.*

[11] 12 CFR 701.6(a).

[12] *Id.*

B. The CARES Act and the SBA's Paycheck Protection Program

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, into law.[13] The law is designed to provide aid to the U.S. economy in the midst of the COVID–19 pandemic. The CARES Act authorized the Small Business Administration (SBA) to create a loan guarantee program, the Paycheck Protection Program (PPP), to help certain businesses affected by the COVID–19 pandemic meet payroll needs (including employee salaries, sick leave, other paid leave, and health insurance expenses), as well as mortgage, rent, and utilities expenses. Provided credit union lenders comply with the applicable lender obligations set forth in the SBA's interim final rule, the SBA will fully guarantee loans issued under the PPP, backed by the full faith and credit of the United States. Most federally insured credit unions are eligible to make PPP loans to members.[14] Under the CARES Act, PPP loans must receive a zero percent risk weighting for purposes of the NCUA's risk-based capital requirements.[15]

Following enactment of the CARES Act, the Board issued an interim final rule to make several amendments to the NCUA's regulations relating to PPP loans.[16] Of most relevance to this proposed rule, an April 27, 2020, interim final rule provided that if a covered PPP loan made by a federally insured credit union is pledged as collateral for a non-recourse loan that is provided as part of the Board of Governors of the Federal Reserve System's (FRB) PPP Liquidity Facility,[17] the covered loan can be excluded from a credit union's calculation of total assets for the purposes of calculating its net worth ratio. The exclusion of PPP loans pledged to the FRB's Liquidity Facility was comparable to an interim final rule issued by the other banking agencies with respect to their capital regulations,[18] which is consistent with the statutory requirement for the Board to prescribe a system of prompt corrective action that is, among other things, comparable to the section of the Federal Deposit Insurance Act that established prompt corrective action requirements for banks.

That change applied only to the calculation of the net worth ratio and not to other requirements or calculations in the NCUA's regulations that depend on a credit union's total assets. At present, an FCU must report the value of all of its PPP loans in its Call Reports, whether the FCU originated the loans, purchased them in the secondary market, or has pledged them to the FRB Liquidity Facility.[19] The value of PPP loans reported in Call Reports could therefore increase the total asset amounts the NCUA uses to compute the annual operating fees due. The Board is concerned that without a change to the NCUA's current operating fee regulation,[20] an FCU's PPP loans may subject the FCU to a higher operating fee, and this may impose a burden for participation in this program, or a disincentive to participate now that the program has been extended. As the PPP serves an important public purpose, the Board believes PPP loans warrant exclusion from total assets when determining operating fees to avoid these harms.

Under § 1755 of the FCU Act, the Board considers, among other things, FCUs' ability to pay assessments. The Board finds that an increase in an FCU's assets based on PPP loans—regardless of whether they are pledged to the PPP Liquidity Facility—poses no undue risk to the credit union's capital strength. Additionally, given the short-term and low-fee nature of PPP loans, FCUs that report increased total assets as a result of them are unlikely to have a corresponding increase in their ability to pay a higher assessment. Furthermore, excluding PPP loans from operating fee assessments makes the program more affordable to the participants and avoids imposing a burden based on participation in a program designed to provide an important public benefit. These benefits closely align with the mission of credit unions to support their member communities through trusted and affordable financial services.

Accordingly, based on this statutory analysis and application, this proposed rule has a broader scope of exclusion than the Board's April 27, 2020, interim final rule on PPP loans.

In addition, due to the possibility of additional economic stimulus through similar programs, the Board is proposing to incorporate a general statement in the regulation that contemplates the Board's exclusion of loans made under programs similar to the PPP from total assets when calculating operating fees. This change would provide the Board with flexibility to consider excluding assets related to future programs that may develop on short notice, particularly in cases where including such assets may create a disincentive for FCUs to participate. In a separate **Federal Register** document, the Board is requesting comment on the methodologies it uses to set the rate schedule for operating fees and how it determines the OTR. Members of the public are encouraged to comment about these methodologies by responding to the appropriate **Federal Register** notice. The notice relating to National Credit Union Administration Overhead Transfer Rate Methodology and Operating Fee Schedule Methodology is published elsewhere in this issue of the **Federal Register**.

II. Legal Authority

The Board is issuing this proposed rule pursuant to its authority under the FCU Act.[21] The FCU Act grants the Board a broad mandate to issue regulations governing both FCUs and, more generally, all federally insured credit unions. For example, section 120 of the FCU Act is a general grant of regulatory authority and authorizes the Board to prescribe rules and regulations for the administration of the FCU Act.[22] Section 105 of the FCU Act requires FCUs to pay an annual operating fee to the NCUA.[23] In particular, section 105(b) provides:

The fee assessed under this section shall be determined according to a schedule, or schedules, or other method determined by the Board to be appropriate, which gives due consideration to the expenses of the Administration in carrying out its responsibilities under this chapter and to the ability of Federal credit unions to pay the fee. The Board shall, among other things, determine the periods for which the fee shall be assessed and the

[13] Public Law 116–136 (Mar. 27, 2020).

[14] Credit unions that are currently permitted to make loans under the SBA's 7(a) program are automatically approved to make PPP loans. Federally insured credit unions that are not current SBA 7(a) lenders can receive approval by submitting an application to the SBA, unless they are currently designated as being in troubled condition or are subject to a formal enforcement action that addresses unsafe and unsound lending practices. Non-depository financing providers, such as credit union service organizations, may qualify as a PPP lender subject to the requirements listed in the interim final rule.

[15] Public Law 116–135 § 1102(a)(2).

[16] 85 FR 23212 (Apr. 27, 2020).

[17] The program was named as both the PPP Lending Facility and the PPP Liquidity Facility when the Board approved the interim final rule. It is now named the PPP Liquidity Facility in FRB documentation on the program.

[18] 85 FR 20387 (Apr. 13, 2020).

[19] *See* SBA Procedural Notice, Guidance on Whole Loan Sales of Paycheck Protection Program Loans (May 1, 2020), *available at https://www.sba.gov/sites/default/files/2020-05/5000-20024.pdf.*

[20] 12 CFR 701.6(a).

[21] 12 U.S.C. 1751 *et seq.*

[22] 12 U.S.C. 1766(a).

[23] 12 U.S.C. 1755(a).

date or dates for the payment of the fee or increments thereof.[24]

Accordingly, the FCU Act provides the Board with broad discretion to decide how the amount of the operating fee is determined.

III. Summary of the Proposed Rule

The proposed rule would amend § 701.6(a) by excluding PPP loans from the FCU's total assets for purposes of calculating its operating fee. In particular, the proposal would amend current § 701.6(a) to provide, among other things, that the operating fee shall be based on the total assets of each FCU, less loans made under the Small Business Administration's Paycheck Protection Program.[25] Under this proposed rule, participating FCUs would continue to report their assets in the quarterly Call Report. For purposes of determining the operating fee, the NCUA will exclude reported PPP loans in the calculation of total assets. The NCUA believes this change will ensure that FCUs interested in making PPP loans do not bear greater financial burdens for doing so. The Board proposes to exclude PPP loans from the calculation of total assets even if the PPP loans are not pledged to the FRB PPP Liquidity Facility because PPP loans pose no undue risk to the FCU's capital strength and, due to their unique structure, do not increase an FCU's ability to pay a higher operating fee. Excluding all reported PPP loans when determining total assets also ensures FCUs that do not pledge their PPP loans to the FRB are treated consistently with those FCUs that do. Absent such consistent treatment, FCUs that do not pledge their PPP loans to the FRB would bear a larger relative cost burden of the operating fee compared to those FCUs that do pledge their PPP loans.

Excluding PPP loans from the calculation of total assets is similar to the amendment the Board made to the calculation of total assets in a 2009 final rule to encourage FCU participation in the Credit Union System Investment Program (CU SIP) or the Credit Union Homeowners Affordability Relief Program (CU HARP).[26] Investments in these programs were excluded from the computation of total assets because the instruments were guaranteed by the Share Insurance Fund, posed no credit risk to the participating credit unions, and the exclusion was intended to encourage a greater participation rate in programs with a clear public benefit. The CU SIP ended in 2010. Similarly, CU HARP investments were issued by the U.S. Central Federal Credit Union and all of those investments matured prior to that credit union's liquidation in 2012. Because these programs no longer exist and have no remaining investments, the Board proposes to amend current § 701.6(a) to delete references to them. However, given the potential for additional programs similar to the PPP to arise in the near future or as a result of future economic crises, the Board proposes adding regulatory language that would contemplate exclusion of assets under similar programs without requiring references to the specific program in the regulation. The Board anticipates making exclusions of similar future programs by issuing an order, which may be published in a letter to FCUs or a similar notice. The Board invites comment on this approach.

In addition, the Board is proposing to amend current § 701.6(a) to use the average of FCUs' four most-recently reported quarterly assets to calculate operating fees and to make conforming amendments to the regulatory text to ensure this same approach is applied to merged and recently converted FCUs. The Board is proposing to use an average of total assets because it believes that doing so will reduce the effect of seasonal fluctuation in the total assets of FCUs, and will provide more certainty to FCUs about their operating fee charges for the forthcoming year. The change to a four-quarter average of reported assets also reduces the risk that the Board will collect less in operating fee revenue than it requires if actual assets reported in FCUs' December Call Reports are below the asset growth assumption used to set the operating fee rates in the budget.

In particular, the proposal would amend current § 701.6(a) to provide, among other things, that the operating fee shall be based on the average of total assets of each FCU based on data reported in the preceding four Call Reports (as reported on NCUA Form 5300 for natural person FCUs and Form 5310 for corporate FCUs), or as otherwise determined pursuant to paragraph (b) of § 701.6. Specifically, when determining the operating fee rate and the invoice amounts due, the NCUA Board will use the average of FCUs' four most-recent Call Reports available at the time the Board approves the budget for the forthcoming year.

The Board anticipates that this change will have no impact on current billing practices for newly chartered FCUs, since these credit unions do not receive an operating fee invoice until the second year after they are chartered. The Board will continue its current practice of treating merged FCUs and conversions of non-FCUs into FCUs as a single entity for purposes of calculating the average total assets that are the basis for determining the amount of operating fees due. For purposes of calculating the average total assets of an FCU that converts from or merges with a federally insured state-chartered credit union (FISCU), the Board proposes to compute comparable quarterly total assets using the Call Report data in the agency's possession. For conversions to an FCU charter from entities not insured by the NCUA, the Board proposes to average assets based only on Call Reports filed by the time the Board finalizes its budget because the NCUA cannot validate the accuracy or consistency of other data sources that may be similar to NCUA Call Reports.

In circumstances where a conversion to an FCU charter from an entity not insured by the NCUA occurs in the fourth quarter of the year before the operating fee is due, no Call Report data will be available at the time the Board finalizes its budget, and the converted entity will therefore pay no operating fee in the year following conversion. While this approach would produce a different result based only on insured status prior to conversion for entities that are otherwise of the same FCU status after the conversion, the Board believes its lack of access to verified Call Report data for non-NCUA insured entities supports the distinction. In addition, the Board expects this will be a rare occurrence, with relatively small impact, as the maximum amount of forgone revenue is one quarter of reported assets for which a converted entity could be exempt from paying an operating fee.

While this discrepancy could be avoided if the Board continued its current practice of estimating December Call Report data as the sole point of reference for determining total assets for the operating fee, the Board believes the four-quarter average is more equitable on the whole because it can account for seasonal share account fluctuations that some FCUs experience based on the characteristics and transaction patterns engaged in by their fields of membership. As discussed above, the proposed four-quarter average approach also would eliminate the risk that the Board could over- or under-collect operating fees based on differences between its estimation of and actual December Call Report data.[27] The Board

[24] 12 U.S.C. 1755(b).

[25] 15 U.S.C. 636(a)(36).

[26] 74 FR 29934 (June 24, 2009).

[27] While the proposed regulatory language introducing section 701.6(b)(2)(i)(B) could be read

Continued

requests comment on this proposed approach.

With respect to mergers where an entity not insured by the NCUA merges into a continuing FCU, the same issue exists with respect to the Board's access to data comparable to the Call Report for periods prior to the merger date. Here again, the proposal would combine assets looking back four quarters for mergers involving two FCUs or where a FISCU merges into a continuing FCU. On the other hand, for mergers into FCUs of entities that are not insured by the NCUA, the proposed regulation would not require combination of assets prior to the merger date, since the NCUA does not collect asset data for entities it does not insure. Instead the continuing FCU would pay a fee based only on assets reported on its own Call Reports. Depending on the specific timing of when the merger occurred, this could result in multiple quarters where the assets acquired from the non-NCUA insured entity are not included in the calculated average assets used to bill the continuing FCU. For the same reasons expressed above with respect to conversions, the Board believes the benefits of the four-quarter average outweigh the different treatment for mergers with FISCUs compared to mergers with entities not insured by the NCUA. The Board also invites public comment on this aspect of the proposal.

With respect to purchase and assumption transactions, the regulation presently designates that they will be treated as mergers in circumstances where an FCU purchases all or essentially all of the assets of another credit union. In this proposed rule, the Board retains that language, but requests comment on alternative approaches the Board may wish to consider. The Board acknowledges that, in some circumstances, determining whether a purchase and assumption included all or essentially all assets could be a difficult determination.

The Board also proposes some technical changes to existing rule language. First, the proposal clarifies that the NCUA will not issue refunds of operating fees to FCUs that convert to any other type of charter, not just a state-charter. This ensures the same treatment for a conversion to a mutual savings bank or any other charter type. The Board also proposes to remove the language ''in the year in which the conversion takes place'' from this provision, as a refund is never provided to any converting FCU, regardless of timing. The Board proposes the same changes to the rule text on refunds in the context of mergers.

In addition, the Board proposes to expand the situations expressly covered in the regulation to include conversions and mergers involving entities not insured by the NCUA. Such transactions could involve privately insured state-chartered credit unions or banking institutions. To support this expansion, the proposed regulatory language introduces the phrase ''entity not insured by the NCUA.'' In the language specifying that certain purchase and assumption transactions will be treated as mergers, the Board proposes to change the term ''credit union'' to ''depository institution'' to clarify that a purchase and assumption involving a bank, for example, would be treated in the same manner. Finally, the proposal would divide paragraph (b) of the regulation into additional subparagraphs to improve readability. The Board invites comments on these technical changes as well.

IV. Regulatory Procedures

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include federally insured credit unions with assets less than $100 million) and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule. The proposed rule would make a technical change to the period for measuring total assets for calculating the Operating Fee. However, the Board does not believe the impact will disproportionally impact small credit unions such that a regulatory flexibility analysis is required. First, small credit unions are still required to report assets on a quarterly basis, and the regulation only increases the number of quarters the NCUA will consider in adjusting the operating fee. Nor does the exclusion of PPP loans from assets increase reporting requirements, as the NCUA already has the information necessary to make that exclusion. Finally, although exclusion of PPP loans will decrease fee amounts for some small credit unions, the Board does not believe the change will amount to a significant impact on a substantial number of small entities. Accordingly, the NCUA certifies that the proposed rule will not have a significant economic impact on a substantial number of small credit unions.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new or amends existing information collection requirements.[28] For the purpose of the PRA, an information collection requirement may take the form of a reporting, recordkeeping, or a third-party disclosure requirement. The proposed rule does not contain information collection requirements that require approval by OMB under the PRA.[29]

C. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive Order. This proposed rulemaking would not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

D. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.[30]

List of Subjects in 12 CFR Part 701

Credit unions, Low income, Nonmember deposits, Secondary capital, Shares.

By the National Credit Union Administration Board on July 30, 2020.

Gerard Poliquin,

Secretary of the Board.

For the reasons discussed above, the Board proposes to amend 12 CFR part 701 as follows:

to require an entity not insured by the NCUA that converts to a FCU charter in the fourth quarter to pay a fee in the year following conversion, the lack of available Call Report data prior to the date the Board adopts the budget would preclude a fee in that scenario.

[28] 44 U.S.C. 3507(d); 5 CFR part 1320.

[29] 44 U.S.C. Chap. 35.

[30] Public Law 105–277, 112 Stat. 2681 (1998).

PART 701—Organization and Operations of Federal Credit Unions

■ 1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.;* 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 2. In § 701.6 revise paragraphs (a) and (b) to read as follows:

§ 701.6 Fees paid by Federal credit unions.

(a) *Basis for assessment.* Each calendar year, or as otherwise directed by the NCUA Board, each federal credit union shall pay an operating fee to the NCUA for the current fiscal year (January 1 to December 31) in accordance with a schedule fixed by the Board from time to time.

(1) *General.* The operating fee shall be based on the average of total assets of each federal credit union based on data reported in NCUA Forms 5300 and 5310 from the four quarters immediately preceding the time the Board approves the agency's budget or as otherwise determined pursuant to paragraph (b) of this section.

(2) *Exclusions from total assets.* For purposes of calculating the operating fee, total assets shall not include any loans on the books of a natural person federal credit union made under the Small Business Administration's Paycheck Protection Program, 15 U.S.C. 636(a)(36), or any similar program approved for exclusion by the NCUA Board.

(b) *Coverage.* The operating fee shall be paid by each federal credit union engaged in operations as of January 1 of each calendar year in accordance with paragraph (a), except as otherwise provided by this paragraph.

(1) *New charters.* A newly chartered federal credit union will not pay an operating fee until the year following the first full calendar year after the date chartered.

(2) *Conversions.*

(i) In the first calendar year following conversion:

(A) A federally insured state-chartered credit union that converts to a federal credit union charter must pay an operating fee based on the average assets reported in the year of conversion on NCUA Forms 5300 or 5310 from the four quarters immediately preceding the time the Board approves the agency's budget in the year of conversion.

(B) An entity not insured by the NCUA that converts to a federal credit union charter must pay an operating fee based on the assets, or average thereof, reported on NCUA Forms 5300 or 5310 for any one or more quarters immediately preceding the time the Board approves the agency's budget in the year of conversion.

(ii) A federal credit union converting to a different charter will not receive a refund of any operating fees paid to the NCUA.

(3) *Mergers.*

(i) In the first calendar year following merger:

(A) A continuing federal credit union that has merged with one or more federally insured credit unions must pay an operating fee based on the average combined total assets of the federal credit union and any merged federally insured credit unions as reported on NCUA Forms 5300 or 5310 in the four quarters immediately preceding the time the Board approves the agency's budget in the merger year.

(B) For purposes of this paragraph, a purchase and assumption transaction where the continuing federal credit union purchases all or essentially all of the assets of another depository institution shall be deemed a merger.

(ii) A federal credit union that merges with a federal or state-chartered credit union, or an entity not insured by the NCUA, will not receive a refund of any operating fee paid to the NCUA.

(4) *Liquidations.* A Federal credit union placed in liquidation will not pay any operating fee after the date of liquidation.

* * * * *

[FR Doc. 2020–16981 Filed 8–28–20; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0768; Airspace Docket No. 18–AWP–25]

RIN 2120–AA66

Proposed Amendment of Class D and E Airspace; Truckee, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify Class E airspace, designated as an extension to Class D or Class E surface airspace, at Truckee-Tahoe Airport. This action also proposes to modify Class E airspace extending upward from 700 feet above the surface. Lastly, this action proposes an administrative correction to all of the airspace's legal descriptions. This action would ensure the safety and management of instrument flight rule (IFR) operations at the airport.

DATES: Comments must be received on or before October 15, 2020.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1–800–647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–0768; Airspace Docket No. 18–AWP–25, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the 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 would amend the Class D and Class E airspace

at Truckee-Tahoe Airport, Truckee, CA, to support IFR operations at the airport.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Persons wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2020–0768; Airspace Docket No. 18–AWP–25''. 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 notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

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

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

Availability and Summary of Documents for Incorporation by Reference

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

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by modifying the Class E airspace at Truckee-Tahoe Airport. The proposal would reduce the dimensions of the Class E airspace areas, designated as an extension to a Class D or Class E surface airspace area. The airspace areas would be described as follows: That airspace extending upward from the surface within 1 mile each side of the 017° bearing from the airport, extending from the 4.2-mile radius of the airport to 9.7 miles north of the airport; and within 1.2 miles west and 0.9 miles east of the 316° bearing from the airport, extending from the 4.2-mile radius of the airport to 8.3 miles northwest of Truckee-Tahoe Airport.

This action also proposes to amend Class E airspace extending upward from 700 feet above the surface. The action proposes to properly size the airspace areas north of the airport and add an area over the airport and an area west of the airport. These areas are designed to contain IFR departures to 1,200 feet above the surface and IFR arrivals descending below 1,500 feet above the surface. These airspace areas would be described as follows: That airspace extending upward from 700 feet above the surface within a 4.2-mile radius of the airport, and within 2 miles each side of the 018° bearing from the airport, extending from 9.7 miles to 11.6 miles north of the airport, and within 1.1 miles each side of the 266° bearing from the airport, extending from the 4.2-mile radius to 13.5 miles west of the airport, and within 2.7 miles west and 1.9 miles east of the 321° bearing from the airport, extending from 8.3 miles to 14.8 miles northwest of the airport, and within an area beginning at 4.2 miles on the 324° bearing from the airport, then to 6.5 miles on the 324° bearing from the airport, then clockwise within a 6.5-mile radius of the airport to the 008° bearing from the airport, then along the 008° bearing to 4.2 miles, then counterclockwise within a 4.2-mile radius of the airport to the 324° bearing northwest of Truckee-Tahoe Airport.

Lastly, this action proposes an administrative amendment to all of the airspace's legal descriptions for Truckee-Tahoe Airport. To match the FAA aeronautical database, the airport's geographical coordinates should be updated to lat. 39°19′12″ N, long. 120°08′23″ W.

Class D, E2, E4, and E5 airspace designations are published in paragraphs 5000, 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 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 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

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, 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 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 5000 Class D Airspace.

* * * * *

AWP CA D Truckee, CA [Amended]

Truckee-Tahoe Airport, CA
(Lat. 39°19′12″ N, long. 120°08′23″ W)

That airspace extending upward from the surface to and including 8,400 feet MSL within a 4.2-mile radius of Truckee-Tahoe Airport. 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.

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

* * * * *

AWP CA E2 Truckee, CA [Amended]

Truckee-Tahoe Airport, CA
(Lat. 39°19′12″ N, long. 120°08′23″ W)

That airspace extending upward from the surface within a 4.2-mile radius of Truckee-Tahoe Airport. This Class E surface 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.

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

* * * * *

AWP CA E4 Truckee, CA [Amended]

Truckee-Tahoe Airport, CA
(Lat. 39°19′12″ N, long. 120°08′23″ W)

That airspace extending upward from the surface within 1 mile each side of the 017° bearing from the airport, extending from the 4.2-mile radius of the airport to 9.7 miles north of the airport; and within 1.2 miles west and 0.9 miles east of the 316° bearing from the airport, extending from the 4.2-mile radius of the airport to 8.3 miles northwest of Truckee-Tahoe Airport.

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

* * * * *

AWP CA E5 Truckee, CA [Amended]

Truckee-Tahoe Airport, CA
(Lat. 39°19′12″ N, long. 120°08′23″ W)

That airspace extending upward from 700 feet above the surface within a 4.2-mile radius of the airport, and within 2 miles each side of the 018° bearing from the airport, extending from 9.7 miles to 11.6 miles north of the airport, and within 1.1 miles each side of the 266° bearing from the airport, extending from the 4.2-mile radius to 13.5 miles west of the airport, and within 2.7 miles west and 1.9 miles east of the 321° bearing from the airport, extending from 8.3 miles to 14.8 miles northwest of the airport, and within an area beginning at 4.2 miles on the 324° bearing from the airport, then to 6.5 miles on the 324° bearing from the airport, then clockwise within a 6.5-mile radius of the airport to the 008° bearing from the airport, then along the 008° bearing to 4.2 miles, then counterclockwise within a 4.2-mile radius of the airport to the 324° bearing northwest of Truckee-Tahoe Airport.

Issued in Seattle, Washington, on August 25, 2020.

B. G. Chew,

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

[FR Doc. 2020–19068 Filed 8–28–20; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2020–0001; FRL–10013–25–Region 4]

Air Plan Approval; NC; Blue Ridge Paper SO_2 Emission Limits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve, through parallel processing, a draft source-specific State Implementation Plan (SIP) revision submitted by the State of North Carolina Department of Environmental Quality, Division of Air Quality (DAQ) through a letter dated June 24, 2020. North Carolina's June 24, 2020, draft source-specific SIP revision requests that EPA incorporate into the SIP more stringent sulfur dioxide (SO_2) permit limits than those currently contained in the SIP for the Blue Ridge Paper Products, LLC (also known as BRPP) facility located in the Beaverdam Township Area of Haywood County, North Carolina. Specifically, EPA is proposing to approve, into the SIP, specific SO_2 permit limits and associated operating restrictions, monitoring, recordkeeping, reporting (MRR) and testing compliance requirements established in a BRPP title V operating permit as permanent and enforceable SO_2 control measures. North Carolina submitted these limits to support its recommendation that EPA designate the Beaverdam Township Area as ''attainment/unclassifiable'' under the 2010 primary SO_2 national ambient air quality standard (NAAQS or standard) (also referred to as the 2010 1-hour SO_2 NAAQS). The purpose of this rulemaking is not to take action on whether these SO_2 emissions limits are adequate for EPA to designate the Beaverdam Township Area as attainment under the 2010 1-hour SO_2 NAAQS. Instead, EPA will determine the air quality status and designate remaining undesignated areas for the 2010 1-hour SO_2 NAAQS, including the Beaverdam Township Area, in a separate action. This proposed SIP approval does not prejudge that future designation action.

DATES: Comments must be received on or before September 30, 2020.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2020–0001 at *www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* 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, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Evan Adams, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9009. Mr. Evan Adams can also be reached via electronic mail at *adams.evan@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. What is parallel processing?

Parallel processing refers to a process that utilizes concurrent state and Federal proposed rulemaking actions. Generally, the state submits a copy of the proposed regulation or other revisions to EPA before conducting its public hearing and completing its public comment process under state law. EPA reviews this proposed state action and prepares a notice of proposed rulemaking under Federal law. In some cases, EPA's notice of proposed rulemaking is published in the **Federal Register** during the same time frame that the state is holding its public hearing and conducting its public comment process. The state and EPA then provide for concurrent public comment periods on both the state action and Federal action. If, after completing its public comment process and after EPA's public comment process has run, the state changes its final submittal from the proposed submittal, EPA evaluates those changes and decides whether to publish another notice of proposed rulemaking in light of those changes or to proceed to taking final action on the changed submittal and describing the state's changes in its final rulemaking action. Any final rulemaking action by EPA will occur only after the final submittal has been adopted by the state and formally provided to EPA.

In this case, however, EPA's and North Carolina's processes have not been perfectly concurrent. North Carolina's submittal was noticed for public comment by the State on June 24, 2020, and submitted to EPA for parallel processing on June 24, 2020; the submission has not yet been submitted in final form. The State's public comment period closed on July 27, 2020. After North Carolina submits the formal SIP revision, EPA will evaluate the submittal. If the State changes the formal submittal from the proposed submittal, EPA will evaluate those changes for significance. If EPA finds any such changes to be significant, then the Agency intends to determine whether to re-propose the action based upon the revised submission or to proceed to take final action on the submittal as changed by the State. Although EPA was unable to have a concurrent public comment process with the State, North Carolina's request for parallel processing allows EPA to begin action on the State's proposed submittal in advance of a formal, final submission.

II. What action is EPA proposing?

EPA is proposing to approve North Carolina's June 24, 2020, draft source-specific SIP revision to incorporate, into the North Carolina SIP, specific SO_2 permit limits and associated operating restrictions, MRR, and testing compliance requirements contained in title V operating permit number 08961T29 (T29) issued to BRPP by DAQ, on June 2, 2020. Specifically, EPA is proposing to incorporate into the North Carolina SIP the maximum permitted SO_2 emission limits and compliance requirements for the seven largest SO_2 emission sources at BRPP. Currently, there are no source-specific SO_2 limits in the North Carolina SIP for BRPP. These permitted SO_2 emission limits that EPA proposes to approve are therefore in addition to and therefore more stringent than generally applicable SO_2 requirements currently in the SIP for BRPP. Incorporating specific SO_2 permit limits and associated operating restrictions, MRR, and testing compliance parameters for BRPP into the North Carolina SIP would establish these specific SO_2 permitted limits and associated operating and compliance parameters as permanently federally enforceable control measures and strengthen the North Carolina SIP. More detail on these emission limits and conditions is provided below.

The purpose of this rulemaking is to act on North Carolina's request to approve into the SIP specific SO_2 permit limits (listed in Table 1 below), and associated operating, MRR, and testing requirements established in permit T29 at section 2.2.J thereby making these limits permanently federally enforceable to strengthen the North Carolina SIP. This rulemaking does not address whether the specific SO_2 permit limits and compliance permit conditions from operating permit T29 are adequate for EPA to promulgate an attainment/unclassifiable designation of the 2010 1-hour SO_2 NAAQS for the Beaverdam Township Area near BRPP, and EPA does not seek and will not respond to comments on that issue in taking final action on this SIP. EPA intends to designate the Beaverdam Township Area near BRPP under a separate national action for all remaining undesignated areas in the country, and any comments on the adequacy of the new limits to provide for attainment should be directed to EPA's docket for that action. See docket number EPA–HQ–OAR–2020–0037.

III. What is the background for this proposed action?

The following provides the relevant background related to the 2010 1-hour SO_2 NAAQS and this proposed action.

A. 2010 1-Hour SO_2 NAAQS

On June 22, 2010, EPA published notice of a revision of the primary SO_2 NAAQS, establishing a new 1-hour SO_2 standard of 75 parts per billion (ppb). *See* 75 FR 35520.[1] Under EPA's regulations at 40 CFR part 50, the 2010 1-hour SO_2 NAAQS is met at a monitoring site when the 3-year average of the annual 99th percentile of daily maximum 1-hour average concentrations is less than or equal to 75 ppb (based on the rounding convention in 40 CFR part 50, appendix T). *See* 40 CFR 50.17. The 2010 1-hour SO_2 NAAQS is violated at an ambient air quality monitoring site (or in the case of dispersion modeling, at an ambient air quality receptor location) when the 3-year average of the annual 99th percentile of the daily maximum 1-hour average concentrations exceeds 75 ppb, as determined in accordance with Appendix T of 40 CFR part 50. The existing primary (health-based) standard provides health protection for at-risk groups against respiratory effects following short-term (*e.g.,* 5-minute) exposures to SO_2 in ambient air.

B. SO_2 NAAQS Implementation

After EPA promulgates a new or revised NAAQS, EPA is required to designate all areas of the country as either ''nonattainment,'' ''attainment,'' or ''unclassifiable,'' for that NAAQS pursuant to section 107(d)(1) of the Clean Air Act (CAA or Act). The process for designating areas following promulgation of a new or revised NAAQS is contained in section 107(d) of the CAA. The CAA requires EPA to complete the initial designations process within 2 years of promulgating a new or revised standard. If the Administrator has insufficient information to make these designations by that deadline, EPA has the authority to extend the deadline for completing designations by up to 1 year.

[1] On February 25, 2019, based on a review of the full body of currently available scientific evidence and exposure/risk information, EPA retained the existing 2010 1-hour SO_2 primary NAAQS. *See* 84 FR 9866.

Through a **Federal Register** notice published on August 3, 2012, EPA announced that the Agency had insufficient information to complete the designations for the 2010 1-hour SO_2 standard within 2 years anticipated by the CAA and extended the designations deadline to June 3, 2013. *See* 77 FR 46295. EPA completed the first round of designations (''Round 1'') [2] for the 2010 1-hour SO_2 NAAQS on July 25, 2013, designating 29 areas in 16 states as nonattainment for the 2010 1-hour SO_2 NAAQS based on violating ambient air monitors. *See* 78 FR 47191 (August 5, 2013). At that time, EPA was not yet prepared to issue designations for the remaining areas of the country.

Subsequently, three lawsuits were filed against EPA in different United States (U.S.) District Courts alleging that the Agency had failed to perform a nondiscretionary duty under the CAA by not designating all portions of the country by the June 3, 2013, deadline. Under a consent decree entered by the court on March 2, 2015, in one of those cases, EPA was required to complete the remaining area designations according to a specific schedule with the following deadlines: July 2, 2016 (''Round 2''), December 31, 2017 (''Round 3''), and December 31, 2020 (''Round 4''). [3] [4]

On August 21, 2015 (80 FR 51052), EPA separately promulgated air quality characterization requirements in a final rule entitled ''Data Requirements Rule for the 2010 1-Hour Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standards,'' also known as the DRR. The DRR required state air agencies to characterize air quality, through air dispersion modeling or monitoring, in areas associated with sources that emitted 2,000 tons per year (tpy) or more of SO_2, or that have otherwise been listed under the DRR by EPA or state air agencies [5] and to provide this information to inform EPA's future designations. For states that chose to use ambient air monitoring to characterize air quality in areas with large SO_2 sources and satisfy the DRR, air agencies were required to deploy and begin operation of the monitors by January 1, 2017. EPA is required, pursuant to the March 2, 2015, court order, to finalize designations for the last remaining areas in the country (*i.e.,* for those areas that deployed SO_2 monitors to characterize SO_2 air quality or Round 4) by December 31, 2020.

On September 5, 2019, EPA issued a guidance memorandum, from Peter Tsirigotis, Director of the Office of Air Quality Planning and Standards, entitled ''Area Designations for 2010 Primary Sulfur Dioxide National Ambient Air Quality Standard—Round 4'' (also known as Round 4 SO_2 Designation Guidance) to provide information on the schedule and process for Round 4 area designations, which will address areas such as the Beaverdam Township Area that have not yet been designated under the NAAQS. In EPA's Round 4 SO_2 Designation Guidance, the Agency explained that EPA might consider, on a case-by-case basis, a designation other than nonattainment for areas with violating monitors where the source impacting the monitor has recently become subject to and is complying with permanent and federally enforceable SO_2 emission limits and modeling of those limits shows attainment of the 2010 SO_2 NAAQS, but the monitored design value does not yet account for these recent emissions reductions. EPA further explained that such new SO_2 emissions limits would need to be permanently federally enforceable and in effect before EPA finalizes the designation for the area for them to be considered in determining what available information is representative of the current air quality conditions in the area. EPA stated that in such circumstances, modeling of the new allowable emissions, which should follow the *Guideline on Air Quality Models* (Appendix W to 40 CFR part 51), can provide a more accurate characterization of current conditions at the time of designation than would monitoring of past conditions.

C. BRPP—Haywood County (Beaverdam Township)

BRPP, a subsidiary of Evergreen Packaging, is located in the City of Canton in Beaverdam Township, Haywood County, North Carolina, 25 kilometers (km) west of Asheville, North Carolina. The facility is located on a 200-acre site in downtown Canton on the Pigeon River. BRPP is a vertically integrated pulp and paper mill that produces specialty paperboard packaging products, and its primary operations are classified under North American Industry Classification System 322121 (Paper Except Newsprint Mills). The facility utilizes multiple boilers to produce steam for energy generation and provide heat for the pulping and paper making processes. The power boilers include two natural gas-fired package boilers: No. 1 and No. 2 Natural Gas Package Boilers (Unit ID G11050 and G11051); two coal-fired boilers: Riley Coal (G11039) and Riley Bark Boiler (G11042); and one coal/biomass fired boiler: No. 4 Power Boiler (G11040). The facility also operates two recovery boilers. Through cogeneration, by utilization of steam-driven turbines, the facility produces most of the electricity and steam required to run internal operations. Product paper is produced from the pulp on four paper machines. For additional facility process description, please see North Carolina's June 24, 2020, draft source-specific SIP revision.

BRPP was determined to be a source subject to further characterization pursuant to EPA's SO_2 DRR because the source emitted more than 2,000 tpy of SO_2 in 2014.[6] In accordance with the DRR, through a letter dated June 30, 2016,[7] DAQ chose the monitoring pathway to characterize SO_2 air quality in the vicinity of BRPP. In the Round 3 designation recommendation to EPA,[8] North Carolina requested EPA designate the Beaverdam Township Area for the 2010 1-hour SO_2 NAAQS by the court-ordered December 31, 2020 (Round 4) deadline based on 3 years (2017–2019) of ambient air quality monitoring data at

[2] The term ''Round'' in this instance refers to which ''round of designations.''

[3] EPA signed **Federal Register** notices of promulgation for Round 2 designations on June 30, 2016 (*see* 81 FR 45039 (July 12, 2016)) and on November 29, 2016 (*see* 81 FR 89870 (December 13, 2016)). EPA and state documents and public comments related to the Round 2 final designations are in the docket at *regulations.gov* with Docket ID No. EPA–HQ–OAR–2014–0464 and at EPA's website for SO_2 designations at *https://www.epa.gov/sulfur-dioxide-designations.*

[4] EPA signed **Federal Register** notices of promulgation for Round 3 designations on December 21, 2017 (*see* 83 FR 1098) (January 9, 2018) and on March 28, 2018 (*see* 83 FR 14597 (April 5, 2018)). EPA and state documents and public comments related to the Round 3 final designations are in the docket at *regulations.gov* with Docket ID No. EPA–HQ–OAR–2017–0003 and at EPA's website for SO_2 designations at *https://www.epa.gov/sulfur-dioxide-designations.*

[5] In lieu of modeling or monitoring, state air agencies, by specified dates, could elect to impose federally-enforceable emissions limitations on those sources restricting their annual SO_2 emissions to less than 2,000 tpy, or provide documentation that the sources have been shut down.

[6] Pursuant to the DRR, on January 15, 2016, North Carolina submitted to EPA a final list identifying DRR sources in the State (*i.e.,* sources that emitted greater than 2,000 tpy of SO_2 emissions) including the BRPP facility in the Beaverdam Township Area.

[7] Letter entitled ''Characterization of Air Quality Near Facilities Subject to SO_2 Data Requirements Rule'' from Pat McCroy, Governor of North Carolina, to Heather McTeer Toney, Regional Administrator for EPA Region 4. This letter is included in the docket for this proposed rulemaking and can be found at *https://www.epa.gov/sites/production/files/2016-07/documents/north_carolina_source_characterization.pdf.*

[8] January 13, 2017, letter entitled ''North Carolina's Recommendation on Boundaries for the 2010 1-hour Sulfur Dioxide (SO_2) National Ambient Air Quality Standard''. This letter can be found at *https://www.epa.gov/sites/production/files/2017-08/documents/nc-rec-3.pdf.*

the Canton DRR site monitor (AQS ID: 37–087–0013).

Pursuant to the DRR, DAQ sited the Canton DRR site monitor near the area of maximum concentration (*i.e.,* approximately 150 feet west of BRPP's fence line) in accordance with EPA's draft monitoring technical assistant documents (TADs) [9] and regulatory monitoring requirements at 40 CFR part 58. The Canton DRR site monitor began operation on November 15, 2016, but did not begin reporting data until January 1, 2017.

IV. Why did North Carolina submit the draft source-specific SIP revision for BRPP?

Subsequent to the Canton DRR site monitor commencing operation, the monitor measured a number of exceedances of the 2010 1-hour SO_2 standard in 2017. In an effort to address the SO_2 exceedances, North Carolina and BRPP entered into a Special Order by Consent 2017–002 (SOC) [10] on October 9, 2017, to implement facility process modifications, upgrade existing control equipment, as well as to install new control equipment to comply with the Boiler Maximum Achievable Control Technology (MACT) standard [11] by May 20, 2019, that cumulatively resulted in control and reduction of facility-wide SO_2 emissions. The MACT standards control hazardous air pollutants (HAPs), and BRPP's planned facility improvements for HAPs also reduced SO_2 emissions. Specific to SO_2, the SOC required BRPP to submit to DAQ a permit application and modeling analysis by March 1, 2018, to characterize the facility's emission sources and develop allowable SO_2 emission limitations based on modeled predictions of ambient SO_2 concentrations.

On September 12, 2019, DAQ issued a modification to BRPP's title V permit (Permit No. 08961T26 or T26) reflecting the requirements of the SOC with DAQ regarding development of SO_2 allowable emission limits supported by DAQ's modeled prediction of those limits resulting in attainment of the SO_2 standard.[12] Subsequent title V permit modifications resulted in the current title V permit—08961T29 or T29.[13] North Carolina is requesting EPA incorporate specific SO_2 emission limits and compliance parameters from permit T29 into the source-specific portion of the North Carolina SIP. DAQ established these specific SO_2 emission limits and compliance parameters pursuant to North Carolina's SIP-approved Rule 15A.NCAC.02D. 0501(c), Compliance with the National Ambient Air Quality Standards. As stated in Section 2.2.J of permit T29, pursuant to 15A NCAC 02D .0501(c), when controls more stringent than named in the applicable emission standards in Section .0500 are required to prevent violation of the ambient air quality standards or are required to create an offset, the permit shall contain a condition requiring these controls.

V. What criteria are EPA using to review this SIP revision?

EPA is evaluating North Carolina's June 24, 2020, draft source-specific SIP revision on the basis of whether it strengthens North Carolina's SIP. As mentioned above, there are no source-specific SO_2 requirements for BRPP in North Carolina's SIP. The new SO_2 permit limits and associated operating restrictions, MRR, and testing compliance parameters in BRPP's title V operating permit number T29 are authorized under 15A NCAC 02D .0501(c), which expressly requires more stringent controls to prevent violations of ambient air standards. EPA preliminarily concurs that these requirements are in addition to and more stringent than generally applicable SO_2 control requirements in the SIP for BRPP and will therefore strengthen North Carolina's SIP. The adequacy of these SO_2 permit limits and compliance parameters for providing for attainment is not a prerequisite for approval of these requirements into the SIP. However, EPA is working with North Carolina in the context of the separate area designations action to analyze whether modeling of these new permitted emission limits, once made permanently federally enforceable, would demonstrate attainment of the NAAQS and provide a more accurate characterization of current air quality conditions in the Beaverdam Township Area at the time of final designation than would the 3-year design value of the air quality monitor for the period of 2017–2019. If EPA approves these SO_2 permit limits and associated compliance parameters into the SIP in a timely fashion, EPA could evaluate a modeling demonstration that these limits provide for attainment as part of the rulemaking on the 2010 1-hour SO_2 NAAQS designation for the Beaverdam Township Area in Haywood County, North Carolina. However, if EPA approves this SIP under CAA section 110, such approval would not prejudge the outcome of EPA's forthcoming designation of the Beaverdam Township Area, as that future determination is occurring as part of a separate national notice and comment rulemaking under CAA section 107.[14]

VI. What did North Carolina submit in the draft source-specific SIP revision for BRPP?

North Carolina's June 24, 2020, draft source-specific SIP revision specifically requests that EPA incorporate into the SIP the maximum allowable SO_2 emissions limits for seven emissions sources, including operational and compliance requirements, from permit T29 because these units are the highest SO_2 emitting sources at the facility. These SO_2 emissions limits are listed in Table 1 below. Specifically, North Carolina's June 24, 2020, draft SIP revision requests that EPA incorporate specific permit conditions from section 2.2.J of permit T29 including portions of Table 2.2.J.1 and section 2.2.J.1.(c) through (i) which also include specific cross-reference permit conditions at section 2.2.D.1. These seven emission units are the No. 10 and 11 Recovery Furnaces (G08020 and G08021); No. 4 and 5 Lime Kilns (G09028 and G09029); and Riley Coal (G11039), Riley Bark (G11042) and No. 4 (G11040) Power Boilers.

[9] *See* Draft SO_2 NAAQS Designations Source-Oriented Monitoring Technical Assistance Document,- February 2016 (*https://www.epa.gov/sites/production/files/2016-04/documents/so2monitoringtad.pdf*). North Carolina's 2016–2017 Monitoring Network Plan at *https://www.epa.gov/sites/production/files/2017-10/documents/ncplan2016.pdf.*

[10] *See* Attachment 1 in DAQ's June 24, 2020, source-specific SIP revision found in the docket for this proposed action. SOC 2017–002 was entered into pursuant to North Carolina General Statute 143–215.110 by and between BRPP and the Environmental Management Commission.

[11] 40 CFR part 63 subpart DDDDD, National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (40 CFR 63.7480–63.7575).

[12] On February 28, 2018, BRPP submitted to DAQ a permit application for the significant modification of its title V operating permit in accordance with the SOC. *See* DAQ's June 24, 2020, source-specific SIP revision Attachment 2 entitled ''Air Permit Application for Incorporation of SO_2 Emission Limits into the Canton Mill's Permit February 2018, Updated March 2019.''

[13] Permit T29 and other versions issued after T26 permit did not modify any SO_2 emissions limitations or significantly change the monitoring, recordkeeping, reporting, or testing requirements established in T26. See Footnote #1 above. For a description of permit modifications, see Table 2 in North Carolina's June 24, 2020 draft SIP submission (pages 13 through 16).

[14] In the SIP submission, NC DAQ also references supplemental air quality modeling information NC DAQ previously provided to EPA to support approval of North Carolina's CAA section 110(a)(2)(D)(i)(I) ''Good Neighbor'' SIP for the SO_2 NAAQS. EPA is not taking any action regarding CAA section 110(a)(2)(D)(i)(I), nor is it prejudging any such submission or action.

TABLE 1—PERMIT T29 SO_2 EMISSION LIMITS PROPOSED FOR INCORPORATION INTO THE NORTH CAROLINA SIP

Emission Unit ID	Emission unit description	SO_2 permitted emission limit Title V Permit No. 08961T29 (lb/hr)
G08020	No. 10 Recovery Furnace-BLS—normal Operation	28.0
	No. 10 Recovery Furnace-ULSD—startup and shutdown	0.54
G08021	No. 11 Recovery Furnace-BLS—normal operation	28.0
	No. 11 Recovery Furnace-ULSD—startup and shutdown	0.54
G09028	No. 4 Lime Kiln	6.28
G09029	No. 5 Lime Kiln	10.47
G11039	Riley Coal Boiler	61.32
G11040	No. 4 Power Boiler	82.22
G11042	Riley Bark Boiler	68.00

BRPP implemented facility improvements and control measures to reduce SO_2 emissions and corresponding ambient SO_2 concentrations to comply with the 2010 1-hour SO_2 NAAQS. Specifically, in response to the SOC, BRPP implemented the construction, installation, and operation of multiple process improvements from March 28, 2015 to May 20, 2019. These improvements are discussed in Table 2 of North Carolina's June 24, 2020, draft SIP revision and summarized below.

On March 29, 2016, DAQ issued an air construction permit authorizing BRPP to proceed with facility-wide modifications for purposes of compliance with the Boiler MACT standards. On May 23, 2017, BRPP began operating two new natural gas-fired boilers, No.1 and No. 2 natural gas package boilers (G11050 and G11051). BRPP permanently shut down coal-fired boiler, Big Bill (G11037) on July 12, 2017, and Peter G (G11038) on November 30, 2017, to reduce SO_2 emissions. The two new natural gas package boilers replace these two coal-fired units. On November 17, 2017, BRPP installed natural gas burners on the No. 4 Power Boiler (G11040). BRPP commenced operation of new wet scrubbers on the Riley Coal (G11039) and the No. 4 Power Boilers on June 29, 2018, and August 1, 2018, respectively. On November 7, 2018, BRPP completed the conversion of auxiliary fuel for the recovery furnaces No. 10 and No. 11 (G08020 and G08021) from No. 6 fuel oil to ultra-low sulfur diesel (ULSD) fuel.

On November 12, 2019, DAQ issued permit T26, which established facility-wide enforceable SO_2 emission limits for 19 emission units at BRPP that emit SO_2 and associated operating restrictions, MRR and testing compliance parameters. Table 2.2.J.1 of permit T29 lists the maximum permitted SO_2 emission limits established at BRPP. These control measures implemented at BRPP between 2017 and 2019 resulted in the reduction of actual SO_2 emissions from 5,875 tons in 2017 to 405 tons in 2019, a 93 percent reduction (reduction of 5,470 tons). Between 2018–2019 the facility reduced emissions from 2,901 tons to 405 tons, respectively) or 86 percent (2,496 tons).

Below is a description of the seven major SO_2-emitting units at BRPP with emissions limits that DAQ has requested EPA incorporate into the North Carolina SIP to ensure the modeled emission limits are permanently federally enforceable for each emission unit:

• No. 10 and No. 11 Recovery Furnace (G08020 and G08021)—These two emission units recover pulping chemicals from spent pulping liquor (black liquor). Each recovery furnace is subject to a pair of SO_2 permitted limits based on ULSD and black liquor solids (BLS) fuel usage. The ULSD is used specifically during startup and shutdown, and the BLS is used during normal operation. During start-up, fuel oil is burned for a period of time to warm up the furnace. The exhaust parameters during startup differ from that of normal operation (*i.e.,* the exhaust flow and temperature are lower when only startup fuel is being fired). Each recovery furnace is subject to two enforceable SO_2 emission limits for start-up and shutdown (0.54 pounds per hour (lb/hr)) firing only ULSD fuel oil (with a maximum sulfur content of 15 parts per million (ppm))(section 2.2.J.1.c.i.) and a separate enforceable emission limit of 28.0 lb/hr when firing black liquor solids. These units are not equipped with control devices and are required to conduct source testing annually under condition 2.2.J.1.d to determine compliance with the emission limits listed in Table 2.2.J.1. of title V permit T29 and are required to maintain records for start-up and shutdown operations and fuel oil supply.

• No. 4 Power, Riley Coal, and Riley Bark—These coal-fired boilers are subject to enforceable SO_2 emission limits of 82.22 lb/hr, 61.32 lb/hr and 68.00 lb/hr, respectively. These coal-fired boilers are operated to produce steam for energy generation and provide heat for the pulping and paper making processes. The Riley Coal and No. 4 Power Boilers are each equipped with a caustic wet scrubber, and the Riley Barker has a venturi-type wet scrubber with caustic addition. For the three boilers, the wet scrubber on each boiler is required to be operated continuously and is considered a part of the physical and operational design of the boilers. Each scrubber is subject to MRR, testing, and compliance certification requirements specified in T29 permit conditions 2.2.J.1.c.i.vii and 2.2.J.1.(d) through (i) which include Boiler MACT parametric monitoring requirements.[15] These three coal-fired units are not equipped with continuous emission monitoring system (CEMS) to continuously collect, record, and report emission data for compliance with an array of enforceable emission standards and other regulatory requirements. In lieu of CEMS, the permit requires BRPP to install, operate, and maintain a

[15] Parametric monitoring is a common method to ensure continuous compliance with an emissions limit in lieu of continuous direct sampling/monitoring of the subject pollutant, in this case SO_2. This is a common regulatory approach used in various Federal regulations such as the MACT and New Source Performance Standards (NSPS). In parametric monitoring, certain performance parameters that are critical to the proper operation of the emission control device are continuously monitored. These parameters can include scrubber recirculation flow, pH, and pressure drop. The compliance parameter minimum levels are typically established during emission source testing to ensure operating at those parameter levels meets the underlying emission control requirement.

continuous monitoring system (CMS) [16] for the wet scrubbers parametric monitoring pursuant to the Boiler MACT monitoring requirements at 40 CFR 63.7525 (d) through (g) and § 63.7535.[17] BRPP is required to continuously monitor the minimum scrubbing liquid pH and recirculation liquid flowrate to verify compliance with the applicable SO_2 emissions for these three boilers. Minimum parametric values for the scrubbing liquid pH and recirculation liquid flowrate are established through performance testing and shown in Table 2.2 J.2 of permit T29 for the wet scrubbers (permit conditions 2.2.J.1.c.vii.A through E). The facility is required to determine the source-specific scrubber liquid pH and flow rate calculated as 3-hour block averages based on three 1-hour source test runs to determine continuous compliance with the SO_2 permit limit in Table 2.2 J.1 as required at condition 2.2.J.1.c.vii. Condition 2.2.J.1.c.vii.E. requires BRPP to maintain the parametric scrubbing flow rate and pH levels at or above the minimum levels confirmed or re-established by the most recent performance test performed pursuant to condition 2.2.J.1.d and approved by DAQ that demonstrates compliance with the corresponding emission limits. Maintaining the 3-hour block averages for the pH and scrubber liquid flow at or above the minimum values is expected to result in maintaining compliance with emission rate. For the Riley Coal, Riley Bark, and No. 4 Power Boiler scrubbers, Table 2.2 J.2 identifies the parameters that BRPP is required to monitor—the minimum pH and recirculation flow rate (gpm) and provides the values for pH and recirculation flow rate (gpm) from the most recent SO_2 performance testing, and the date of the latest testing for the three coal-fired boilers. Table 2.2 J.2 simply shows the values confirmed or re-established by the most recent performance testing that demonstrated compliance at the time of permit issuance as explained in condition 2.2.J.vii.E. For purposes of the source-specific SIP revision, condition 2.2.J.vii.E provides the enforceable provision for parametric monitoring—BRPP is required to meet the minimum values confirmed or re-established in the most recent performance testing. BRPP is required to conduct periodic performance testing of the wet and venturi scrubbers. If the currently applicable parametric values are revised in subsequent performance testing,[18] the newly established values are enforceable upon approval by DAQ.[19] Deviations from the applicable parameters must be reported to the DAQ. For the Riley Coal and No. 4 Power Boilers, testing is required on an annual basis or, once a test is conducted such that the results of the test are less than 80 percent of the SO_2 emission limit, BRPP will be required to stack test only once every five years as required at condition 2.2.J.1.d Table 2.2 .J.3 in T29 identifies which units are subject to performance testing as required at condition 2.2.J.1.d.

- No. 4 and No. 5 Lime Kilns—The No. 4 Lime Kiln (G09028) is subject to an enforceable SO_2 emissions limit of 6.28 lb/hr and is equipped with a wet scrubber. The No. 5 Lime Kiln (G09029) is subject to an enforceable SO_2 emissions limit of 10.47 lb/hr and equipped with a venturi-type wet scrubber.[20] These two emission units are part of the Kraft pulp mill chemical recovery cycle and, following startup, they calcine lime mud ($CaCO_3$) to produce lime product (CaO). During normal operation, the kilns emit very little SO_2 because the calcium in the lime mud acts as a natural scrubbant by absorbing sulfur. The wet scrubbers are primarily in place to control emissions of particulate matter (PM) and total reduced sulfur (TRS), as required at condition 2.1.O.1, but also control emissions of SO_2 during startup and can provide some control of SO_2 during normal operation. The lime kilns burn a combination of No. 6 fuel oil and natural gas during both startup and normal operation, with the majority of the heat input coming from natural gas. The kilns go through startup approximately once per month for Kiln No. 4 and every other month for Kiln No. 5. To ensure compliance with the hourly SO_2 emissions limit, BRPP is required to continuously operate the scrubbers and comply with the operating restrictions, testing, recordkeeping, and reporting requirements set forth in conditions 2.2.J.1.d through (i) including Table 2.2 J.3. In the case of the lime kilns, the parametric monitoring requirements for SO_2 in permit T29 refer to pre-existing air permit and regulatory requirements for proper scrubber operation and air emissions control in condition 2.2.D.1, which establish conditions for the Federal MACT Standard 40 CFR part 63 Subpart MM ''*National Emission Standards for Hazardous Air Pollutants (NESHAP) for Chemical Recovery Combustion Sources.*'' As such, the facility is required to operate the scrubbers for PM control (which also results in SO_2 control) by regulations that are in addition to the SO_2 control requirements specified in condition 2.2.J of permit T29. These requirements, namely conditions 2.2.D.1(f) through (r) as they apply to lime kilns #4 and 5, are cross referenced in condition 2.2.J.1 of the permit as the basis to ensure compliance with the SO_2 emission limits in Table 2.2 J.1. Thus, BRPP must install, calibrate, maintain, and operate a continuous parameter monitoring system that can be used to determine and record the pressure drop across each scrubber and the scrubbing liquid flow rates. These parameters are continuously monitored, recorded, and reduced to 3-hour averages for comparison to the minimum operating limits established in accordance with condition 2.2.D.1.h and those in Table 2.2 D.2. Parameters must be maintained above the minimum established values. Deviations from the established parameters must be reported to DAQ. To verify compliance with the emission limitations in permit T29, BRPP is required to perform annual testing or, once a test is conducted such that the results of the test are less than 50 percent of the emission limit, the facility is required to stack test only once every five years pursuant to condition 2.2.J.1.d. This reduction in testing frequency for sources with control devices, monitored operating parameter limits, and margins of

[16] 40 CFR 63.1 defines CMS as a comprehensive term that may include, but is not limited to, continuous emission monitoring systems, continuous opacity monitoring systems, continuous parameter monitoring systems, or other manual or automatic monitoring that is used for demonstrating compliance with an applicable regulation on a continuous basis as defined by the regulation.

[17] Pursuant to 63.7525 (d) through (g), BRPP must operate the CMS in accordance with the criteria on the collection of data and recordkeeping, inspection, and validation requirements at 63.7525(d) (except (d)(4)) and 63.7535; and must meet the criteria for the operation of flow and pH sensors of 63.7525(e) and (g). In lieu of the 30-day rolling average per 62.7525(d)(4), BRPP is required to maintain the 3-hour block average for the parameters in Table 2.2.J.2 at or above the levels required in the permit.

[18] The initial parametric monitoring ranges identified in Table 2.2.J.2 have already been established by performance tests; any tests conducted subsequent to that time are used to either confirm that the monitoring ranges are still valid or to re-establish new ranges if the tests indicate that is necessary.

[19] If revised parametric values are approved based on subsequent performance testing, the permit may be revised to change the values shown in Table 2.2 J.2, pursuant to condition 2.2.J.e.

[20] Source testing was conducted on each lime kiln during normal operation, and the source test results showed that the emission rate for each kiln was much lower than the emission rate, calculated using the emission factor that was used to establish the SO_2 limit. The permitted emission rate is therefore conservative, and normal emission rates are expected to be quite low, based on stack test results, and contribute little to the facility's ambient SO_2 impact.

compliance are consistent with the federal rules applicable to the facility (*i.e.,* NSPS, MACT, compliance assurance monitoring, and title V) and EPA guidance. BRPP is in the process of upgrading its scrubbers for lime kilns 4 and 5. Thus, in the permit T29, Table 2.2 D–2 establishes operating parameter limits for operations prior to and after the upgrades. For lime kiln #4, recirculation liquid flow and differential pressure must meet the minimum operating limits established in Table 2.2 D–2 identified as applicable prior to the upgrade. Following the upgrade, BRPP will be required to meet the minimum values for these parameters recommended by the manufacturer as an interim measure and will be required to conduct testing to establish site-specific limits. Similarly, for lime kiln #5, the permit requires BRPP to meet minimum operating limits in Table 2.2 D–2 prior to the upgrade. Lime kiln #5 uses a venturi-type scrubber and is required to meet minimum limits for venturi liquid flow, quench liquid flow, and differential pressure. Again, following the upgrade, this scrubber is required to meet manufacturer's recommended minimums for these parameters as an interim measure and conduct testing to establish site-specific limits. NC DAQ interprets condition 2.2.J.1.c.iii to require BRPP to meet the operating limits in Table 2.2 D–2, including any operating limits established through testing under 2.2.D.1.h, in accordance with the monitoring exceedance provision 2.2.D.1.j., to ensure the SO_2 emission limitations in Table 2.2 J.1 will not be exceeded for these lime kilns. The scrubber-specific minimum monitoring parameters from performance tests approved by the DAQ will supersede the manufacturer's recommended limits without requiring a permit or SIP revision.

VII. Incorporation by Reference

In this document, EPA is proposing to include, in a final EPA rule, regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing the incorporation by reference into North Carolina's SIP the conditions identified below from title V operating Permit No. 08961T29 issued by DAQ to BRPP with an effective date of June 2, 2020. These permit conditions relate to enforcement of and compliance with SO_2 emission limitations at BRPP for seven SO_2 emitting units. Specifically, DAQ has requested EPA incorporate into the North Carolina SIP condition 2.2.J.b and the lb/hr SO_2 emission limitations in Table 2.2 J.1 for the No. 10 and No. 11 Recovery Furnaces (G08020 and G08021), No. 4 and No. 5 Lime Kilns (G09028 and G09029) and Riley Bark, Riley Coal, and No. 4 Power Boilers (G11042, G11039 and G11040). North Carolina has also requested EPA incorporate into the SIP the following operating, MRR, and testing conditions to ensure compliance with SO_2 emission limitations identified in Table 2.2 J.1 of condition 2.2.J.1.b: (1) For the No. 10 and No. 11 Recovery Furnaces (G08020 and G08021)—condition 2.2.J.1.c.i; (2) for No. 4 and No. 5 Lime Kilns (G09028 and G09029)—condition 2.2.J.1.c.iii; condition 2.2 D.1.f.ii; Table 2.2.D–2; condition 2.2 D.1.h; condition 2.2 D.1.i.ii; condition 2.2 D.1.j.ii; conditions 2.2 D.1.l.ii, 2.2 D.1.l.iii, 2.2 D.1.l.iv, 2.2 D.1.l.v, 2.2 D.1.l.vii, and 2.2 D.1.l.viii; condition 2.2 D.1.m; condition 2.2 D.1.n; condition 2.2 D.1.o, and condition 2.2 D.1.p.iii; (3) for the Riley Bark, Riley Coal and No. 4 Power Boilers (G11042, G11039 and G11040)—condition 2.2.J.1.c.vii, including Table 2.2 J.2; (4) Testing—condition 2.2.J.1.d and Table.2.2 J.3, (5) condition 2.2.J.1.e; (6) Recordkeeping—conditions 2.2 J.1.g.i, 2.2 J.1.g.ii, and 2.2 J.1.g.iii; (7) Reporting—conditions 2.2.J.1.h and 2.2.J.1.i. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VIII. Proposed Action

EPA is proposing to approve SO_2 emissions limits and associated operating restrictions, MRR, and testing compliance parameters from BRPP's title V operating permit T29 into the North Carolina SIP. EPA confirms that the SO_2 emissions limits and associated operating restrictions, MRR, and testing compliance parameters for BRPP are more stringent than requirements that are currently approved into the North Carolina SIP for BRPP. By incorporating these SO_2 permit limits and associated operating restrictions, MRR, and testing compliance parameters into the North Carolina SIP, these requirements will become permanently federally enforceable and strengthen the North Carolina SIP.

IX. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

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

Dated: July 31, 2020.

Mary Walker,

Regional Administrator, Region 4.

[FR Doc. 2020–17231 Filed 8–28–20; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 600

[EPA–HQ–OAR–2020–0314; FRL–10012–24–OAR]

RIN 2060–AU89

Technical Correction to the Flex-Fuel Vehicle Provisions in CAFE Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to correct an error in EPA's regulations for test procedures used in the Corporate Average Fuel Economy (CAFE) program finalized in a 2012 rulemaking. EPA established the procedures under the general provisions of Energy Policy and Conservation Act (EPCA) which authorize EPA to establish test and calculation procedures for CAFE. The correction clarifies the method for how flex-fuel vehicles are accounted for in manufacturer fuel economy calculations in model years 2020 and later. This correction allows the program to be implemented as originally intended in the 2012 rule. This proposed action is not expected to result in any significant changes in regulatory burdens or costs. In the ''Rules and Regulations'' section of this **Federal Register**, we are taking direct final action without a prior proposed rule. If we receive no adverse comment, we will not take further action on this proposed rule.

DATES: *Comments:* Written comments must be received by October 15, 2020. If EPA receives a request for a public hearing by September 8, 2020, we will publish information related to the hearing and new deadline for public comment in a subsequent **Federal Register** document.

Public hearing: EPA will not hold a public hearing on this matter unless a request is received by the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble by September 8, 2020. If EPA receives such a request, we will hold a public hearing. Additional information about the hearing would be published in a subsequent **Federal Register** document.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2020–0314, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2020–0314 in the subject line of the message.
- *Fax:* (202) 566–9744 Include Docket ID No. EPA–HQ–OAR–2020–0314 on the cover of the fax.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, OAR, Docket EPA–HQ–OAR–2020–0314, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery/Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document. 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.*

FOR FURTHER INFORMATION CONTACT: Christopher Lieske, Office of Transportation and Air Quality (OTAQ), Assessment and Standards Division (ASD), Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214–4584; email address: *lieske.christopher@epa.gov* fax number: (734) 214–4816.

SUPPLEMENTARY INFORMATION:

I. Why is EPA issuing this proposed rule?

This document proposes to correct an error in EPA's regulations for test procedures used in the Corporate Average Fuel Economy (CAFE) program finalized in a 2012 rulemaking. The correction clarifies the method for how flex-fuel vehicles are accounted for in manufacturer fuel economy calculations in model years 2020 and later. This correction allows the program to be implemented as originally intended in the 2012 rule.

We have published a direct final rule in the ''Rules and Regulations'' section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule; that document also includes draft regulations detailing all the amendments under consideration.

If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the direct final rule, or the relevant provisions of the rule, will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

II. Does this action apply to me?

This action affects companies that manufacture or sell passenger automobiles (passenger cars) and non-passenger automobiles (light trucks) as defined under NHTSA's CAFE regulations.[1] Regulated categories and entities include:

[1] ''Passenger car'' and ''light truck'' are defined in 49 CFR part 523.

Category	NAICS codes [A]	Examples of potentially regulated entities
Industry	336111 336112	Motor Vehicle Manufacturers.
Industry	811111 811112 811198 423110	Commercial Importers of Vehicles and Vehicle Components.
Industry	335312 811198	Alternative Fuel Vehicle Converters.

[A] North American Industry Classification System (NAICS).

This list is not intended to be exhaustive, but rather provides a guide regarding entities likely to be regulated by this action. To determine whether particular activities may be regulated by this action, you should carefully examine the regulations. You may direct questions regarding the applicability of this action to the person listed in **FOR FURTHER INFORMATION CONTACT**.

III. Public Participation

EPA will keep the record open until October 15, 2020. All information will be available for inspection at the EPA Air Docket No. EPA–HQ–OAR–2020–0314. Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2020–0314, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, 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/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

IV. Proposed Provisions

This proposal would correct a technical error in EPA regulations pertaining to the treatment of model year (MY) 2020 and later E85 flex-fuel vehicles (FFVs) in the Corporate Average Fuel Economy (CAFE) program. These provisions were established in the 2012 final rule ''2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards,'' where EPA adopted new test procedures for weighting the measured fuel economy of MY 2020 and later FFVs when the vehicles are tested on both E85 and gasoline test fuels.[2] EPA established the procedures under the general provisions of Energy Policy and Conservation Act (EPCA) which authorize EPA to establish test and calculation procedures for CAFE.[3]

49 U.S.C. 32905 specifies how the fuel economy of dual fuel vehicles is to be calculated for the purposes of CAFE through the 2019 model year. The basic calculation includes a 50/50 harmonic average weighting of the fuel economy for the alternative fuel and the conventional fuel, irrespective of the actual usage of each fuel. In a related provision, 49 U.S.C. 32906, the amount by which a manufacturer's CAFE value (for domestic passenger cars, import passenger cars, or light-duty trucks) can be improved by the statutory incentive for dual fuel vehicles is limited by EPCA to 1.2 mpg through 2014, and then gradually reduced until it is phased out entirely starting in model year 2020.[4]

Recognizing the expiration of the special calculation procedures in 49 U.S.C. 32905 for dual fuel vehicles, EPA established, in the 2012 rule, calculation procedures for model years 2020 and later FFVs under the general provisions of EPCA noted above authorizing EPA to establish CAFE testing and calculation procedures. EPA regulations at 40 CFR 600.510–12(c)(2)(v) specify weighting the fuel economy measured when an FFV is tested on E85 and gasoline test fuel using the same weighting factor as is used in the greenhouse gas program for weighting CO_2 emissions measured on the two fuels.[5] As part of the 2012 rule, NHTSA modified its regulations at Part 536.10 to limit the applicability of the EPCA limits to MYs 2019 and earlier and to state that for MYs 2020 and beyond a manufacturer must calculate the fuel economy of dual-fuel vehicles in accordance with EPA's regulations at 40 CFR 600.510–12(c)(2)(v).

The preamble for the 2012 rule summarized EPA's approach for MY 2020 and later as follow: ''EPA is finalizing its proposal, under its EPCA authority, to use the ''utility factor'' methodology for PHEV and CNG vehicles described above to determine how to apportion the fuel economy when operating on gasoline or diesel fuel and the fuel economy when operating on the alternative fuel. For FFVs under the CAFE program, EPA is using the same methodology it uses for the GHG program to apportion the fuel economy, namely based on actual usage of E85. As proposed, EPA is continuing to use Petroleum Equivalency Factors and the 0.15 divisor used in the MY 2012–2016 rule for the alternative fuels,

[2] See 77 FR 62830 and 63127, October 15, 2012.

[3] 49 U.S.C. 32904(a), (c).

[4] 49 U.S.C. 32906.

[5] This weighting factor is commonly referred to as the ''F-factor.'' The F-factor is a value specified by EPA in accordance with 40 CFR 600.510–12(k) based on EPA's assessment of the real-world use of E85 over the life of the FFVs.

however with no cap on the amount of fuel economy increase allowed.'' [6]

EPA noted in the 2012 preamble ''[i]n a related provision, 49 U.S.C. 32906, the amount by which a manufacturer's CAFE value (for domestic passenger cars, import passenger cars, or light-duty trucks) can be improved by the statutory incentive for dual fuel vehicles is limited by EPCA to 1.2 mpg through 2014, and then gradually reduced until it is phased out entirely starting in model year 2020. With the expiration of the special calculation procedures in 49 U.S.C. 32905 for dual fueled vehicles, the CAFE calculation procedures for model years 2020 and later vehicles need to be set under the general provisions authorizing EPA to establish testing and calculation procedures.'' [7] The 2012 rule preamble also notes ''NHTSA interprets section 32906(a) as not limiting the impact of duel fueled vehicles on CAFE calculations after MY2019.'' [8] The 2012 rule preamble states ''we interpret Congress' statement in section 32906(a)(7) that the maximum increase in fuel economy attributable to dual-fueled automobiles is '0 miles per gallon for model years after 2019' within the context of the introductory language of section 32906(a) and the language of section 32906(b), which, again, refers clearly to the statutory credit, and not to dual-fueled automobiles generally. It would be an unreasonable result if the phaseout of the credit meant that manufacturers would be effectively penalized, in CAFE compliance, for building dual-fueled automobiles . . .'' [9] EPA believes all of these statements from the 2012 final rule make clear EPA's intent not to apply the 49 U.S.C. 32906 credit limits to CAFE calculations for model year 2020 and later vehicles.

A discrepancy in EPA's regulations exists in section 40 CFR 600.510–12(h), where prior to the 2012 rule, EPA codified the EPCA limits in EPA's regulations. These regulations specify that the impact of certain dual-fuel vehicles on a manufacturer's fleet CAFE calculations is limited to 0.0 for MY 2020 and later. EPA inadvertently did not revise the regulations at 40 CFR 600.510–12(h) to account for the 2012 rule's treatment of MY 2020 and later FFVs. The existing 40 CFR 600.510–12(h) provisions may be read as applying the EPCA limits to MY 2020 and later FFVs, inconsistent with the clear intent of the 2012 rule. This proposal would correct this error by making narrow revisions to this section of the regulations to clarify that the limits do not apply to MY 2020 and later FFVs, where the emissions of those vehicles are calculated in accordance with 40 CFR 600.510–12(c)(2)(v), consistent with the intent of the 2012 final rule.

For additional discussion of the proposed rule changes, see the direct final rule EPA has published in the ''Rules and Regulations'' section of today's **Federal Register**. This proposal incorporates by reference all the reasoning, explanation, and regulatory text from the direct final rule.

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

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

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act

This action does not impose any new information collection burden under the PRA, since it merely clarifies and corrects existing regulatory language. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number of 2060–0104.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This rule merely clarifies and corrects existing regulatory language. We therefore anticipate no costs and therefore no regulatory burden associated with this rule.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments. Requirements for the private sector do not exceed $100 million in any one year.

F. Executive Order 13132: Federalism

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

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

This action does not have tribal implications as specified in Executive Order 13175. This rule only corrects and clarifies regulatory provisions that apply to light-duty vehicle manufacturers. Tribal governments would be affected only to the extent they purchase and use regulated vehicles. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This proposed rule merely corrects and clarifies previously established regulatory provisions.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note)

[6] 77 FR 62653.
[7] 77 FR 62830.
[8] 77 FR 62830.
[9] 77 FR 63020.

directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs agencies to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action modifies existing regulations to correct an error in the regulations and therefore involves technical standards previously established by EPA. The amendments to the regulations do not involve the application of new technical standards. EPA is continuing to use the technical standards previously established in its rules regarding the light-duty vehicle GHG standards for MYs 2017–2025. See 77 FR 62960 and 85 FR 25265.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). This regulatory action merely corrects previously established provisions that auto manufacturers use to demonstrate compliance for light-duty vehicles.

List of Subjects in 40 CFR Part 600

Environmental protection, Administrative practice and procedure, Electric power, Fuel economy, Labeling, Reporting and recordkeeping requirements.

Andrew Wheeler,

Administrator.

[FR Doc. 2020–17214 Filed 8–28–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 206

[Docket ID: FEMA–2019–0012]

RIN 1660–AB00

Public Assistance Appeals and Arbitrations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Emergency Management Agency (FEMA) is proposing regulations to implement the new right of arbitration authorized by the Disaster Recovery Reform Act of 2018 (DRRA), and to revise its regulations regarding first and second Public Assistance appeals.

DATES: Comments must be received no later than October 30, 2020.

ADDRESSES: You may submit comments, identified by Docket ID: FEMA–2019–0012, via the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Shabnaum Amjad, Deputy Associate Chief Counsel, Regulatory Affairs, Office of Chief Counsel, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472. Phone: 202–212–2398 or email: *Shabnaum.Amjad@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

We encourage you to participate in this rulemaking by submitting comments and related materials. We will consider all comments and materials received during the comment period.

If you submit a comment, identify the agency name and the Docket ID for this rulemaking, indicate the specific section of this document to which each comment applies, and give the reason for each comment. All submissions will be posted, without change, to the Federal e-Rulemaking Portal at *www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. For more about privacy and the docket, visit *https://www.regulations.gov/document?D=DHS-2018-0029-0001.*

Viewing comments and documents: For access to the docket to read background documents or comments received, go to the Federal e-Rulemaking Portal at *http://www.regulations.gov.*

II. Background

A. The Public Assistance Program

Under the Public Assistance (PA) Program, authorized by the Robert T. Stafford Disaster Relief and Emergency Assistance Act [1] (Stafford Act), FEMA awards grants to eligible applicants to assist them in responding to and recovering from Presidentially-declared emergencies and major disasters. The recipient, as defined at 44 CFR 206.201(m), is the government to which a grant is awarded, and which is accountable for the use of the funds provided. Generally, the State for which the emergency or major disaster is declared is the recipient. The recipient can also be an Indian Tribal government. The applicant, as defined at 44 CFR 206.201(a), is a State agency, local government, or eligible private nonprofit organization submitting an application to the recipient for assistance under the recipient's grant.

The PA Program provides Federal funds for debris removal, emergency protective measures, and permanent restoration of infrastructure. When the President issues an emergency or major disaster declaration authorizing PA FEMA may accept applications from eligible applicants under the PA Program. To apply for a grant under the PA Program, the eligible applicant must submit a Request for PA to FEMA through the recipient. Upon award, the recipient notifies the applicant of the award, and the applicant becomes a subrecipient.

FEMA uses Project Worksheets (PWs) to administer the PA Program. A FEMA Project Specialist develops PWs for large projects, working with a recipient representative and the applicant. A PW is the primary form used to document the location, damage description and dimensions, scope of work, and cost estimate for a project. Although large projects are funded on documented actual costs, work typically is not complete at the time of project formulation, PW development, and approval. Therefore, FEMA obligates large project grants based on estimated costs and relies on financial reconciliation at project closeout for final costs.

The obligation process is the process by which FEMA makes funds available to the recipient. The funds reside in a

[1] Disaster Relief Act of 1974, Public Law 93–288, 88 Stat. 143 (May 22, 1974), as amended, 42 U.S.C. 5121 *et seq.*

Federal account until drawn down by the recipient and disbursed to the applicant, unless partially or otherwise deobligated for reasons including, but not limited to, discrepancies between estimated and actual costs, updated estimates, a determination that a prior eligibility determination was incorrect, additional funds received from other sources that could represent a prohibited duplication of benefits, or expiration of the period of performance.

Occasionally, an applicant or recipient may disagree with FEMA regarding a determination related to their request for Public Assistance. Such disagreements may include, for instance, whether an applicant or recipient, facility, item of work, or project is eligible for Public Assistance; whether approved costs are sufficient to complete the work; whether a requested time extension was properly denied; whether a portion of the cost claimed for the work is eligible; or whether the approved scope of work is correct. In such circumstances, the applicant or recipient may appeal FEMA's determination. 44 CFR 206.206.

B. 44 CFR 206.206, Public Assistance Appeals

Under the appeals procedures in 44 CFR 206.206, an eligible applicant, subrecipient, or recipient may appeal any determination made by FEMA related to an application for or the provision of Public Assistance. There are two levels of appeal. The first appeal is to the FEMA Regional Administrator. The second appeal is to the FEMA Assistant Administrator for Recovery at FEMA Headquarters.

The applicant must file an appeal with the recipient within 60 calendar days of the applicant's receipt of a notice from FEMA of the Federal determination that is being appealed. 44 CFR 206.206(c)(1). The applicant must provide documentation to support the position of the appeal. In this documentation, the applicant will specify the monetary amount in dispute and the provisions in Federal law, regulation, or policy with which the applicant believes FEMA's initial action was inconsistent. 44 CFR 206.206(a). The recipient reviews and evaluates the appeal documentation. The recipient then prepares a written recommendation on the merits of the appeal and forwards that recommendation to the FEMA Regional Administrator within 60 calendar days of the recipient's receipt of the appeal from the applicant. 44 CFR 206.206(c)(2). Recipients may make recipient-related appeals to the FEMA Administrator.

The FEMA Regional Administrator reviews the appeal and takes one of two actions: (1) Renders a decision on the appeal and informs the recipient of the decision; or (2) requests additional information. If the appeal is granted, the FEMA Regional Administrator takes appropriate action, such as approving additional funding or sending a Project Specialist to meet with the appellant to determine additional eligible funding. 44 CFR 206.206(c)(3).

If the FEMA Regional Administrator denies the appeal, the applicant or recipient may submit a second appeal.[2] The applicant must submit the second appeal to the recipient within 60 calendar days of receiving the notice of the FEMA Regional Administrator's decision on the first appeal. The recipient must forward the second appeal with a written recommendation to the FEMA Regional Administrator within 60 calendar days of receiving the second appeal. 44 CFR 206.206(c)(2). The FEMA Regional Administrator will forward the second appeal for action to the FEMA Assistant Administrator for Recovery as soon as practicable. Recipients may make recipient-related second appeals to the FEMA Assistant Administrator for Recovery.

The FEMA Assistant Administrator for Recovery at FEMA Headquarters reviews the second appeal and renders a decision or requests additional information from the applicant. In a case involving highly technical issues, FEMA may request an independent scientific or technical analysis by a group or person having expertise in the subject matter of the appeal. 44 CFR 206.206(d). Upon receipt of requested information and reports from the applicant, FEMA must render a decision on the second appeal within 90 calendar days. 44 CFR 206.206(c)(3). This decision constitutes the final administrative decision of FEMA. 44 CFR 206.206(e)(3).

C. 44 CFR 206.209, Arbitration for Public Assistance Determinations Related to Hurricanes Katrina and Rita

Under 44 CFR 206.209, applicants may request arbitration to resolve disputed PA applications under major disaster declarations for Hurricanes Katrina and Rita, pursuant to the authority of the American Recovery and Reinvestment Act of 2009 (ARRA).[3] Pursuant to section 601 of the ARRA, FEMA promulgated 44 CFR 206.209 to establish arbitration procedures to resolve outstanding disputes regarding PA projects over $500,000. The ARRA arbitration regulations are only available to the States of Louisiana, Mississippi, Alabama, and Texas under the following declarations: DR–1603, DR–1604, DR–1605, DR–1606, and DR–1607.

D. Former 44 CFR 206.210, Dispute Resolution Pilot Program

The Sandy Recovery Improvement Act of 2013[4] (SRIA) authorized FEMA to conduct a Dispute Resolution Pilot Program (DRPP), which was in effect from August 16, 2013 to December 31, 2015. 78 FR 49950, Aug 16, 2013. FEMA promulgated regulations at 44 CFR 206.210 (since removed) to effectuate the pilot program. It included arbitration by an independent review panel to resolve disputes relating to PA projects, to facilitate an efficient recovery from major disasters. Applicants could choose to use for their second appeal either the DRPP or the review already offered under 44 CFR 206.206. Arbitration by an independent review panel was available only for disputes in an amount equal to or greater than $1,000,000 for projects with non-Federal cost share requirement (where, the subrecipient had a cost share requirement), and for applicants that had completed a first appeal pursuant to 44 CFR 206.206.

The arbitration decisions under this section were to be binding upon the parties to the dispute, as required by section 1105(b)(2) of SRIA. Under section 1105 of SRIA, the authority to accept a request for arbitration pursuant to the DRPP sunset on December 31, 2015, and FEMA has since removed these regulations.[5] FEMA did not receive any requests for arbitration pursuant to the DRPP.

E. Arbitration Under the Disaster Recovery Reform Act of 2018 (DRRA)

On October 5, 2018, the President signed into law the Disaster Recovery Reform Act of 2018 (DRRA).[6] Section 1219 of DRRA, which amended Section 423(d) of the Stafford Act (42 U.S.C. 5189a), provides a right of arbitration to certain applicants of the PA Program that have a dispute concerning the eligibility for assistance or repayment of assistance.

[2] Introductory text of paragraph(a) of 44 CFR 206.206.

[3] American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (Feb. 17, 2009), 26 U.S.C. 1 note.

[4] Sandy Recovery Improvement Act of 2013, Public Law 113–2, 127 Stat. 43 (Jan. 29, 2013), 42 U.S.C. 5189a note.

[5] See Removal of Dispute Resolution Pilot Program for Public Assistance Appeals, 83 FR 44238, Aug. 30, 2018.

[6] Disaster Recovery Reform Act of 2018, Public Law 115–254, 132 Stat. 3186 (Oct. 5, 2018), 42 U.S.C. 5189a.

To request arbitration pursuant to the newly amended 42 U.S.C. 5189a, a PA applicant (1) must have a dispute arising from a disaster declared after January 1, 2016, (2) must be disputing an amount that exceeds $500,000 (or $100,000 for an applicant in a ''rural area'' with a population of less than 200,000 and outside of an urbanized area), and (3) must have submitted a first appeal pursuant to the requirements established under 44 CFR 206.206. Such applicants that receive a negative first appeal decision then have the option of submitting either a request for a second appeal or a request for arbitration. In addition, an applicant that has had a first appeal pending with FEMA for more than 180 calendar days may withdraw such appeal and submit a request for arbitration.

Applicants that had a second appeal pending with FEMA as of October 5, 2018, from a disaster declared after January 1, 2016 may, if they meet the amount in dispute requirement of $500,000 (or $100,000 for rural areas), withdraw their second appeal and request arbitration. Following the DRRA's enactment, FEMA individually notified applicants with pending second appeals that were eligible to withdraw those appeals and request arbitration.

Applicants that are not eligible to request arbitration are (1) applicants that have received a second appeal determination from FEMA prior to October 5, 2018, and (2) applicants that were eligible to submit a second appeal prior to October 5, 2018, but did not do so within the 60 calendar days required by 44 CFR 206.206.[7]

As amended by Section 1219 of the DRRA, 42 U.S.C. 5189a(d) names the Civilian Board of Contract Appeals (CBCA) as the entity responsible for conducting these arbitrations. The CBCA has promulgated regulations at 48 CFR part 6106 establishing its arbitration procedures for such purpose. The CBCA also currently conducts arbitrations arising from Hurricanes Katrina and Rita under the ARRA regulations pursuant to an Inter-Agency Agreement between the CBCA and FEMA.

III. Proposed Rule

FEMA proposes to revise its current PA appeals regulation at 44 CFR 206.206 to add in the new right to arbitration under DRRA, in conjunction with some revisions to the current appeals process. The DRRA adds arbitration as a permanent alternative to a second appeal under the PA Program. Additionally, applicants that have had a first appeal pending with FEMA for more than 180 calendar days may withdraw such appeal and submit a request for arbitration. In both cases, the amount in dispute must be greater than $500,000, or greater than $100,000 for an applicant for assistance in a rural area. The other major proposed revisions to 44 CFR 206.206 include adding definitions; adding subparagraphs to clarify what actions FEMA may take and will not take while an appeal is pending and state that FEMA may issue separate guidance as necessary, similar to current 44 CFR 206.209(m); adding a finality of decision paragraph; requiring electronic submission for appeals and arbitrations documents; and clarifying overall time limits for first and second appeals.

These proposed rules for arbitration are separate and distinct from the arbitration provisions located in 44 CFR 206.209.

Applicants should also review the Civilian Board of Contract Appeals regulations at 48 CFR part 6101, Rules of Procedure of the Civilian Board of Contract Appeals, and 48 CFR part 6106, Rules of Procedure for Arbitration of Public Assistance Eligibility or Repayment, for additional CBCA rules of procedure.

FEMA proposes to change the 44 CFR 206.206 section heading from ''Appeals'' to ''Appeals and arbitrations,'' since FEMA proposes new regulatory text to implement DRRA's right of arbitration at § 206.206. Throughout this section, FEMA proposes to change references to the ''Disaster Assistance Directorate'' to the ''Recovery Directorate.'' The proposed changes are technical edits, as they represent past FEMA organizational changes. Also, throughout this section FEMA proposes to change all ''dates'' to ''calendar dates'' for clarity. Finally, since FEMA is proposing new arbitration regulations, FEMA is proposing that the first appeal, second appeal, and arbitration requirements are in separate paragraphs for clarity. Currently in § 206.206, FEMA's first and second appeal requirements are comingled.

A. Definitions (Proposed 44 CFR 206.206(a))

Currently, § 206.206 does not include any definitions. FEMA proposes to add the terms ''Administrator,'' ''Amount in dispute,'' ''Applicant,'' ''Final agency determination,'' ''Recipient,'' ''Rural area,'' and ''Urbanized area,'' as follows.

Administrator. FEMA proposes to define the term ''Administrator'' to mean the Administrator of the Federal Emergency Management Agency for clarity.

Amount in dispute. FEMA proposes to define the term ''Amount in dispute'' to mean the difference between the amount of financial assistance sought for a Public Assistance project and the amount of financial assistance for which FEMA has determined such Public Assistance project is eligible. The DRRA amendments to 42 U.S.C. 5189a(d)(1) introduced the term ''dispute,'' and also added dollar thresholds that applicants must meet (which differ depending on the area of the country in which the applicant applies for assistance) in order to request arbitration. ''Amount in dispute'' is not used in the current appeals section, 44 CFR 206.206, because there is no required dollar threshold to appeal a decision. Accordingly, FEMA proposes to define the term ''amount in dispute'' because applicants seeking arbitration must state an amount in dispute as a prerequisite for the arbitration portion of proposed 44 CFR 206.206.

A Project is a logical grouping of work required as a result of the declared major disaster or emergency. The scope of work and cost estimate for a project are documented on a PW. 44 CFR 206.201(k). Applicants and recipients cannot combine PWs together in order to obtain eligibility. FEMA makes PA determinations at the PW level.

Facility means any publicly or privately owned building, works, system, or equipment, built or manufactured, or an improved and maintained natural feature. Land used for agricultural purposes is not a facility. 44 CFR 206.201(c). FEMA must consider the amount in dispute at the PW level, rather than by facility (as one PW could encompass multiple facilities) or by appeal (which could consolidate multiple PWs, thereby increasing the amount in dispute).

Applicant. FEMA proposes to define the term ''Applicant'' to refer to the definition at 206.201(a) for the sake of consistency within the program.

Final agency determination. FEMA proposes to define the term ''Final agency determination'' to mean the decision of FEMA, if the applicant or recipient does not submit a first appeal within the time limits provided for in paragraph (b)(1)(ii)(A) of proposed § 206.206; or the decision of FEMA, if the applicant or recipient withdraws the pending appeal and does not file a

[7] On December 18, 2018, FEMA implemented section 1219 of DRRA by posting a Fact Sheet on its website. After CBCA published their March 5, 2019 proposed rule, see 84 FR 7861, FEMA updated the: Section 1219 Public Assistance Appeals and Arbitration Fact Sheet on March 27, 2019. A link to the current Fact Sheet: *https://www.fema.gov/media-library/assets/documents/175821.* Accessed May 15, 2020.

request for arbitration within 30 calendar days of the withdrawal of the pending appeal; or the decision of the FEMA Regional Administrator, if the applicant or recipient does not submit a second appeal within the time limits provided for in paragraph (b)(2)(ii)(A) of proposed § 206.206. This term was introduced by the DRRA amendments to 42 U.S.C. 5189a(d)(5)(B) and requires a definition.

The purpose of the proposed definition is to clearly state when a FEMA determination is final and thus no longer ripe for any additional review through FEMA's administrative appeal process or arbitration under the DRRA. Using ''final agency determination'' to replace the current term ''final administrative decision,'' used in § 206.206(e)(3), will align FEMA's regulation with the language introduced by the DRRA amendments at 42 U.S.C. 5189a(d)(5)(B).

Recipient. FEMA proposes to define the term ''Recipient'' to refer to the definition at § 206.201(m) for the sake of consistency within the program.

Rural area. FEMA proposes to define the term ''Rural area'' to mean an area with a population of less than 200,000 outside an urbanized area. As amended by the DRRA, 42 U.S.C. 5189a(d)(4) defines this term.

FEMA makes PA determinations at the PW level. Therefore, considerations of the amount in dispute and rural/urban status must be done at the PW level, rather than by facility (as one PW could encompass multiple facilities) or by appeal (which could consolidate multiple PWs. If a PW encompasses multiple facilities, and those facilities happen to be in both rural and urbanized areas, then FEMA will consider the entire PW as ''rural.''

Urbanized area. FEMA proposes to define the term ''Urbanized area'' to mean the area as identified by the United States Census Bureau. The Census Bureau defines an ''urbanized area'' as an area that consists of densely settled territory that contains 50,000 or more people.[8] The DRRA amendments to 42 U.S.C. 5189a(d)(4) introduced this term and it requires a definition. FEMA proposes to defer to the Census Bureau definition, which meets FEMA's needs for determining eligibility for an arbitration.

B. Appeals and Arbitrations (Proposed 44 CFR 206.206(b) Introductory Paragraph)

For the introductory paragraph of § 206.206(b), FEMA proposes to state that an eligible applicant or recipient may appeal or an eligible applicant may arbitrate any determination previously made related to an application for or the provision of Public Assistance according to the procedures of proposed § 206.206. This language is similar to the current regulation at § 206.206 introductory paragraph. FEMA proposes changing '' applicant, subrecipient, or recipient'' to ''applicant or recipient'' since the definition of applicant at § 206.201(a) includes subrecipient. FEMA proposes changing ''Federal assistance'' to ''Public Assistance'' to clarify that appeal and arbitration procedures only apply to Public Assistance. Additionally, FEMA proposes to add ''or an eligible applicant may arbitrate'' to the proposed § 206.206(b) introductory paragraph, since the current § 206.206 only discusses an appeal and 42 U.S.C. 5189a requires applicants to have the choice to either request an arbitration or a second appeal. FEMA also proposes to replace ''procedures below'' with ''procedures of this section'' for clarity.

C. First Appeal (Proposed 44 CFR 206.206(b)(1))

In the introductory paragraph of proposed paragraph (b)(1), FEMA states that the applicant must make a first appeal in writing and submit it electronically through the recipient to the Regional Administrator. The current regulation (at 44 CFR 206.206(a)) does not require submission electronically, but states submissions must be in writing. FEMA proposes this revision to the current regulation to accurately track the transmittal/receipt of appeals for the purposes of establishing deadlines for second appeal and arbitration.

The revision removes the mandatory language that the recipient ''shall review and evaluate'' all subrecipient appeals before submission to the Regional Administrator. Instead, FEMA proposes that the recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's first appeal to the Regional Administrator. To include a recommendation on the applicant's appeal, the recipient must review and evaluate the appeal. Accordingly, FEMA proposes striking the review and the evaluation portion of the sentence as superfluous. FEMA's proposed language regarding the mandatory recommendation includes electronic submission to the Regional Administrator. Again, the change to electronic submissions is to accurately track the transmittal/receipt of recommendations for the purposes of establishing deadlines for second appeals and arbitrations.

FEMA is proposing a requirement that the recipient provide a recommendation on the applicant's appeal due to the recipient's grant management responsibilities and fiscal accountability for all PA grants under a major disaster declaration, including its commitment to comply with the applicable cost share requirement.[9] The recipient has a responsibility to ensure all applicants abide by grant and cost share requirements, so in this capacity FEMA believes that the recipient should make a recommendation on the substance of the applicant's first appeal.

The final sentence of proposed paragraph (b)(1) is currently the third sentence in paragraph 206.206(a), which states that the recipient may make recipient-related appeals to the Regional Administrator.

In proposed paragraph (b)(1)(i), FEMA states the requirements of a first appeal, which must include all documented justification supporting the applicant or recipient's position; the specific amount in dispute, as applicable; and the specific provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent. This is consistent with the current regulation in § 206.206(a), except that FEMA proposes to change ''initial action'' to ''FEMA determination.'' This change clarifies what the ''initial action'' actually is and aligns the regulation with the terminology the program now uses. As such, no substantive change is intended. Similarly, FEMA proposes to change ''monetary figure in dispute'' to ''amount in dispute, as applicable'' so that we could use one term for both appeals and arbitrations, plus for clarity. Currently, FEMA allows an applicant, subrecipient, or recipient to appeal a provision of assistance without providing a monetary figure. (E.g. time extension requests, scope of work change requests, etc.) Therefore, FEMA has proposed ''amount in dispute, as applicable'' to replace the current regulations of ''monetary figure in

[8] See ''Qualifying Urban Areas for the 2010 Census, 77 FR 18651, Mar. 27, 2012.

[9] All grants FEMA administers must comply with the government-wide rules governing all Federal assistance. These rules, set out at 2 CFR part 200, apply to FEMA awards to recipients as well as to subawards under the FEMA award, which a recipient, as pass-through entity, awards to subrecipients. These rules govern administrative and grants management requirements, cost principles, and audit requirements. FEMA Manual 205–0–1, ''Grants Management,'' as a whole serves to explain key requirements of 2 CFR part 200 as they pertain to FEMA assistance. The following regulations cover FEMA's cost share requirement: 44 CFR 206.36(c)(5), 206.44, and 206.203(b).

dispute.'' Also, the current regulation uses the term ''appellant'' instead of ''applicant or recipient'' for the requirement of specifying the provisions in Federal law, regulation, or policy in dispute. FEMA's reason for changing from ''appellant'' to ''applicant or ''recipient'' is for consistency in terminology and no substantive change is intended. Finally, in keeping with principles of transparency and plain language, FEMA proposes to replace ''shall'' with ''must'' in the last sentence of current § 206.206(a) and reorganizing the last sentence by separating it into subparagraphs (b)(1)(i)(A) through (C).

Proposed paragraph (b)(1)(ii) addresses time limits for first appeals. Under proposed paragraph (b)(1)(ii)(A), the applicant may make a first appeal through the recipient within 60 calendar days from the date of the FEMA determination that is the subject of the appeal, and the recipient must electronically forward to the Regional Administrator the applicant's first appeal with a recommendation within 120 calendar days from the date of the FEMA determination that is the subject of the appeal. FEMA proposes to change the term ''appellant'' to ''applicant'' for consistency in terminology; no substantive change is intended. FEMA also proposes to change ''after receipt of a notice of the action that is being appealed'' to ''from the date of the FEMA determination that is the subject of the appeal'' to enable FEMA to accurately track the transmittal/receipt of appeals.

The proposed revision removes the mandatory language that the recipient ''will review'' the first appeal. In order for the recipient to provide a written recommendation, the recipient must review the appeal, so the deleted language is superfluous. FEMA proposes adding a requirement that the recipient forward the applicant's appeal and the recipient's recommendation electronically to the Regional Administrator. The proposed change to electronic submissions is to accurately track the transmittal/receipt of appeals for the purposes of establishing deadlines for second appeal and arbitration.

Finally, under proposed paragraph (b)(1)(ii)(A), FEMA proposes to state that FEMA will deny all first appeals it receives from the recipient more than 120 calendar days from the date of the FEMA determination that is the subject of the appeal. This addition is added for clarity to explain what occurs if an applicant misses the deadline. This addition is not a new deadline. Currently, 44 CFR 206.206(c)(1) allows an applicant 60 days to file an appeal and paragraph 206.206(c)(2) allows a recipient to review and forward an applicant's appeals along with a written recommendation within 60 days. FEMA has combined the two 60-day deadlines into a 120-calendar days deadline.

Under proposed paragraph (b)(1)(ii)(B), within 90 calendar days following receipt of a first appeal, if there is a need for additional information, the Regional Administrator will provide electronic notice to the recipient and applicant. This is consistent with the current regulations, with the added requirement for electronic notification and simultaneous notification of the applicant. FEMA also proposes for clarity to state that if there is no need for additional information, then FEMA will not provide notification. Finally, FEMA also proposes to state that the Regional Administrator will generally allow the recipient 30 calendar days to provide any additional information. This is consistent with the current regulation, except that the current regulation does not include the 30-calendar day timeframe, but rather states that the Regional Administrator will include a date by which the information must be provided. This change is to better allow FEMA to issue timely determinations on first appeal. The proposed regulations, at (b)(1)(ii)(B) and (C), have split the current regulations into two paragraphs.

Under proposed paragraph (b)(1)(ii)(C), FEMA will require the Regional Administrator to provide electronic notice of the disposition of the appeal to the applicant and recipient within 90 calendar days of receipt of the appeal or within 90 calendar days following the receipt of additional information or following expiration of the period for providing the information. The proposed regulations reorganize the word order of the current regulation and adds the following phrase ''within 90 calendar days of receipt of the appeal'' for clarification. Additionally, proposed paragraph (b)(1)(ii)(C) adds the requirement to provide electronic notice of the disposition of the appeal, removes the requirement that it be ''in writing,'' and includes simultaneous notification of the applicant. The change to electronic submissions is to accurately track the transmittal/receipt of appeals for the purposes of establishing deadlines for second appeal and arbitration. Currently, FEMA may receive submissions several ways, including electronically, through courier delivery, and through the United States (U.S.) mail.

Proposed paragraph (b)(1)(iii) addresses technical advice and states that in appeals involving highly technical issues, the Regional Administrator may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for technical review may be in addition to other allotted time periods. Within 90 calendar days of the report, the Regional Administrator will provide electronic notice of the disposition of the appeal to the recipient and applicant. This is consistent with the current regulation at 44 CFR 206.206(d), except for the requirement to electronically notify the recipient and provide simultaneous notice to the applicant.

FEMA proposes to add a new paragraph regarding the effect of an appeal in proposed paragraph (b)(1)(iv). Proposed paragraph (b)(1)(iv)(A) states that FEMA will take no action to implement any determination pending an appeal decision from the Regional Administrator, subject to the exceptions in paragraph (b)(1)(iv)(B) of proposed § 206.206. This section is added to provide clarity to an appellant as to what actions FEMA will not take and what actions FEMA may take while an appeal is pending. It does not alter any current FEMA practices or procedures, nor does the rule limit any rights an appellant has regarding their appeal.

In proposed paragraph (b)(1)(iv)(B), FEMA states that, notwithstanding (b)(1)(iv)(A), FEMA may suspend funding (referring to 2 CFR 200.338); defer or disallow other claims questioned for reasons also disputed in the pending appeal; or take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation. As stated above, this section is added to provide clarity to an appellant as to what actions FEMA will not take and what actions FEMA may take while an appeal is pending and does not alter any of FEMA's current practices or procedures or limit any rights an appellant has regarding their appeal.

As stated in the current regulation in the final sentence of § 206.206(c)(3), if the Regional Administrator grants an appeal, the Regional Administrator will take appropriate implementing action(s). This language is now in proposed paragraph (b)(1)(v).

In proposed paragraph (b)(1)(vi), FEMA states that FEMA may issue separate guidance as necessary to supplement paragraph (b)(1). This language arises from 44 CFR 206.209(m) and is carried over to this proposed regulation for consistency. Since FEMA has separated first appeal, second

appeal, and arbitration requirements into separate paragraphs for clarity, FEMA proposes adding a guidance subparagraph to the first and second appeal paragraphs for consistency. FEMA already provides guidance for first appeals in the Public Assistance Program and Policy Guide, FP–104–009–2 (April 2018). FEMA likewise provides guidance for staff implementing appeals procedures in Recovery Directorate Manual Public Assistance Program Appeal Procedures (Version 4) Approval Date: March 29, 2016. As such, proposed paragraph (b)(1)(vi) will not alter current practice.

D. Second Appeal (Proposed 44 CFR 206.206(b)(2))

The introductory paragraph to proposed § 206.206(b)(2) states that if the Regional Administrator denies a first appeal in whole or in part, the applicant may make a second appeal in writing and submit it electronically through the recipient to the Assistant Administrator for the Recovery Directorate. This is consistent with the current regulation, except for the addition of the requirement to submit electronically. This requirement ensures the accurate and clear tracking of transmittal dates of appeals for the purposes of establishing deadlines for arbitrations. In addition, the current regulation refers to the ''Assistant Administrator for the Disaster Assistance Directorate.'' The title of this position is now the ''Assistant Administrator for the Recovery Directorate;'' the proposed regulation reflects this new title.

The second to last sentence under the introductory paragraph to proposed § 206.206(b)(2) states that the recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's second appeal to the Assistant Administrator for the Recovery Directorate. This is consistent with FEMA's current implementation of § 206.206(c)(2). FEMA's proposed language regarding the mandatory recommendation includes electronic submission to the Assistant Administrator for the Recovery Directorate. Again, the change to electronic submissions is to accurately track the transmittal/receipt of recommendations for the purposes of establishing deadlines.

The last sentence under the introductory paragraph to proposed § 206.206(b)(2) states that the recipient may make recipient-related second appeals to the Assistant Administrator for the Recovery Directorate. This is consistent with the current third sentence in paragraph 206.206(a) that the recipient may make recipient-related appeals to the Regional Administrator.

In proposed paragraph (b)(2)(i), FEMA states the requirements of a second appeal, which must include all documented justification supporting the applicant or recipient's position; the specific amount in dispute, as applicable; and the specific provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent. This is consistent with the current regulation, with the substitution of ''FEMA determination'' for ''initial action'' and ''appellant'' for ''applicant or recipient'' for clarity as described above.

Also consistent with the proposed paragraph (b)(1)(i) described above, FEMA proposes replacing ''monetary figure in dispute'' with ''amount in dispute, as applicable,'' since FEMA allows an applicant or recipient to appeal a FEMA determination that does not concern a monetary figure. Additionally, FEMA proposes again to change ''appellant'' to ''applicant or recipient'' in this paragraph for consistency of terminology, and replacing ''shall'' with ''must'' for purposes of plain language. FEMA finally proposes reorganizing the last sentence by separating it into subparagraphs (b)(2)(i)(A)–(b)(2)(i)(C).

Proposed paragraph (b)(2)(ii) addresses time limits for second appeals. Under proposed paragraph (b)(2)(ii)(A), if the Regional Administrator denies a first appeal in whole or in part, the applicant may make a second appeal through the recipient within 60 calendar days from the date of the Regional Administrator's first appeal decision and the recipient must electronically forward to the Assistant Administrator for the Recovery Directorate the applicant's second appeal with a recommendation within 120 calendar days from the date of the Regional Administrator's first appeal decision. FEMA will deny all second appeals it receives from the recipient more than 120 calendar days from the date of the Regional Administrator's first appeal decision. This proposed language allows the recipient the same level of review and involvement in the second appeal process as they have with the first appeals process, which is consistent with how FEMA currently implements § 206.206, and emphasizes that FEMA will deny all second appeals it receives from the recipient more than 120 calendar days from the date of the Regional Administrator's first appeal decision. This addition is not a new deadline. Currently, 44 CFR 206.206(c)(1) allows an applicant 60 days to file an appeal and paragraph 206.206(c)(2) allows a recipient to review and forward an applicant's appeals along with a written recommendation within 60 days. FEMA has combined the two 60-day deadlines into a 120-calendar day deadline.

Proposed paragraph (b)(2)(ii)(B) states that within 90 calendar days following receipt of a second appeal, if there is a need for additional information, the Assistant Administrator for the Recovery Directorate will provide electronic notice to the recipient and applicant. If there is no need for additional information, then FEMA will not provide notification. The Assistant Administrator for the Recovery Directorate will generally allow the recipient 30 calendar days to provide any additional information. This is consistent with the current regulation, except that the current regulation does not include the 30-calendar day time limit or simultaneous notification of the applicant.

Proposed paragraph (b)(2)(ii)(C) states that the Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the appeal to the recipient and applicant within 90 calendar days of receipt of the appeal or within 90 calendar days following the receipt of additional information or following expiration of the period for providing the information. This is consistent with the current regulations except for the requirement that the notice be provided electronically, and the simultaneous notification of the applicant. Again, the change to electronic submission is to accurately track the transmittal/receipt.

Proposed paragraph (b)(2)(iii) states that in appeals involving highly technical issues, the Assistant Administrator for the Recovery Directorate may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The paragraph further states that the period for this technical review may be in addition to other allotted time periods and within 90 calendar days of receipt of the report, the Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the appeal to the recipient and applicant. Proposed paragraph (b)(2)(iii) has been added to this section to be consistent with proposed paragraph (b)(1)(iii), which mirrors this section for first appeals.

Proposed paragraph (b)(2)(iv) addresses the effect of an appeal and has

been added to this section to be consistent with the proposed paragraph in (b)(1)(iv), which mirrors this section for first appeals.

Proposed paragraph (b)(2)(v) states that if the Assistant Administrator for the Recovery Directorate grants an appeal, the Assistant Administrator for the Recovery Directorate will direct the Regional Administrator to take appropriate implementing action(s). Proposed paragraph (b)(2)(v) has been added to this section for consistency with the proposed paragraph in (b)(1)(v), which mirrors this section for first appeals.

Proposed paragraph (b)(2)(vi) addresses guidance and has been added to this section for consistency with the proposed paragraph (b)(1)(vi), which mirrors this section for first appeals.

E. Arbitration (Proposed 44 CFR 206.206(b)(3))

Proposed paragraph 206.206(b)(3)(i) states that an applicant may request arbitration from the CBCA if there is a disputed agency determination arising from a major disaster declared on or after January 1, 2016. This is consistent with the requirements set forth in 42 U.S.C. 5189a(d), as amended by Section 1219 of the DRRA. The proposed paragraph sets forth additional requirements for eligibility to request arbitration, stating in (b)(3)(i)(B) that the amount in dispute is greater than $500,000, or greater than $100,000 for an applicant for assistance in a rural area; and in (b)(3)(i)(C) that the Regional Administrator has either denied a first appeal decision or received a first appeal but not rendered a decision within 180 calendar days of receipt. These eligibility requirements are consistent with the requirements set forth in 42 U.S.C. 5189a(d). FEMA added proposed paragraph (b)(3)(ii) to clarify that arbitration is in lieu of a second appeal. The proposed regulatory text clarifies that an applicant cannot submit a second appeal after requesting arbitration.

Proposed paragraph 206.206(b)(3)(iii) details how applicants may request arbitration. Proposed paragraph 206.206(b)(3)(iii)(A) states that an applicant may initiate arbitration by submitting an electronic request simultaneously to the recipient, CBCA, and FEMA. See 48 CFR part 6106 (CBCA's ''Rules of Procedure for Arbitration of PA Eligibility or Repayment''). Proposed paragraph 206.206(b)(3)(iii)(B)*(1)* states that an applicant must submit a request for arbitration within 60 calendar days from the date of the Regional Administrator's first appeal decision. This proposed rule is consistent with 42 U.S.C. 5189a(d)(5)(A).

FEMA is proposing in paragraph 206.206(b)(3)(iii)(B)*(1)* a 60 calendar day deadline for submission of requests for arbitration. FEMA is proposing 60 calendar days to be consistent with the submission time limits for second appeals.

Proposed paragraph 206.206(b)(3)(iii)(B)*(2)* provides that if the first appeal was timely submitted, and the Regional Administrator has not rendered a decision within 180 calendar days of receiving the appeal, an applicant may electronically submit a withdrawal of the pending appeal simultaneously to the recipient, the FEMA Regional Administrator, and the CBCA. The applicant may then submit a request for arbitration within 30 calendar days from the date of the withdrawal of the pending appeal. This proposed language describes the right to arbitration consistent with 42 U.S.C. 5189a(d)(5)(A) and adds a 30-day deadline to ensure that applicants make requests for arbitration promptly. Since the applicant will have already received 60 calendar days when they initially filed their appeal, FEMA believes that allowing 30 calendar days to request arbitration following withdrawal of their appeal is a sufficient submission period. If the applicant does not request arbitration within 30 calendar days after withdrawing their pending appeal, then the decision of FEMA becomes the final agency determination.

Proposed paragraph 206.206(b)(3)(iii)(C) states that the request for arbitration must contain a written statement that specifies the amount in dispute, all documentation supporting the position of the applicant, the disaster number, and the name and address of the applicant's authorized representative or counsel. This rule is consistent with 42 U.S.C. 5189a(d)(5)(A), which refers to the arbitration process established under the authority of section 601 of ARRA codified at 44 CFR 206.209.[10]

Proposed paragraph 206.206(b)(3)(iv) states that expenses for each party will be paid by the party who incurred the expense. This is consistent with 42 U.S.C. 5189a(d)(5)(A). Since 42 U.S.C. 5189a(d)(1) requires the Civilian Board of Contract Appeals to conduct arbitrations, CBCA's regulations state that the CBCA arbitrates at no cost to the parties. (See 48 CFR 6106.606.)

Proposed paragraph 206.206(b)(3)(v) states that FEMA may issue separate guidance as necessary to supplement paragraph (b)(3). This proposed rule is consistent with 42 U.S.C. 5189a(d)(5)(A) and directly corresponds to language contained in 44 CFR 206.209(m).

F. Finality of Decision (Proposed 44 CFR 206.206(c))

Proposed paragraph 206.206(c) states that a FEMA final agency determination or a decision of the Assistant Administrator for the Recovery Directorate on a second appeal constitutes a final decision of FEMA. In the alternative, a decision of the majority of the CBCA panel constitutes a final decision, binding on all parties. See 48 CFR 6106.613. (CBCA's Decision; finality regulation.) Final decisions are not subject to further administrative review. This is consistent with the provision in 42 U.S.C. 5189a(d)(1) that CBCA decisions are binding. The purpose of this paragraph is to clarify that an applicant cannot appeal, arbitrate, or pursue any administrative remedy for any matter for which FEMA has issued a final agency determination or a second appeal decision; or regarding which the CBCA has issued an arbitration decision.

G. Removal of Current 44 CFR 206.206(e), Transition

FEMA proposes removing current paragraphs 206.206(e)(1) and (2) as they are no longer necessary for this section. FEMA proposes removing current paragraph 206.206(e)(3) because FEMA proposes defining ''final agency determination'' in § 206.206(a). Using the proposed term ''final agency determination'' to replace the current term ''final administrative decision,'' used in § 206.206(e)(3), will align FEMA's regulation with the language introduced by Congress in 42 U.S.C. 5189a(d)(5)(B), offering consistency with the statute.

IV. Regulatory and Statutory Analyses

A. Executive Order 12866, as Amended, Regulatory Planning and Review, Executive Order 13563, Improving Regulation and Regulatory Review; and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

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

[10] American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (Feb. 17, 2009), 26 U.S.C. 1 note.

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 designated this rule as a non-significant regulatory action, under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. Due to this non-significant determination, this rule is also exempt from the requirements of Executive Order 13771. See the OMB Memorandum titled ''Guidance Implementing Executive Order 13771, titled 'Reducing Regulation and Controlling Regulatory Costs' '' (April 5, 2017.)

FEMA is proposing this rule to implement a new right of arbitration authorized by DRRA, and to revise its regulations regarding first and second PA appeals.

FEMA's PA Program provides Federal grant assistance to government organizations and eligible private nonprofit (PNP) organizations following a Presidential disaster declaration. The PA Program is administered through a coordinated effort between FEMA, States, or federally recognized Tribes and local governments or eligible PNPs (subrecipients).

Need for Regulatory Action

Under current regulations, when FEMA determines that an applicant or recipient is ineligible for PA funding, or if the applicant or recipient disputes the amount awarded, FEMA has implemented a process to appeal the decision. First, the applicant or recipient can appeal to the FEMA Regional Administrator. If the applicant or recipient does not submit a second appeal within 60 days, the result of the first appeal is the final agency determination. If the applicant or recipient is not satisfied with the result of the first appeal, they can submit a second appeal to the FEMA Assistant Administrator for the Recovery Directorate. The result of the second appeal is a final decision of FEMA.

FEMA is proposing in this rule to implement provisions for arbitration in lieu of a second appeal, or in cases where an applicant has had a first appeal pending with FEMA for more than 180 calendar days. Applicants choosing arbitration would have their case heard by a panel of judges with the CBCA. A decision by the majority of the CBCA panel constitutes a final decision that would be binding on all parties. Final decisions would not be subject to further administrative review.

Pursuant to 42 U.S.C. 5189a, as amended by section 1219 of the DRRA, to request arbitration, an applicant (1) must have a dispute arising from a disaster declared after January 1, 2016; (2) must be disputing an amount that exceeds $500,000 (or $100,000 for an applicant in a ''rural area'' with a population of less than 200,000 and outside of an urbanized area); and, (3) must have submitted a first appeal and has either received a denial of the first appeal or has not received a decision after 180 calendar days.

This proposed rule would directly affect applicants or recipients disputing FEMA PA eligibility determinations or disputing the amount awarded for PA projects. Applicants would be required to submit appeals through their State, or in the case of a Tribal declaration,[11] their Tribal government (recipients). The recipient would then forward the request to the FEMA Regional Administrator, along with a recommendation for a first appeal.

If an applicant has not received a decision on their first appeal after 180 days and meets the other two previously-outlined criteria, they may withdraw the first appeal and request arbitration. Alternatively, if the applicant does not agree with the Regional Administrator's decision on the first appeal, they may either submit a second appeal to the FEMA Assistant Administrator for the Recovery Directorate or request arbitration. A panel of judges with the CBCA would hear any arbitration cases. The applicant would send a representative and possibly expert witnesses to the arbitration hearing. The recipient would also send a representative to support the applicant. FEMA representatives and expert witnesses would also attend the hearing to defend FEMA's determination.

The proposed rule would codify regulations for the appeals and arbitration process as directed by 42 U.S.C. 5189a(d)(5). Applicants are eligible for arbitration for disputes arising from major disasters declared on or after January 1, 2016. This process is already available, and eligible applicants have been notified of this option.[12]

As amended by Section 1219 of the DRRA, 42 U.S.C. 5189a(d) names the CBCA as the entity responsible for conducting these arbitrations. The CBCA has promulgated regulations at 48 CFR part 6106 establishing its arbitration procedures for such purpose.

FEMA is proposing in paragraph 206.206(b)(3)(iii)(B) a 60 calendar day deadline for submitting requests for arbitration. FEMA is proposing this as FEMA does not want different submission time limits for second appeals and arbitrations. Rather, FEMA believes that there should be consistency between the time to request arbitration and the time to submit second appeals for administrative ease and to reduce potential confusion amongst applicants.

Affected Population

The proposed rule would affect PA applicants arising from major disaster declarations. Specifically, applicants that (1) submitted a first appeal and received a negative decision, or, (2) have a first appeal pending for more than 180 days and wish to withdraw the appeal in favor of arbitration. Applicants may only request arbitration for disputes in excess of $500,000, or $100,000 in rural areas, and for disputes that arise from major disasters declared on or after January 1, 2016.

Summary of Regulatory Changes

FEMA proposes to revise its current PA appeals regulation at 44 CFR 206.206 to add in the new right to arbitration under DRRA, in conjunction with some revisions to the current appeals process. DRRA adds arbitration as a permanent alternative to a second appeal under the PA Program, or for applicants that have had a first appeal pending with FEMA for more than 180 calendar days that may withdraw such appeal and submit a request for arbitration, provided the dispute is in excess of $500,000, or $100,000 in rural areas, and for disputes that arise from major disasters declared on or after January 1, 2016. The other major proposed revisions to 44 CFR 206.206 include adding definitions; adding subparagraphs to clarify what actions FEMA may take and will not take while

[11] Tribes may choose to apply for PA independently as a recipient (tribal declaration) or may submit through their State as a subrecipient.

[12] On December 18, 2018, FEMA implemented section 1219 of DRRA by posting a Fact Sheet on its website. After CBCA published their March 5, 2019 proposed rule, see 84 FR 7861, FEMA updated the: Section 1219 Public Assistance Appeals and Arbitration Fact Sheet (3–27–19). A link to the current Fact Sheet: *https://www.fema.gov/media-library/assets/documents/175821.* Accessed May 15, 2020.

an appeal is pending and state that FEMA may issue separate guidance as necessary, similar to current 44 CFR 206.209(m); adding a finality of decision paragraph; requiring electronic submission for appeals and arbitrations documents; and clarifying overall time limits for first and second appeals.

Assumptions

This analysis uses the following assumptions:

- All monetary values are presented in 2018 dollars. FEMA used the Bureau of Labor Statistics (BLS) Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month, Annual Average as published May 2019.[13]
- This proposed rule does not apply to emergency disaster declarations. Thus, FEMA only included major disaster declarations in this analysis.
- FEMA assumes the length of time for an arbitration case is based on the hearing location.
- FEMA used 2018 wage rates for all parties involved in arbitration cases.

Baseline

Following guidance in OMB Circular A–4, FEMA assesses the impacts of this proposed rule against a pre-statutory baseline. The pre-statutory baseline is an assessment of what the world would look like if the relevant statute(s) had not been adopted. In this instance, FEMA has been accepting arbitration cases since the implementation of DRRA, and retroactive to January 1, 2016. Since the statute has already been implemented and because this rule is not making additional substantive changes, the rule has no cost or benefits related to the new right of arbitration. The benefit of this rule is making information publicly available in the CFR for transparency and to prevent any confusion on the most up-to-date arbitration process.

Currently, FEMA has no permanent regulations for arbitrations outside of Hurricanes Katrina and Rita. Since the passage of the DRRA, certain PA applicants under declarations since January 1, 2016 may request arbitration pursuant to 42 U.S.C. 5189a(d). On June 21, 2019, CBCA published a final rule (see 84 FR 29085) and FEMA has published a corresponding fact sheet. Between January 1, 2016 and May 7, 2020, FEMA received 15 [14] requests for arbitration. Five of these cases are still in progress, so FEMA does not have available data on the outcome of these cases. Of the 10 closed cases, FEMA prevailed in 6 cases, the applicant prevailed in 3 cases, and the applicant withdrew from the arbitration process prior to a decision in 1 case. Of the four cases involving PNPs, FEMA prevailed in three cases and the applicant prevailed in one case. These figures will continue to change as FEMA continues to receive arbitration requests.

While arbitration is available for disaster declarations retroactive to January 1, 2016, the process did not become available to applicants until FEMA published guidance in December 2018, and FEMA did not begin receiving arbitration requests until March 7, 2019. This means that FEMA only has 14 months of historical data, and therefore, FEMA also relies on older arbitration regulations as a proxy for the expected number of arbitration cases arising out of this proposed rule.

FEMA previously had regulations permitting arbitrations arising from disaster declarations for Superstorm Sandy. No applicants requested arbitration pursuant to these regulations. The authority for these arbitrations has sunset and FEMA has since removed the regulations. FEMA has regulations, at 44 CFR 206.209, permitting arbitrations arising from disaster declarations for Hurricanes Katrina and Rita. This regulation is only available for PA applicants under Hurricane Katrina and Rita disaster declarations. The number of arbitrations submitted under this authority and the process relied on to conduct these arbitrations provide insight to project the number of arbitration cases in this proposed rule. While the Katrina/Rita arbitration regulations have some key differences from the proposed regulations, such as time frames and allowing applicants to request arbitration in lieu of first appeals, it is the best historical data that FEMA has available to estimate the number of expected arbitration cases for this proposed rule.

FEMA recognizes that the regulations at 44 CFR 206.209 have a 30 day time limit for submitting arbitration requests; whereas, FEMA is proposing a 60 calendar-day time limit for arbitrations under this proposed rule. FEMA does not know the impact that these additional 30 days may have on the number of arbitrations submitted.

Number of Potential Arbitration Cases

In addition to reviewing the limited historical data available on the 15 arbitration cases, FEMA also examined the number of arbitrations submitted from the Hurricane Katrina and Rita disasters pursuant to 44 CFR 206.209, in lieu of filing a first appeal, from 2009 through 2017 to derive an estimate on the number of arbitration cases that applicants might submit per year pursuant to 42 U.S.C. 5189a(d). Pursuant to 42 U.S.C. 5189(d)(5)(A), arbitrations authorized by the DRRA must follow the process established in 44 CFR 206.209 for Katrina and Rita arbitrations, so FEMA relied on the annual average percentage of cases submitted under this regulation as a basis for estimating the number of cases that would arise for this proposed rule. The authority to arbitrate in lieu of filing a first appeal for Hurricanes Katrina and Rita became available in February 2009 and 2017 is the latest calendar year where complete data was available at the time of this analysis. Applicants could arbitrate in lieu of a first appeal only if the amount of the project was greater than $500,000.[15] During this period, applicants submitted a total of 75 arbitrations and a total 290 first appeals.[16] From this available data, applicants chose arbitration in lieu of a first appeal 26 percent of the time ((75 ÷ 290) × 100 = approximately 26 percent).

Pursuant to 42 U.S.C. 5189(d)(5)(B), arbitration is authorized by the DRRA in lieu of a second appeal where the dispute is more $500,000, or $100,000 for rural areas. For second appeals estimates, FEMA looked at all PA appeals from 2009 through 2017, rather than just the appeals resulting from Hurricanes Katrina and Rita since a second appeal was available to all applicants. FEMA found that there were 801 [17] second appeals submitted. Of that total, FEMA had data on the amount in dispute for 559 appeals. FEMA applied the proposed urban/rural and minimum

[13] Accessed and downloaded June 17, 2019. *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-201905.pdf.*

[14] The number of arbitration requests was provided by FEMA's Office of Chief Counsel Disaster Disputes Branch as of May 7, 2020.

[15] Please note that arbitration cases for Hurricanes Katrina and Rita are not bound by a threshold for rural areas as is proposed by this rule. FEMA does not know if this limitation would result in more or less cases filed.

[16] Data on appeals and arbitrations is provided by FEMA's Office of Chief Counsel Disaster Disputes Branch. Not all of these first appeals would have been eligible for arbitration. To be eligible for arbitration, the amount in dispute would have had to have been greater than $500,000. FEMA does not have amount in dispute data available for these cases, so the arbitration percentage may be overstated.

[17] During the period of 2009–2017, 801 second level appeals were submitted. FEMA has amount in dispute data for 559 cases. The amount in dispute for 242 cases was not available. FEMA does not have the amount in dispute data on the 242 cases because FEMA did not maintain electronic records for appeals prior to 2015. Prior to 2015, this data was manually entered into a database with many fields left blank. Therefore, the percentages used for estimates for this proposed rule are based on a total of 559 cases.

project amount requirements to these appeals and found that 261 or 47 percent would have been eligible for arbitration under this proposed rule [18] ((261÷ 559) × 100 = approximately 47 percent).

FEMA then applied the arbitration rate of 47 percent from the Katrina and Rita arbitrations to the number of second appeals that would have been eligible under this proposed rule, by year, from 2009 to 2017 as shown in Table 1.

TABLE 1—TOTAL AND ANNUAL AVERAGE ESTIMATED ARBITRATION CASES PER YEAR

CY	Number of second appeals	Percent eligible under proposed rule	Percent choosing arbitration	Expected number of arbitration cases
2009	122	47	26	15
2010	92	47	26	11
2011	107	47	26	13
2012	93	47	26	11
2013	102	47	26	12
2014	82	47	26	10
2015	43	47	26	5
2016	83	47	26	10
2017	77	47	26	9
Total	801			96
Average	89			11

Based on historical data from 2009 through 2017 and case data from 44 CFR 206.209, FEMA estimates that there would be an average of 11 arbitration cases in lieu of a second appeal per year under the proposed rule.

The option to withdraw a first appeal and request arbitration was not available under 44 CFR 206.209, so FEMA could not use this historical data [19] to estimate the number of arbitration cases after a first appeal withdrawal. However, arbitration has been available under 42 U.S.C. 5189a(d)(5) since January 1, 2016. So far, 15 cases were submitted, with two submitted for a first appeal lasting more than 180 days. Based on this limited data, FEMA estimates that 13.3 percent of arbitration cases would result from a withdrawal of a first appeal. ((2 ÷ 15) × 100 = 13.3 percent). Applying the 13.3 percent rate to the annual average number of expected arbitration cases would result in one additional arbitration case per year (13.3 percent × 11 cases = 1.46, rounded to one case). Therefore, FEMA estimates an average of 12 arbitration cases per year (11 + 1 = 12 arbitrations per year).

Costs

Based on experience from the arbitrations conducted for Hurricanes Katrina and Rita, costs from this proposed rule would arise mainly from travel expenses; opportunity costs of time for the applicant and applicant's representatives, recipient's representatives, and FEMA's representatives; and contract costs for applicants and FEMA to retain legal counsel and experts. Cost estimates are based on the expected number of arbitration cases per year. Since FEMA does not reimburse for applicant arbitration expenses, FEMA does not have data on the expenses incurred by applicants who have arbitrated from Hurricanes Katrina and Rita to serve as a proxy for this proposed rule. Other provisions of the proposed rule, such as timeframe requirements, electronic filing requirements, technical advice and clarifications would not have associated costs. FEMA does not expect the electronic filing requirement to have associated costs since nearly all applicants have access to internet and email, and most submit arbitration requests through their attorneys. The proposed timeframe requirements would align the submission deadlines for arbitration and appeals and would not place additional burdens on the applicants. FEMA currently provides technical advice as needed, so this would not be a new practice under this proposed rule.

The arbitration process is highly customizable for the applicant. The applicant may choose to use an attorney, or several attorneys to represent them during the arbitration process. The applicant may also choose not to hire legal representation at all. Additionally, the applicant may use any number of expert witnesses or none. Because of the variability in the way arbitrations are conducted, FEMA is presenting what it considers a typical case upon which to base its cost estimates. This ''typical case'' is based on recent experience with the 15 arbitration already cases filed. Generally, the applicant will use one or two attorneys and at least one expert witness. However, the arbitration process is extremely flexible, and an applicant can use whatever resources it thinks would be most appropriate for its case. For example, in one case, the applicant hired several non-local attorneys for representation. In another case, the arbitration was conducted via written reports only, and no hearing was conducted.

Costs to the CBCA are not discussed in this analysis. CBCA promulgated their own regulations regarding their procedures for FEMA arbitration cases. Under DRRA, CBCA will be responsible for covering the costs of conducting arbitration hearings. All other parties including the applicant, the recipient, and FEMA would be responsible for covering their own expenses. The proposed rule does not mandate any costs for the applicant or recipient. The arbitration process would be entirely voluntary on the part of the applicant. Applicants would choose to request arbitration, if they determine that the cost of arbitration is justified by the potential benefits.

[18] Out of 559 cases, 166 had an amount in dispute greater than $500,000 and would be eligible regardless of the urban/rural classification. 193 cases were for amounts between $100,000 and $500,000, of which 95 were classified as rural. 261 (166 + 95 = 261) cases out of 559, or 47 percent would have met the eligibility requirements for arbitration in lieu of a second appeal.

[19] Out of 3,778 first appeals between 2009 and 2017, 1,834 or 49 percent lasted longer than 180 days. ((1,834 ÷ 3,778) × 100 = 49 percent).

This analysis estimates a range of potential costs based on the applicant's or recipient's use of attorneys for representation. The proposed rule would not require attorneys to represent any party for arbitration. However, FEMA would be represented by attorneys at any arbitration hearing.

The costs to the applicant, recipient, and FEMA would be due to travel and opportunity cost of time and contract costs for legal counsel and experts. To estimate the opportunity cost of time, FEMA assumed that each case would take each party 46.5 hours [20] (rounded to 47 hours) to prepare for the hearing, attend the hearing, and for post hearing work. Hearings have historically lasted two working days, or 16 hours.[21] Additional time would be required for travel as is discussed later in this analysis. FEMA also assumes that each party would make use of expert witnesses in support of their case. Additionally, FEMA generally pays for a court reporter.

Opportunity Cost of Time

A typical arbitration request requires the work of several people, including lawyers to represent the applicants, a court reporter to take a transcript of the hearing, and State, local, Tribal, or PNP managers who are responsible for compiling and submitting the original PA request. Applicants will also typically supply expert witnesses when making their case to the CBCA panel. FEMA used General and Operations Managers to represent State, Tribal, local, and PNP managers. Many PA projects involve repair or replacement of buildings and infrastructure, so FEMA assumes that Engineers would be the most likely occupation used as expert witnesses.

FEMA used hourly wage rates from the Bureau of Labor Statistics Occupational Employment Statistics for the following occupations: Lawyers (SOC 23–1011), $69.34; Court Reporters (SOC 23–2091), $30.00; Engineers (SOC 17–2000), $47.71; and General and Operations Managers (SOC 11–1021) $59.56.[22] To account for employee benefits, FEMA used a wage multiplier of 1.46,[23] resulting in fully-loaded hourly wages of $101.24 for Lawyers, $43.80 for Court Reporters, $69.66 for Engineers, and $86.96 for General and Operations Managers.

FEMA used the 2018 hourly wage tables for the Washington-Baltimore-Arlington, DC–MD–VA–WV–PA [24] locality rate for FEMA employees participating in arbitration cases. Based on current FEMA practice, FEMA assumes that GS–13 employees would perform both legal and other services for an arbitration case and the work would be reviewed by a manager at the GS–15 level. The hourly GS–13 Step 5 salary was $52.66, and the hourly GS–15 step 5 salary was $73.20. In order to account for the benefits paid by employers, FEMA used a 1.46 multiplier to calculate loaded wage rates of $76.88 for a GS–13 Federal employee and $106.87 for a GS–15 Federal employee.

Travel

Arbitration cases are heard by a panel of judges of the CBCA, which is based in Washington, DC. The arbitration process is very customizable, so applicants can choose to have the hearings locally, where a CBCA judge would travel to their location, and FEMA would also send its representatives. Alternatively, cases could be heard at the CBCA, and the applicant would travel to Washington, DC, along with any lawyers and expert witnesses. Finally, the applicant could choose to have the CBCA review documents, and nobody would be required to travel. Because PA applicants are located throughout the U.S. and can be travelling from any location within the U.S., FEMA used average nationwide travel costs to estimate the travel costs for this rule.

The U.S. General Service Administration (GSA) provides guidance on travel policy, hotel rates, and meals and incidentals for Federal employees. FEMA used GSA data on hotel prices and per diem rates to estimate travel expense costs of attending a hearing in person.[25] Because data on travel expenses for non-Federal employees is not available, FEMA used the Federal lodging and per diem rates for applicants travelling to Washington DC to attend hearings. According to GSA, in 2018, the average price of a hotel room in the U.S. in the Washington, DC was $219 per night and outside of Washington, DC was $93 per night. The per diem rate for meals and incidentals on the first and last travel days is $52 and $69 for other travel day(s) in Washington, DC. Similarly, the per diem rates for meals and incidentals on the first and last day is $39 and $51 for the other days outside of Washington, DC.

The U.S. Department of Transportation (DOT) provides information on the price of domestic airfare.[26] According to the Bureau of Transportation Statistics, the annual cost of an average domestic flight within the United States, the average airfare was $350 roundtrip.[27] The total travel costs for applicants attending hearings in Washington, DC would be $1,249 per person ($350 average airfare + ($219 hotel in DC × 3 nights) + ($69 meals and incidentals × 2 days of stay) + ($52 meals and incidentals × 2 travel days)) = $1,249).

Expert Witnesses

FEMA assumes that each party would make use of expert witnesses to support their case. The expert witnesses would be required to travel to the hearing at the expense of the party that hired them. Based on historical experience, preparing for the hearing is estimated to take 20 hours, the duration of the hearing is estimated to be 16 hours and the travel time is estimated at 11 hours for a total of 47 hours for a hearing in Washington, DC, the opportunity costs of time for one expert witness to attend a hearing would be $3,274 ($69.66 × 47 hours). Thus, the total cost for one expert witness' travel and opportunity cost of time is $4,523 ($1,249 + $3,274). Table 2 shows the detailed the costs of an expert witness. To provide a range of estimates since cases vary, a hearing at the applicant's location for an expert witness would cost $2,508 ($69.66 × 36 hours).

[20] Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

[21] Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

[22] U.S. Bureau of Labor Statistics. National Occupational Employment and Wage Estimates United States. May 2018. Accessed May 20, 2020. *https://www.bls.gov/oes/2018/may/oes_nat.htm.*

[23] BLS Employer Costs for Employee Compensation, Table 1, December 2018 located at *https://www.bls.gov/news.release/archives/ecec_03192019.pdf.* The loaded wage factor is equal to the total compensation of $36.32 divided by the wages and salary of $24.91. Values for the total compensation and wages and salary are for civilian workers in the all workers occupational group. Accessed April 29, 2019.

[24] U.S. Office of Personnel Management. 2018 General Schedule (GS) Locality Pay Tables. Accessed May 22, 2020. *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/18Tables/html/DCB_h.aspx.*

[25] U.S. General Services Administration. ''FY 2018 Per Diem Rates for District of Columbia .'' Accessed on May 18, 2020. Standard CONUS rate used for lodging and MI&E. *https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-rates-lookup/?action=perdiems_report&state=DC&fiscal_year=2018&zip=&city=.* Per diem rates are calendar year instead of fiscal year.

[26] Bureau of Transportation Statistics. ''Annual Fares 1995–2019 3Q 2019'' (.xlsx) March 23, 2020. U.S. Department of Transportation. *https://www.bts.gov/sites/bts.dot.gov/files/Annual%20Fares%201995-2019%203Q%202019.xlsx.*

[27] The airfare was adjusted to 2018 dollars and excludes airline tickets under $50.

TABLE 2—ESTIMATED COST PER EXPERT WITNESS, WASHINGTON, DC HEARING

[2018$]

Round trip flight	Three nights of lodging at $219 per night	Meals and incidentals	Total travel expenses	Opportunity costs of time for a hearing in Washington, DC	Total expert witness cost
(A)	(B)	(C)	(D) = (A + B + C)	(E)	(D + E)
$350	$657	$242	$1,249	$3,274	$4,523

Cost for the Applicant

The total cost for the applicant includes travel expenses (round trip flight, three nights of lodging, and meals and incidentals) and opportunity costs of time for the applicant, the applicant's representatives, and the expert witnesses. The total travel expenses for the applicant and the representative would be $2,498 ($1,249 × 2 personnel = $2,498), if the hearing is held in Washington DC. As previously discussed in this analysis, costs include 47 hours for hearing preparation, attending the hearing, and post hearing work, plus 11 hours of travel time for applicants and the applicant's representative. FEMA notes that an applicant can choose not to bring a representative or an applicant's representative could be one attorney or in some cases more than one attorney. To provide a range of costs, FEMA analyzes the typical case where one attorney or no attorneys are present. If the applicant's representative is an attorney, the opportunity costs of time would be $10,916 ($101.24 per hour wages for a lawyer × 58 hours) + ($86.96 per hour wages for a general and operations manager × 58 hours) = $10,916). If the applicant does not use an attorney as their representative, the opportunity costs of time would be $10,087 (2 general and operations managers at $86.96 each × 58 hours = $10,087). Table 3 shows the range of total costs to the applicant.

TABLE 3—RANGE OF APPLICANT COSTS—WASHINGTON, DC HEARING

[2018$]

	Opportunity cost of time	Travel	Total
1 Attorney and 1 Non-Attorney	$10,916	$2,498	$13,414
2 Non-Attorneys	10,087	2,498	12,585

The total cost to the applicant if they were to travel to Washington, DC for a hearing with a representative and two expert witnesses, ranges from $21,631 ((2 expert witnesses at a cost of $4,523 each) + $12,585 recipient cost) to $22,460 ((2 expert witnesses at $4,523 each) + $13,414 recipient and attorney cost).

For a local hearing, the costs to the applicant would include 47 hours of opportunity costs of time for the applicant and representative (assuming the representative is local), and 36 hours of opportunity costs of time to attend the hearing for two expert witnesses (assuming the expert witnesses are local) and would range from $13,190 ((2 general and operations managers at $86.96 each × 47 hours) + (2 expert witnesses at $69.66 each × 36 hours) = $13,190) to $13,861 (($86.96 for a general and operations manager × 47 hours) + ($101.24 for an attorney × 47 hours) + (2 expert witnesses at $69.66 each × 36 hours) = $13,861) depending on who the recipient uses as a representative. Table 4 shows the range of total costs for an applicant for hearings held at the applicant's location.

TABLE 4—APPLICANT COSTS—LOCAL HEARING

[2018$]

	Expert witnesses	Opportunity cost of time	Total
1 Attorney and 1 Non-Attorney	$5,016	$8,845	$13,861
2 Non-Attorneys	5,016	8,174	13,190

Cost for the Recipient

The recipient would not present information in the arbitration case, but would send one or more representatives in a supporting role for the applicant. The cost per arbitration case for the recipient, is the opportunity costs of time for the representative totaling $10,087 (2 general and operations managers at $86.96 each × 58 hours = $10,087) and travel expenses $2,498 (2 representatives × $1,249) of those attending the hearing in Washington, DC. As shown in table 5, the total cost to the recipient would be $12,585 if the hearing was held in Washington, DC.

TABLE 5—ESTIMATED RECIPIENT COSTS, WASHINGTON, DC HEARING

[2018$]

	Opportunity cost of time	Travel	Total
General and Operations Managers	$10,087	$2,498	$12,585

For a local hearing, two representatives would spend 47 hours on the case and the cost to the recipient would be $8,174 (2 general and operations managers at $86.96 each × 47 hours = $8,174).

Cost to Government/FEMA

FEMA would require two attorneys for a typical arbitration case, a GS–13 step 5 attorney and a GS–15 step 5 supervisory attorney, to review and to prepare a response to the request for arbitration. Based on historical experience, the two attorneys' total time from preparation to post hearing is 47 hours.[28] The opportunity costs of time of the attorneys, including preparation and review of a case, is $8,636 (($76.88 GS 13 Step 5 attorney × 47 hours) + ($106.87 GS 15 Step 5 Supervisory Attorney × 47) hours = $8,636).

Based on historical experience, FEMA would also require four non-attorneys (*e.g.,* GS–13 Step 5 program analysts) to support the arbitration case only for the duration of the hearing. The opportunity costs of time associated with the program analysts would be $4,920 (4 GS 13 Step 5 program analysts at $76.88 each × 16 hours = $4,920). Thus, the total opportunity costs of time for all six FEMA personnel would be $13,556.

FEMA would also call their own expert witnesses to attend the hearing. Based on historical experience, FEMA assumes that it would use four expert witnesses per case for a total of $10,032 ($2,508 cost per expert witness × 4 expert witnesses = $10,032). The expert witnesses provide testimony on a range of subjects, for example soil degradation or building construction.

Arbitration hearings do not require transcription services. However, FEMA has historically hired a court reporter for hearings and provided the transcript to the CBCA for their records. FEMA would continue to pay for a court reporter for the duration of a hearing under the proposed rule. The opportunity costs of time for the court reporter services for a transcript would be $701 per arbitration case ($43.80 per hour wages for Court Reporters × 16 hours of arbitration time = $701).

The estimated total cost to FEMA, including staff time, expert witnesses and transcript services, would be $24,289 per case. Table 6 presents the cost of each component by opportunity cost of time and other costs.

TABLE 6—ESTIMATED FEMA COSTS—WASHINGTON, DC HEARING

[2018$]

Cost for four expert witnesses	Cost of court reporter	Cost for FEMA employees (2 attorneys and 4 program analysts)	Total per-case cost to FEMA
$10,032	$701	$13,556	$24,289

For a hearing at the applicant's location, FEMA representatives would need to travel to the location of the hearing. Costs for a local hearing would be higher due to paying for travel time as well as actual travel costs. Travel costs are estimated using the figures previously mentioned and would be $1,249 per person for a total of $2,498, if 2 attorneys travel to the applicant's location. Additionally, FEMA estimates that the time would increase to 58 hours due to 11 hours of travel time for the attorneys totaling (2 attorneys at $106.87 each × 58 hours) $12,397 plus $4,920 for non-travelling program analysts resulting in a total cost of $17,317. The estimated costs to FEMA for a local hearing are presented in Table 7.

TABLE 7—ESTIMATED FEMA COSTS—LOCAL

[2018$]

Cost for four expert witnesses	Cost of court reporter	Opportunity costs of time for FEMA employees	Travel costs (2 attorneys)	Total per-case cost to FEMA
$10,032	$701	$ 17,317	$2,498	$30,548

In addition to these costs, FEMA's PA Program would also hire an Arbitration Coordinator at the GS–13 Step 5 level with an annual salary of $109,900.With the 1.46 multiplier for a fully loaded wage rate, the additional cost to FEMA would be $160,454 per year. Therefore, the annual total costs to FEMA range from $184,743 ($160,454 + $24,289) if the hearing is held in Washington, DC to $191,002 ($160,454 + $30,548) if the hearing is held at the applicant's location.

[28] Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

Total Costs

The total cost per case vary based on who the applicant uses as a representative, and whether the hearing is held in Washington, DC or local to the applicant. Government and FEMA costs would be higher for a hearing held local to the applicant, and likewise, applicant and recipient costs would be higher if the hearing was held in Washington, DC. FEMA estimates that the total costs per case to range between $51,912 and $59,343. Table 8 presents the range of estimated costs per arbitration case.

TABLE 8—TOTAL COST PER CASE

[2018$]

	FEMA	Applicant	Recipient	Total
Low	$30,548	$13,190	$8,174	$51,912
High	24,289	22,460	12,585	59,334

As established earlier in this analysis, FEMA estimate an average of 12 arbitration cases per year. Therefore, FEMA estimates the total annual costs to range between $783,398 ((12 cases × $30,548 per case) + $160,454 for a new FEMA employee + (12 × $13,190 per case for applicant) + (12 × $8,174 per case for the recipient)= $783,398) (low) and $872,462((12 cases × $24,289 per case) + $160,454 for a new FEMA employee + (12 × $22,460 per case for the applicant) + (12 × $12,585 for the recipient)= $872,462) (high). Table 9 shows the estimated total costs per year of this proposed rule. The low cost estimate assumes that all hearings would be held at the applicant's location, while the high estimate assumes hearings would be held in Washington, DC.

TABLE 9—TOTAL COST PER YEAR FOR 12 CASES

[2018$]

	FEMA	Applicant	Recipient	Total
Low	$527,030	$158,280	$98,088	$783,398
High	451,922	269,520	151,020	872,462

Tables 10 and 11 show the total 10-year costs and 10-year costs annualized at 3 percent and 7 percent.

TABLE 10—10-YEAR COST TOTALS USING 3 PERCENT AND 7 PERCENT DISCOUNT RATES

[Low Estimate, 2018$]

Year	FEMA costs	Applicant costs	Recipient costs	Total costs	Annual costs discounted at 3% [1]	Annual costs discounted at 7% [1]
1	$527,030	$158,280	$98,088	$783,398	$759,896	$728,560
2	527,030	158,280	98,088	783,398	737,099	677,561
3	527,030	158,280	98,088	783,398	714,986	630,132
4	527,030	158,280	98,088	783,398	693,536	586,023
5	527,030	158,280	98,088	783,398	672,730	545,001
6	527,030	158,280	98,088	783,398	652,548	506,851
7	527,030	158,280	98,088	783,398	632,972	471,371
8	527,030	158,280	98,088	783,398	613,983	438,375
9	527,030	158,280	98,088	783,398	595,564	407,689
10	527,030	158,280	98,088	783,398	577,697	379,151
Total	5,270,300	1,582,800	980,880	7,833,980	6,651,012	5,370,714
Annualized					783,398	783,398

[1] The annualized amounts for 7 percent and 3 percent are equal in this table because the amounts for each year are identical and the first year is discounted.

TABLE 11—10-YEAR COST TOTALS USING 3 PERCENT AND 7 PERCENT DISCOUNT RATES

[High Estimate, 2018$]

Year	FEMA costs	Applicant costs	Recipient costs	Total costs	Annual costs discounted at 3% [1]	Annual costs discounted at 7% [1]
1	$451,922	$269,520	$151,020	$872,462	$846,288	$811,390
2	451,922	269,520	151,020	872,462	820,899	754,593
3	451,922	269,520	151,020	872,462	796,273	701,771
4	451,922	269,520	151,020	872,462	772,384	652,647

TABLE 11—10-YEAR COST TOTALS USING 3 PERCENT AND 7 PERCENT DISCOUNT RATES—Continued
[High Estimate, 2018$]

Year	FEMA costs	Applicant costs	Recipient costs	Total costs	Annual costs discounted at 3%[1]	Annual costs discounted at 7%[1]
5	451,922	269,520	151,020	872,462	749,212	606,962
6	451,922	269,520	151,020	872,462	726,736	564,475
7	451,922	269,520	151,020	872,462	704,934	524,962
8	451,922	269,520	151,020	872,462	683,786	488,215
9	451,922	269,520	151,020	872,462	663,272	454,040
10	451,922	269,520	151,020	872,462	643,374	422,257
Total	4,519,220	2,595,200	1,510,200	8,724,620	7,407,158	5,981,312
Annualized					872,462	872,462

[1] The annualized amounts for 7 percent and 3 percent are equal in this table because the amounts for each year are identical and the first year is discounted.

FEMA believes that it would not have any implementation or familiarization costs. FEMA currently has an arbitration process that is very similar to the proposed rule for cases arising from Hurricanes Katrina and Rita. FEMA has already notified eligible applicants, dating back to January 1, 2016 of their eligibility for arbitration under DRRA section 1219.

Further, applicants would not have familiarization costs because the process for requesting arbitration would consist of an email request and would use materials previously submitted in the application for PA funding.

Benefits

The benefits of this proposed rule would be qualitative in nature, and would apply mostly to the applicant. FEMA believes that this proposed rule would further its mission of supporting State, Tribal, and local governments, as well as eligible PNPs by offering them an alternative procedure for disputing PA eligibility and funding decisions. Applicants retain the option to submit a second appeal. The proposed rule would offer an alternative that the applicant may see as more impartial because the arbitration cases would be heard by CBCA judges, as opposed to second appeals that would continue to be conducted entirely within FEMA. Additionally, applicants would have the opportunity to present their case in person and call expert witnesses to support their claims. These two options would allow applicants to choose the course that would be most appropriate to their circumstances.

Customization

Applicants may select arbitration, if they consider this process more customizable. The arbitration process would provide applicants with the opportunity to appear in person before an impartial panel and present evidence as to why they are disputing a FEMA determination. Applicants can also retain expert witnesses to provide support to their position. Expert witnesses provide testimony within their technical specialty to assist the arbitration panel in understanding the underlying work for which FEMA ultimately decides eligibility.

Additionally, applicants would have the opportunity to respond in real time to evidence presented by FEMA, allowing them more control over the dispute than they might have under a second appeal. Applicants may opt to hire an expert witness in arbitration to help present the disputed information in a manner more favorable to the applicant. The ability to hire expert witnesses may provide applicants with additional utility and may be an incentive to select arbitration.

The proposed rule would also allow applicants to present the same technical documentation in both the appeals and arbitration procedures. An applicant who submits a first appeal, but elects to withdrawal in favor of arbitration may opt to reuse the information in the request for arbitration that was previously submitted in the first appeal. Applicants may gain utility from the convenience of reusing documents.

Impartiality

It is not possible to quantify an applicant's increased utility due to perceived impartiality. The purpose of arbitration is to create a process to resolve the issues in a manner satisfactory to all parties. Based on past cases, FEMA has granted or partially granted 23 percent of the second appeals submitted by applicants.[29] CBCA has found in favor or partially in favor for the applicant in less than 20 percent of Katrina/Rita arbitrations.[30]

The applicant may nevertheless perceive they have a better opportunity to gain additional Federal funding through arbitration. Applicants would select arbitration as their case would be heard by a third party, rather than an appeal process that is conducted entirely by FEMA. Applicants would perceive a more impartial system, if the forum encourages both parties to solicit discussion rather than ''paper'' based appeals. Applicants would expect that impartiality would best achieve their objective of a fair resolution.

Tables 12 and 13 analyze the historical outcomes from second appeals and arbitration from 44 CFR 206.209. Because of the unpredictable nature and unique circumstances of every disaster, these figures may not be representative of future outcomes, as the outcomes are based on the arbitration policies for Hurricanes Rita and Katrina and the unique circumstances of each case.

TABLE 12—SECOND APPEALS OUTCOMES
[2009–2017]

Second appeal outcome	Number of cases	Percent
Granted	118	14.7
Denied	445	55.6
Partially Granted	67	8.4
Active	1	0.1
Other[1]	170	21.2
Total	801	100

[1] The category of Other includes appeal decision not available, remand, rescind, arbitration, and withdrawn.

[29] Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

[30] Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

TABLE 13—ARBITRATION OUTCOMES UNDER 44 CFR 206.209
[2009–2017]

Arbitration outcome	Number of cases	Percent
Binding Decision without CBCA	3	4.0
In Favor of FEMA	17	22.7
In Favor of Applicant	10	13.3
Partial in Favor of Applicant	31	41.3
Withdrawn	3	4.0
Other[2]	11	14.7
Total	75	100

[2] The category of Other includes other decision, dismissed, and ongoing cases.

Transfers

FEMA is unable to quantify transfers due to this proposed rule. Transfers would arise from the possibility that FEMA may award a different amount of grant funding under the arbitration process than it would under current regulations that only allow for a second appeal. However, it would be speculative for FEMA to make an estimate as to the potential changes in grant disbursement due to the proposed rule.

Impacts

Table 14 summarizes the costs, benefits, and transfer impacts from the proposed rule.

TABLE 14—OMB CIRCULAR A–4 ACCOUNTING TABLE

Category	Estimates		Units		
	Low estimate	High estimate	Year dollar	Discount rate	Period covered
Benefits:					
Annualized Monetized	$0	$0	2018	7%	10 Years.
	$0	$0	2018	3%	10 Years.
Annualized Quantified	0	0			
	0	0			
Qualitative	• Additional option for review of PA projects and decisions. • Greater perception of impartiality in the arbitration process. • Ability to customize arbitration process.				
Costs:					
Annualized Monetized	$783,398	$ 872,462	2018	7%	10 Years.
	$783,398	$4872,462	2018	3%	10 Years.
Annualized Quantified	0	0			
	0	0			
Qualitative	• Longer time frame to resolve disputes under arbitration option.				
Transfers	Possible changes to PA grant disbursements.				
Effects:					
Small Entities	FEMA expects 9 arbitration cases per year from small entities with an estimated cost of between $13,190 and $22,460 per small entity.				
Wages	None.				
Growth	None.				

Uncertainty Analysis

The estimates of the costs of the proposed rule are subject to uncertainty due to the uniqueness of each arbitration case. The cost estimates can vary widely depending on complexity and other factors. As a result, the cost estimate could be overstated or understated.

There are several sources of uncertainty in this analysis: The number of eligible applicants, the proposed deadlines for filing, and the potential number of arbitration cases. Major disasters do not occur on a regular time interval. The severity of the disaster would affect the number of applicants that decide to apply for funding in the PA Program. The number of eligible applicants can vary year-to-year.

Historical data used in this analysis was based on the arbitration process for Hurricanes Katrina and Rita, which is different in a couple of key respects from the proposed arbitration process. While the cost shares for Katrina and Rita were 100 percent, cost shares for future disaster declarations may be as high as 25 percent for applicants. Because Katrina/Rita applicants were not required to pay for any portion of their project cost, they had an incentive to apply for more costly projects and pursue arbitration when denied. Future disasters with a cost share may lead applicants to be more conservative in applying for PA projects, which may result in fewer arbitration requests than was indicated in the primary estimate.

Additionally, the timeframe for submitting arbitration requests under 44 CFR 206.209 was 30 days. However, FEMA is proposing a 60 day submission deadline for arbitration submissions under DRRA requirements to align with the current 60 day submission timeframe for second appeals. This additional time may affect the number of arbitration cases submitted in the future, but FEMA cannot reliably predict these impacts at this time.

Alternatives

FEMA considered several alternative regulatory approaches to the requirements in the proposed rule. The alternatives included: (1) Not issuing a mandatory regulation; (2) proposing an alternate definition of rural; and (3) not requiring electronic submission. FEMA did not consider a no-action alternative. The DRRA mandates FEMA to promulgate a rule allowing the option of arbitration in lieu of a second appeal and specifies the CBCA as the arbitration administrator. As such, FEMA must pursue a regulatory action.

FEMA considered using OMB's nonmetropolitan area definition as an alternate definition of the term ''rural.'' OMB's nonmetropolitan area is defined as areas outside the boundaries of metropolitan areas.

Nonmetropolitan areas are outside the boundaries of metropolitan areas and are further subdivided into two types:

1. Micropolitan (micro) areas, which are nonmetro labor-market areas centered on urban clusters of 10,000–49,999 persons and defined with the same criteria used to define metro areas.

2. All remaining counties, often labeled ''noncore'' counties because they are not part of ''core-based'' metro or micro areas.

OMB defines metropolitan areas to include:

1. Central counties with one or more urbanized areas; urbanized areas are densely-settled urban entities with 50,000 or more people.

2. Outlying counties that are economically tied to the core counties as measured by labor-force commuting. Outlying counties are included if 25 percent of workers living in the county commute to the central counties, or if 25 percent of the employment in the county consists of workers coming out from the central counties—the so-called ''reverse'' commuting pattern.

FEMA did not recommend using the OMB's definition because it combines rural area populations into Metropolitan counties. The OMB definition would also result in some rural areas such as the Grand Canyon being considered a metropolitan county. This alternative would not result in reducing the impact on small entities, while accomplishing the stated objective of the rule.

FEMA considered not requiring applicants to submit a request for arbitration electronically. Current practices allow FEMA to accept hard copy submissions (through U.S. Mail or other means) for first and second appeals. In addition, FEMA currently accepts electronic submissions for requests for arbitration under 44 CFR 206.209. FEMA chose this alternative, as it would provide FEMA with enhanced ability to track and establish deadlines in the arbitration process. CBCA's rule requires applicants to use an electronic method to submit their documentation and request for arbitration to CBCA. Thus, FEMA believes requiring electronic submission would not pose an undue burden on most applicants.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FEMA does not believe this proposed rule will have a significant economic impact on a substantial number of small entities. However, FEMA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the proposed requirements in this NPRM. FEMA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of this NPRM. FEMA will consider all comments received during the public comment period when making a final determination. In accordance with the Regulatory Flexibility Act, an IFRA must contain the following statements, including descriptions of the reason(s) for the rulemaking, its objective(s), the affected small entities, any additional burden for book or record keeping and other compliance requirements; any Federal rules that duplicate, overlap, or conflict with the rulemaking, and significant alternatives considered. The following sections address these subjects individually in the context of this proposed rule.

1. A Description of the Reasons why Action by the Agency Is Being Considered

PA helps State and local governments respond to and recover from the challenges faced during major disasters and emergencies. To support State and local governments facing those challenges, Congress passed DRRA.

Under the PA Program, as authorized by the Stafford Act, FEMA awards grants to eligible applicants to assist them in responding to and recovering from Presidentially-declared emergencies and major disasters. The recipient, as defined at 44 CFR 206.201(m), is the government to which a grant is awarded, and which is accountable for the use of the funds provided. Generally, the State for which the emergency or major disaster is declared is the recipient. The recipient can also be an Indian Tribal government. The applicant, as defined at 44 CFR 206.201(a), is a State agency, local government, or eligible private nonprofit organization submitting an application to the recipient for assistance under the State's grant.

The PA Program provides Federal funds for debris removal, emergency protective measures, repair and replacement of roads and bridges, utilities, water treatment facilities, public buildings, and other infrastructure. When the President declares an emergency or major disaster declaration authorizing disbursement of funds through the PA Program, that presidential declaration automatically authorizes FEMA to accept applications from eligible applicants under the PA Program. To apply for a grant under the PA Program, the eligible applicant must submit a Request for PA to FEMA through the recipient. Upon award, the recipient notifies the applicant of the award, and the applicant becomes a subrecipient.

The DRRA requires FEMA to promulgate a regulation providing applicants with a right of arbitration under FEMA's PA Program. Applicants currently have a right to arbitration to dispute FEMA eligibility determinations associated with Hurricanes Katrina and Rita; see 44 CFR 206.209. The proposed rule would expand the scope by allowing applicants to request arbitration for disputes under all disaster declarations after January 1, 2016 that are above certain dollar amount thresholds. The proposed rule would grant applicants an additional method of recourse.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The proposed rule would implement section 1219 of the DRRA by providing applicants with a right to arbitration for the PA Program under major disaster declarations. Pursuant to section 1219, to request arbitration a PA applicant (1) must have a dispute arising from a disaster declared after January 1, 2016, (2) must be disputing an amount that exceeds $500,000 (or $100,000 for an applicant in a ''rural area'' with a population of less than 200,000 outside an urbanized area), and (3) must have submitted a first appeal pursuant to the time requirements established in 44 CFR 206.206.

Accordingly, FEMA is initiating a rulemaking to amend appeals regulation at 44 CFR 206.206 to add in the new right to arbitration under DRRA. The proposed rule would revise appeals procedures and establish arbitration procedures.

3. A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

''Small entity'' is defined in 5 U.S.C. 601. The term ''small entity'' can have the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''

Section 601(3) defines a ''small business'' as having the same meaning as ''small business concern'' under Section 3 of the Small Business Act (SBA). This includes any small business concern that is independently owned and operated and is not dominant in its field of operation. Section 601(4) defines a ''small organization'' as any not-for-profit enterprise which is independently owned and operated and is not dominant in their field of operation. Section 601(5) defines ''small governmental jurisdiction'' as governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.

The SBA also stipulates in its size standards of how large an entity may be and still be classified as a ''small entity.'' These small business size standards are matched to industries described in the North American Industry Classification System (NAICS) to determine if an entity is considered small.

This proposed rule does not place any requirements on small entities. It does, however, offer them an alternative means to dispute FEMA's determination for PA eligibility. If the entity chooses to dispute a PA determination, and they select arbitration rather than a second appeal, they would be responsible for their share of the cost of the arbitration process.

All small entities would have to meet the proposed requirements to be eligible for arbitration. FEMA identified 3,778 applicants for FEMA's PA Program that would be eligible for arbitration under the proposed requirements for the time frame from 2009 through 2017. FEMA used Slovin's formula and a 90 percent confidence interval to determine the sample size.[31] FEMA sampled 97 of these applicants and found that 73 (75 percent) met the definition of a small entity based on the population size of local governments (less than 50,000 population),[32] or PNPs based on size standards set by the SBA.[33] The remaining 24 entities were not found to be considered as small entities. Eligible small entities included 70 small government agencies and three PNP organizations. Based on information presented in the Executive Orders 12866 and 13563, FEMA estimates 12 arbitration cases per year. If 75 percent of these are small entities, FEMA estimates 9 arbitration requests per year from small entities with an average cost of between $13,190 and $22,460 per case. Nine small entities may not represent a substantial number of small entities impacted by this proposed rule and FEMA does not believe the costs imposed to these small entities are significant. FEMA welcomes any comments from the public on the number of small entities presented in this analysis and any impacts imposed onto them by this proposed rule.

4. A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

Arbitration—As an alternative to the appeal process, applicants may request arbitration of the disputed determination. To be eligible for Section 423 arbitration, a PA applicant's request must meet all three of the following conditions: (1) The amount in dispute arises from a disaster declared after January 1, 2016; (2) the disputed amount exceeds $500,000 (or $100,000 if the applicant is in a ''rural area,'' defined as having a population of less than 200,000 living outside an urbanized area); and (3) the applicant submitted a first appeal with FEMA pursuant to the requirements established in 44 CFR 206.206.

The applicant must submit a Request for Arbitration to the recipient, CBCA, and FEMA. The Request for Arbitration must contain a written statement, which specifies the amount in dispute, all documentation supporting the position of the applicant, the disaster number, and the name and address of the applicant's authorized representative or counsel. FEMA estimates that it would take an applicant 2 hours to complete the Request for Arbitration (these 2 hours are accounted for in the economic analysis through the 47 hours of hearing preparation time for applicants) with a wage rate of $86.96 for a general and operations manager. FEMA estimates the opportunity cost of time for completing the request would be $173.92 per applicant. With an estimated 9 cases per year, FEMA estimates the total burden for completing the request at $1,565 per year. The person completing the request would need to be familiar with PA regulations and policies.

5. An Identification, to the Extent Practicable, of all Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

FEMA's regulations on appeals, found at 44 CFR 206.206, are still in effect and provide the required process for submitting first and second appeals.[34] Applicants must submit a request for a first appeal prior to submitting a request for arbitration. Applicants may submit a request for arbitration or a second appeal, but not both.

Section of 1219 of DRRA requires CBCA to conduct the arbitrations. Accordingly, applicants that request arbitration to dispute a FEMA determination must also meet the CBCA electronic submission requirement.

There are overlapping provisions between FEMA's proposed rule and CBCA's final rule.[35] Applicants should also see CBCA regulations at 48 CFR parts 6101 and 6106 for additional procedures for requesting arbitration.

6. A Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

The alternatives included: (1) Using another definition for ''rural'' and (2) not requiring electronic submission.

FEMA considered using OMB's nonmetropolitan area definition as an alternate definition of the term ''rural.'' OMB's nonmetropolitan area is defined as areas outside the boundaries of metropolitan areas and are further subdivided into two types:

1. Micropolitan (micro) areas, which are nonmetro labor-market areas centered on urban clusters of 10,000–49,999 persons and defined with the same criteria used to define metro areas.

2. All remaining counties, often labeled ''noncore'' counties because they are not part of ''core-based'' metro or micro areas.

OMB defines metropolitan areas to include:

1. Central counties with one or more urbanized areas; urbanized areas are densely-settled urban entities with 50,000 or more people.

2. Outlying counties that are economically tied to the core counties

[31] Slovin's formula is n = N/(1 + N *e ∧2). Therefore, 3,778/(1 + 3,778 * 0.1∧2) = 97 (rounded).

[32] Information on population sizes was obtained using the U.S. Census Bureau's City and Town Population Totals 2010–2018. Available at *https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html.*

[33] Small Business Administration. ''Table of Size Standards'' (.xlxs). Available at *https://www.sba.gov/document/support--table-size-standards.* Revenue and employment information for individual PNP's was obtained from PNP websites.

[34] A link to the current Fact Sheet: *https://www.fema.gov/media-library/assets/documents/175821.* Accessed May 15, 2020.

[35] A copy of CBCA's final rule can be found online at: *https://www.govinfo.gov/content/pkg/FR-2019-06-21/pdf/2019-13081.pdf.* Accessed July 22, 2019.

as measured by labor-force commuting. Outlying counties are included if 25 percent of workers living in the county commute to the central counties, or if 25 percent of the employment in the county consists of workers coming out from the central counties—the so-called ''reverse'' commuting pattern.

FEMA did not recommend using the OMB's definition as it combines rural area populations into Metropolitan counties. The OMB definition would also result in some rural areas such as the Grand Canyon being considered a metropolitan county. This alternative would not result in reducing the impact on small entities while accomplishing the stated objective of the rule.

FEMA considered not requiring electronic submission. Current practices allow FEMA to accept physical mail for appeals. In addition, FEMA currently accepts electronic submissions for requests for arbitration under 44 CFR 206.209. As CBCA provided an electronic address for applicants to submit their request for arbitration and documentation, applicants must use electronic method if they choose the arbitration process. Thus, FEMA believes requiring electronic submission would not pose an additional undue burden on applicants that are considered small entities.

Conclusion

FEMA is interested in the potential impacts from this rule on small businesses and requests public comment on these potential impacts. If you think that this rule will have a significant economic impact on you, your business, or organization, please submit a comment to the docket at the address under **ADDRESSES** in this proposed rule. In your comment, explain why, how, and to what degree you think this rule will have an economic impact. FEMA does not believe this proposed rule will have a significant economic impact on a substantial number of small entities. However, FEMA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the proposed requirements in this NPRM. FEMA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of this NPRM.

C. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 658, 1501–1504, 1531–1536, 1571 (the Act), pertains to any notice of proposed rulemaking which implements any rule that 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 (adjusted annually for inflation) or more in any one year. If the rulemaking includes a Federal mandate, the Act requires an agency to prepare an assessment of the anticipated costs and benefits of the Federal mandate. The Act also pertains to any regulatory requirements that might significantly or uniquely affect small governments. Before establishing any such requirements, an agency must develop a plan allowing for input from the affected governments regarding the requirements. Exemptions from the Act are found at 2 U.S.C. 1503, they include any regulation or proposed regulation that ''provides for emergency assistance or relief at the request of any State, local, or tribal government or any official of a State, local, or tribal government.'' Thus, FEMA finds this rule to be exempt from the Act.

Additionally, FEMA has determined that this rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, nor by the private sector, of $100 million or more (adjusted annually for inflation) in any one year because of a Federal mandate, and it would not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Paperwork Reduction Act of 1995

As required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, 109 Stat. 163, (May 22, 1995) (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

In this proposed rule, FEMA is seeking a revision to the already existing collection of information, OMB Control Number 1660–0017. The annual cost to the Federal Government is decreasing from $1,920,626 to $1,890,650. The decrease to the cost to the Federal Government occurred since we deleted $29,976 in arbitration travel costs; as, we do not have to include them per the PRA exceptions for civil & administrative actions. See 44 U.S.C. 3518(c). This proposed rule serves as the 60-day comment period for this proposed change pursuant to 5 CFR 1320.12. FEMA invites the public to comment on the proposed collection of information.

Collection of Information

Title: PA Program.

Type of information collection: Revision of a currently approved collection.

OMB Number: 1660–0017.

Form Forms: FEMA Form 009–0–49 Request for Public Assistance; FEMA Form 009–0–91 Project Worksheet (PW); FEMA Form 009–0–91A Project Worksheet (PW)—Damage Description and Scope of Work Continuation Sheet; FEMA Form 009–0–91B Project Worksheet (PW)—Cost Estimate Continuation Sheet; FEMA Form 009–0–91C Project Worksheet (PW)—Maps and Sketches Sheet; FEMA Form 009–0–91D Project Worksheet (PW)—Photo Sheet; FEMA Form 009–0–120 Special Considerations Questions; FEMA Form 009–0–121 PNP Facility Questionnaire; FEMA Form 009–0–123 Force Account Labor Summary Record; FEMA Form 009–0–124 Materials Summary Record; FEMA Form 009–0–125 Rented Equipment Summary Record; FEMA Form 009–0–126 Contract Work Summary Record; FEMA Form 009–0–127 Force Account Equipment Summary Record; FEMA Form 009–0–128 Applicant's Benefits Calculation Worksheet; FEMA Form 009–0–111, Quarterly Progress Report; FEMA Form 009–0–141, FAC–TRAX System.

Abstract: The information collected is utilized by FEMA to make determinations for PA grants based on the information supplied by the respondents.

Affected Public: State, local, or Tribal Government.

Estimated Number of Respondents: 1,012.

Estimated Number of Responses: 398,068.

Estimated Total Annual Burden Hours: 466,025.

The proposed rule to implement section 423 arbitration would not impact the total number of responses or burden hours. FEMA proposes to add a new paragraph to 44 CFR 206.206 to add a right of arbitration for applicants. The proposed regulation would provide applicants an additional choice in FEMA's appeals and arbitration processes: Applicants must choose either submitting a second appeal or submitting a request for arbitration. Or, an applicant may select arbitration if the Regional Administrator has received a first appeal, but has not rendered a decision within 180 calendar days of receipt. There is no change to the number of responses due to the proposed rule, as applicants can only choose one option.

FEMA estimated it will take approximately 2 hours to prepare a letter for appeal or arbitration. This estimate is based on the assumption that

most of the information necessary for preparing the appeal or arbitration request is found in the existing Project Worksheet.

Recipients will also provide a recommendation per each applicant request for an appeal or arbitration. The total number of recommendations would not change because of the proposed rule. FEMA estimates it will take approximately 1 hour to prepare a recommendation.

Currently, the estimated time to complete a request and submit a letter of recommendation for an appeal is three hours. FEMA also estimates the time to complete a request and submit a letter of recommendation for arbitration would also be three hours. The applicant could re-use the same information from the request for an appeal or arbitration and the recipient would review similar information in providing its recommendation. The proposed rule would not impact the estimate of the burden hours.

Table A.12 provides estimates of annualized cost to respondents for the hour burdens for the collection of information.

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/form No.	Number of respondents	Number of responses per respondent	Total No. of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
State, Local or Tribal Government.	FEMA Form 009–0–49, Request for PA/.	56	129	7,224	0.25	1,806	$63.52	$114,717
State, Local or Tribal Government.	FEMA Form 009–0–91, Project Worksheet (PW) and a Request for Time Extension.	56	840	47,040	1.50	70,560	63.52	4,481,971
State, Local or Tribal Government.	FEMA Form 009–0–91A Project Work Sheet (PW) Damage Description and Scope of Work.	56	784	43,904	1.50	65,856	63.52	4,183,173
.....	FEMA Form 009–0–91B, Project Worksheet (PW) Cost Estimate Continuation Sheet and Request for additional funding for Cost Overruns.	56	784	43,904	1.3333	58,537	63.52	3,718,283
State, Local or Tribal Government.	FEMA Form 009–0–91C Project Worksheet (PW) Maps and Sketches Sheet.	56	728	40,768	1.50	61,152	63.52	3,884,375
State Local or Tribal Government.	FEMA Form 009–0–91D Project Worksheet (PW) Photo Sheet.	56	728	40,768	1.50	61,152	63.52	3,884,375
State, Local or Tribal Government.	FEMA Form 009–0–120, Special Considerations Questions/.	56	840	47,040	0.50	23,520	63.52	1,493,990
State, Local or Tribal Government.	FEMA Form 009–0–128, Applicant's Benefits Calculation Worksheet/.	56	784	43,904	0.50	21,952	63.52	1,394,391
State, Local or Tribal Government.	FEMA Form 009–0–121, PNP Facility Questionnaire.	56	94	5,264	0.50	2,632	63.52	167,185
State, Local or Tribal Government.	FEMA Form 009–0–123, Force Account Labor Summary Record.	56	94	5,264	0.50	2,632	63.52	167,185
State, Local or Tribal Government.	FEMA Form 009–0–124, Materials Summary Record/.	56	94	5,264	0.25	1,316	63.52	83,592
State, Local or Tribal Government.	FEMA Form 009–0–125, Rented Equipment Summary Record.	56	94	5,264	0.50	2,632	63.52	167,185
State, Local or Tribal Government.	FEMA Form 009–0–126, Contract Work Summary Record/.	56	94	5,264	0.50	2,632	63.52	167,185
State, Local or Tribal Government.	FEMA Form 009–0–127, Force Account Equipment Summary Record/.	56	94	5,264	0.25	1,316	63.52	83,592
State, Local or Tribal Government.	State Administrative Plan and State Plan Amendments/No Form.	56	1	56	8.00	448	63.52	28,457
State, Local or Tribal Government.	FEMA Form 009–0–111, Quarterly Progress Report.	56	4	224	100.00	22,400	63.52	1,422,848
State, Local or Tribal Government.	Request for Appeals or Arbitrations & Recommendation/No Forms.	56	9	504	3.00	1,512	63.52	96,042
State, Local or Tribal Government.	Request for Arbitration & Recommendation resulting from Hurricanes Katrina or Rita/No Form.	4	5	20	3.00	60	63.52	3,811
State, Local or Tribal Government.	FEMA Form 009–0–141, FAC–TRAX System.	56	913	51,128	1.25	63,910	63.52	4,059,563
Total	.....	1,012	.....	398,068	.....	466,025	.....	29,601,921

Note: The ''Avg. Hourly Wage Rate'' for each respondent includes a 1.46 multiplier to reflect a fully-loaded wage rate.

Estimated Total Annual Respondent Cost: $29,601,921.

Estimated Respondents' Operation and Maintenance Costs: N/A.

Estimated Respondents' Capital and Start-Up Costs: N/A.

Estimated Total Annual Costs to the Federal Government: $1,890,650.

E. Privacy Act

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a proposed regulation will result in a system of records. A ''record'' is any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his/her education, financial transactions, medical history, and criminal or employment history and that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. See 5 U.S.C. 552a(a)(4). A ''system of records'' is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

In accordance with DHS policy, FEMA has completed a Privacy Threshold Analysis (PTA) for this proposed rule. DHS has determined that this proposed rulemaking does not affect the 1660–0017 OMB Control Number's current compliance with the E-Government Act of 2002 or the Privacy Act of 1974, as amended. As a result, DHS has concluded that the 1660–0017 OMB Control Number is covered by the DHS/FEMA/PIA–013 Grants Management Programs Privacy Impact Assessment (PIA). Additionally, DHS has decided that the 1660–0017 OMB Control Number is covered by the DHS/FEMA—009 Hazard Mitigation, Disaster Public Assistance, and Disaster Loan Programs System of Records, 79 FR 16015, Mar. 24, 2014 System of Records Notice (SORN).

F. National Environmental Policy Act of 1969 (NEPA)

Section 102 of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*) requires agencies to consider the impacts of their proposed actions on the quality of the human environment. The Council on Environmental Quality's (CEQ) procedures for implementing NEPA, 40 CFR parts 1500 through 1508, require Federal agencies to prepare Environmental Impact Statements (EISs) for major Federal actions significantly affecting the quality of the human environment. Each agency can develop categorical exclusions (catexes) to cover actions that have been demonstrated to not typically trigger significant impacts to the human environment individually or cumulatively. Agencies develop environmental assessments (EAs) to evaluate those actions that are ineligible for an agency's catexes and which have the potential to significantly impact the human environment. At the end of the EA process, the agency will determine whether to make a Finding of No Significant Impact (FONSI) or whether to initiate the EIS process.

Rulemaking is a major Federal action subject to NEPA. The list of catexes at DHS Instruction Manual 023–01–001–01 (Revision 01), ''Implementation of the National Environmental Policy Act (NEPA),'' Appendix A, includes a catex for the promulgation of certain types of rules, including rules that implement, without substantive change, statutory or regulatory requirements and rules that interpret or amend an existing regulation without changing its environmental effect. (Catex A3(b) and (d)).

The purpose of this rule is to propose regulations to implement the new right of arbitration authorized by the DRRA, and to revise FEMA's regulations regarding first and second PA appeals. These changes are to implement statutory requirements and to amend existing regulation without changing its environmental effect, consistent with Catex A3, as defined in DHS Instruction Manual 023–01–001–01 (Rev. 01), Appendix A. No extraordinary circumstances exist that will trigger the need to develop an EA or EIS. See DHS Instruction Manual 023–01–001–01 V(B)(2). An EA will not be prepared because a catex applies to this rulemaking action and no extraordinary circumstances exist.

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

Executive Order 13175, ''Consultation and Coordination With Indian Tribal Governments,'' 65 FR 67249, Nov. 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Under this Executive Order, to the extent practicable and permitted by law, no agency will promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless funds necessary to pay the direct costs incurred by the Indian Tribal government or the Tribe in complying with the regulation are provided by the Federal Government, or the agency consults with Tribal officials.

The purpose of this rule is to propose regulations to implement the new right of arbitration authorized by 42 U.S.C. 5189a(d) and to revise FEMA's regulations regarding first and second PA appeals. Current regulations at 44 CFR 206.206 only provide regulatory guidance on a first and second PA appeal process, but not arbitration. The other major proposed revisions to 44 CFR 206.206 include adding definitions; adding subparagraphs to clarify what actions FEMA may take and will not take while an appeal is pending and state that FEMA may issue separate guidance as necessary, similar to current 44 CFR 206.209(m); adding a finality of decision paragraph; requiring electronic submission for appeals and arbitrations documents; and clarifying overall timeframe limits for first and second appeals.

Under the proposed rule, Indian Tribes have the same opportunity to participate in arbitrations as other eligible applicants; however, given the participation criteria required under 42 U.S.C. 5189a(d) and its voluntary nature, FEMA anticipates a very small number, if any Indian Tribes, will participate in the new proposed permanent right of arbitration. FEMA also anticipates a very small number of Indian Tribes will be affected by the other major revisions to 44 CFR 206.206. As a result, FEMA does not expect this proposed rule to have a substantial direct effect on one or more Indian tribes or impose direct compliance costs on Indian Tribal governments. Additionally, since FEMA anticipates a very small number, if any Indian Tribes will participate in the arbitration portion of the proposed rule nor will be affected by the rest of the proposed revisions to 44 CFR 206.206, FEMA does not expect the regulations to have substantial direct effects on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

H. Executive Order 13132, Federalism

A rule has implications for federalism under Executive Order 13132 ''Federalism'' (64 FR 43255, Aug. 10, 1999), 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. FEMA has analyzed this proposed rule under Executive Order 13132 and determined that it does not have implications for federalism.

I. Executive Order 12630, Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, ''Governmental Actions and Interference With Constitutionally Protected Property Rights'' (53 FR 8859, Mar. 18, 1988).

J. Executive Order 12898, Environmental Justice

Executive Order 12898 ''Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, Feb. 16, 1994), mandates that Federal agencies identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and

low-income populations. It requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in, denying persons the benefit of, or subjecting persons to discrimination because of their race, color, or national origin or income level.

The purpose of this rule is to propose regulations to implement the new right of arbitration authorized by the DRRA in 42 U.S.C. 5189a(d) and to revise FEMA's regulations regarding first and second PA appeals. Current regulations, at 44 CFR 206.206, only provide regulatory guidance on a first and second PA appeal process, but not arbitration. The other major proposed revisions to 44 CFR 206.206 include adding definitions; adding subparagraphs to clarify what actions FEMA may take and will not take while an appeal is pending and state that FEMA may issue separate guidance as necessary, similar to current 44 CFR 206.209(m); adding a finality of decision paragraph; requiring electronic submission for appeals and arbitrations documents; and clarifying overall timeframe limits for first and second appeals. There are no adverse effects and no disproportionate effects on minority or low-income populations.

K. Executive Order 12988, Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, Feb. 7, 1996), to minimize litigation, eliminate ambiguity, and reduce burden.

L. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

This proposed rule will not create environmental health risks or safety risks for children under Executive Order 13045, ''Protection of Children From Environmental Health Risks and Safety Risks'' (62 FR 19885, Apr. 23, 1997).

M. Congressional Review of Agency Rulemaking

Under the Congressional Review of Agency Rulemaking Act (CRA), 5 U.S.C. 801–808, before a rule can take effect, the Federal agency promulgating the rule must submit to Congress and to the Government Accountability Office (GAO) a copy of the rule; a concise general statement relating to the rule, including whether it is a major rule; the proposed effective date of the rule; a copy of any cost-benefit analysis; descriptions of the agency's actions under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act; and any other information or statements required by relevant executive orders.

FEMA will send this rule to the Congress and to GAO pursuant to the CRA, if the rule is finalized. The rule is not a ''major rule'' within the meaning of the CRA. It will not have an annual effect on the economy of $100,000,000 or more; it will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects in 44 CFR Part 206

Administrative practice and procedure, Coastal zone, Community facilities, Disaster assistance, Fire prevention, Grant programs-housing and community development, Housing, Insurance, Intergovernmental relations, Loan programs-housing and community development, Natural resources, Penalties, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Federal Emergency Management Agency proposes to amend 44 CFR part 206 as follows:

PART 206—FEDERAL DISASTER ASSISTANCE

■ 1. The authority citation for part 206 continues to read as follows:

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.;* Department of Homeland Security Delegation 9001.1.

■ 2. Revise § 206.206 to read as follows:

§ 206.206 Appeals and arbitrations.

(a) *Definitions.* The following definitions apply to this section:

Administrator means the Administrator of the Federal Emergency Management Agency.

Amount in dispute means the difference between the amount of financial assistance sought for a Public Assistance project and the amount of financial assistance for which FEMA has determined such Public Assistance project is eligible.

Applicant refers to the definition at § 206.201(a).

Final agency determination means:

(1) The decision of FEMA, if the applicant or recipient does not submit a first appeal within the time limits provided for in paragraph (b)(1)(ii)(A) of this section; or

(2) The decision of FEMA, if the applicant or recipient withdraws the pending appeal and does not file a request for arbitration within 30 calendar days of the withdrawal of the pending appeal; or

(3) The decision of the FEMA Regional Administrator, if the applicant or recipient does not submit a second appeal within the time limits provided for in paragraph (b)(2)(ii)(A) of this section.

Recipient refers to the definition at § 206.201(m).

Rural area means an area with a population of less than 200,000 outside an urbanized area.

Urbanized area means the area as identified by the United States Census Bureau.

(b) *Appeals and Arbitrations.* An eligible applicant or recipient may appeal or an eligible applicant may arbitrate any determination previously made related to an application for or the provision of Public Assistance according to the procedures of this section.

(1) *First Appeal.* The applicant must make a first appeal in writing and submit it electronically through the recipient to the Regional Administrator. The recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's first appeal to the Regional Administrator. The recipient may make recipient-related appeals to the Regional Administrator.

(i) *Content.* A first appeal must:

(A) Contain all documented justification supporting the applicant or recipient's position;

(B) Specify the amount in dispute, as applicable; and

(C) Specify the provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent.

(ii) *Time Limits.* (A) The applicant may make a first appeal through the recipient within 60 calendar days from the date of the FEMA determination that is the subject of the appeal and the recipient must electronically forward to the Regional Administrator the applicant's first appeal with a recommendation within 120 calendar days from the date of the FEMA determination that is the subject of the appeal. FEMA will deny all first appeals it receives from the recipient more than 120 calendar days from the date of the

FEMA determination that is the subject of the appeal.

(B) Within 90 calendar days following receipt of a first appeal, if there is a need for additional information, the Regional Administrator will provide electronic notice to the recipient and applicant. If there is no need for additional information, then FEMA will not provide notification. The Regional Administrator will generally allow the recipient 30 calendar days to provide any additional information.

(C) The Regional Administrator will provide electronic notice of the disposition of the appeal to the applicant and recipient within 90 calendar days of receipt of the appeal or within 90 calendar days following the receipt of additional information or following expiration of the period for providing the information.

(iii) *Technical Advice.* In appeals involving highly technical issues, the Regional Administrator may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for this technical review may be in addition to other allotted time periods. Within 90 calendar days of receipt of the report, the Regional Administrator will provide electronic notice of the disposition of the appeal to the recipient and applicant.

(iv) *Effect of an Appeal.* (A) FEMA will take no action to implement any determination pending an appeal decision from the Regional Administrator, subject to the exceptions in paragraph (b)(1)(iv)(B) of this section.

(B) Notwithstanding paragraph (b)(1)(iv)(A) of this section, FEMA may:

(1) Suspend funding (see 2 CFR 200.338);

(2) Defer or disallow other claims questioned for reasons also disputed in the pending appeal; or

(3) Take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation.

(v) *Implementation.* If the Regional Administrator grants an appeal, the Regional Administrator will take appropriate implementing action(s).

(vi) *Guidance.* FEMA may issue separate guidance as necessary to supplement paragraph (b)(1) of this section.

(2) *Second Appeal.* If the Regional Administrator denies a first appeal in whole or in part, the applicant may make a second appeal in writing and submit it electronically through the recipient to the Assistant Administrator for the Recovery Directorate. The recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's second appeal to the Assistant Administrator for the Recovery Directorate. The recipient may make recipient-related second appeals to the Assistant Administrator for the Recovery Directorate.

(i) *Content.* A second appeal must:

(A) Contain all documented justification supporting the applicant or recipient's position;

(B) Specify the amount in dispute, as applicable; and

(C) Specify the provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent.

(ii) *Time Limits.* (A) If the Regional Administrator denies a first appeal in whole or in part, the applicant may make a second appeal through the recipient within 60 calendar days from the date of the Regional Administrator's first appeal decision and the recipient must electronically forward to the Assistant Administrator for the Recovery Directorate the applicant's second appeal with a recommendation within 120 calendar days from the date of the Regional Administrator's first appeal decision. FEMA will deny all second appeals it receives from the recipient more than 120 calendar days from the date of the Regional Administrator's first appeal decision.

(B) Within 90 calendar days following receipt of a second appeal, if there is a need for additional information, the Assistant Administrator for the Recovery Directorate will provide electronic notice to the recipient and applicant. If there is no need for additional information, then FEMA will not provide notification. The Assistant Administrator for the Recovery Directorate will generally allow the recipient 30 calendar days to provide any additional information.

(C) The Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the appeal to the recipient and applicant within 90 calendar days of receipt of the appeal or within 90 calendar days following the receipt of additional information or following expiration of the period for providing the information.

(iii) *Technical Advice.* In appeals involving highly technical issues, the Assistant Administrator for the Recovery Directorate may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for this technical review may be in addition to other allotted time periods. Within 90 calendar days of receipt of the report, the Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the appeal to the recipient and applicant.

(iv) *Effect of an Appeal.* (A) FEMA will take no action to implement any determination pending an appeal decision from the Assistant Administrator for the Recovery Directorate, subject to the exceptions in paragraph (b)(2)(iv)(B) of this section.

(B) Notwithstanding paragraph (b)(2)(iv)(A) of this section, FEMA may

(1) Suspend funding (see 2 CFR 200.338);

(2) Defer or disallow other claims questioned for reasons also disputed in the pending appeal; or

(3) Take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation.

(v) *Implementation.* If the Assistant Administrator for the Recovery Directorate grants an appeal, the Assistant Administrator for the Recovery Directorate will direct the Regional Administrator to take appropriate implementing action(s).

(vi) *Guidance.* FEMA may issue separate guidance as necessary to supplement paragraph (b)(2) of this section.

(3) *Arbitration.* (i) *Applicability.* An applicant may request arbitration from the Civilian Board of Contract Appeals (CBCA) if:

(A) There is a disputed agency determination arising from a major disaster declared on or after January 1, 2016; and

(B) The amount in dispute is greater than $500,000, or greater than $100,000 for an applicant for assistance in a rural area; and

(C) The Regional Administrator has denied a first appeal decision or received a first appeal but not rendered a decision within 180 calendar days of receipt.

(ii) *Limitations.* A request for arbitration is in lieu of a second appeal.

(iii) *Request for Arbitration.* (A) An applicant may initiate arbitration by submitting an electronic request simultaneously to the recipient, the CBCA, and FEMA. See 48 CFR part 6106.

(B) *Time Limits. (1)* An applicant must submit a request for arbitration within 60 calendar days from the date of the Regional Administrator's first appeal decision; or

(2) If the first appeal was timely submitted, and the Regional Administrator has not rendered a decision within 180 calendar days of

receiving the appeal, an applicant may electronically submit a withdrawal of the pending appeal simultaneously to the recipient, the FEMA Regional Administrator, and the CBCA. The applicant may then submit a request for arbitration within 30 calendar days from the date of the withdrawal of the pending appeal.

(C) *Content of request.* The request for arbitration must contain a written statement that specifies the amount in dispute, all documentation supporting the position of the applicant, the disaster number, and the name and address of the applicant's authorized representative or counsel.

(iv) *Expenses.* Expenses for each party will be paid by the party who incurred the expense.

(v) *Guidance.* FEMA may issue separate guidance as necessary to supplement paragraph (b)(3) of this section.

(c) *Finality of decision.* A FEMA final agency determination or a decision of the Assistant Administrator for the Recovery Directorate on a second appeal constitute a final decision of FEMA. In the alternative, a decision of the majority of the CBCA panel constitutes a final decision, binding on all parties. See 48 CFR 6106.613. Final decisions are not subject to further administrative review.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–16040 Filed 8–28–20; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 209, 212, 213, and 252

[Docket 2020–0027]

RIN 0750–AK44

Defense Federal Acquisition Regulation Supplement: Use of Supplier Performance Risk System (SPRS) Assessments (DFARS Case 2019–D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to update the policy and procedures for use of the Supplier Performance Risk System.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 30, 2020, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019–D009, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Search for ''DFARS Case 2019–D009.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2019–D009'' on any attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D009 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Heather Kitchens, telephone 571–372–6095.

SUPPLEMENTARY INFORMATION:

I. Background

The Supplier Performance Risk System (SPRS) is a DoD enterprise application that retrieves quality and delivery data from Government systems to calculate ''on time'' delivery scores and quality classifications. Contracting officers will use the overall risk assessment generated by the SPRS module to evaluate quotes and offers received under all solicitations for supplies and services, including solicitations using part 12 procedures for the acquisition of commercial items. The system generates three risk assessments using the SPRS Evaluation Criteria and calculations at *https://www.sprs.csd.disa.mil/pdf/SPRS_DataEvaluationCriteria.pdf.* These risk assessments are described as follows:

- *Item Risk.* SPRS collects data to generate the probability that a product or service, based on intended use, will introduce counterfeit or nonconforming material entering the DoD supply chain, which can result in significant personnel safety issues, mission degradation, or monetary loss. SPRS ''flags'' items identified by Government sources as ''high risk'' and provides suggested mitigations, or as ''not high risk''.
- *Price Risk.* SPRS collects historical pricing data from Government sources and applies a common statistical method to calculate the average price paid for a product or services, generating a price range that contracting officers can use in the evaluation of fair and reasonable pricing. Price Risk determines whether ''a proposed price is consistent with historical prices paid for that item and is depicted by high, low, or within range''.
- *Supplier Risk.* SPRS calculates a supplier risk score, for contracting officers to compare competing suppliers. This score includes three years of relevant supplier performance information from existing Government data sources.

II. Discussion and Analysis

The proposed rule amends the DFARS to: (1) Move coverage of the Supplier Performance Risk System (SPRS) from part 213, Simplified Acquisition Procedures, to a new subpart 204.7X, Supplier Performance Risk System; and (2) replace DFARS clause 252.213–7000, Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Past Performance Evaluations, with DFARS provision 252.204–70XX, Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Performance Evaluations, to enhance the use of SPRS in the evaluation of a supplier's performance through the introduction of SPRS system-generated item, price, and supplier risk assessments.

In the new subpart, at 204.7X01, definitions are added for item, price, and supplier risk. Section 204.7X02, Applicability, provides that the use of SPRS is required to be used to evaluate quotes and offers in response to all solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial items. Language is added at 204.7X03, Procedures, to provide guidance to the contracting officer on how SPRS risk assessments shall be considered during award decisions, how to respond to risk assessment ratings, and what mitigating strategies shall be considered for risk assessments prior to award. A prescription for use of the new solicitation provision at 252.204–70XX is added at 204.7X04.

The proposed rule amends the DFARS by requiring contracting officers to use the supplier risk assessments available in SPRS as a factor in determining

responsibility at DFARS 209.105–1, as required by 204.7X03(c)(1). The supplier risk assessment reduces supply chain risk as it highlights for the contracting officer the probability that an award made to a supplier may subject the procurement to the risk of unsuccessful performance or to supply chain risk.

At DFARS 212.301(f), the newly proposed provision, 252.204–70XX, Notice to Prospective Suppliers on Use of the Supplier Performance Risk System in Performance Evaluations, is added to the list of clauses and provisions applicable to FAR part 12 acquisitions. DFARS provision 252.213–7000, which is superseded by 252.204–70XX, is removed from the list.

DFARS 213.106–2, Evaluation of quotations or offers, is amended to provide a cross-reference to subpart 204.7X, and expanded to require that SPRS data is used for evaluation of a supplier quote or offer for all solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial items. Previously, use of SPRS was limited to competitive acquisitions using simplified acquisition procedures that were valued at less than or equal to $1 million under the authority at FAR subpart 13.5. The language is amended to require the contracting officer to evaluate suppliers using all SPRS data, not just past performance data. The text is also amended to require that the basis for award will be based on an overall risk assessment, if applicable. A cross-reference is added to see 204.7X04 for use of the 252.204–70XX provision, while DFARS 213.106–2–70 is removed, since DFARS provision 252.213–7000 is being removed.

The new solicitation provision at DFARS 252.204–70XX, Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Performance Evaluations, provides the definitions of the SPRS risk assessments for item, price, and supplier risk; provides a notice that SPRS will be used in the evaluation of suppliers' performance and adds a link to the SPRS web page; addresses how the SPRS risk assessments will be used by the contracting officer to evaluate quotes or offers received in response to the solicitation; and provides links to the SPRS User's Guide and SPRS evaluation criteria.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule is applicable to all solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial items. The rule proposes to add DFARS provision 252.204–70XX, Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Performance Evaluations, to replace DFARS provision 252.213–7000, Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Past Performance Evaluations. The new provision provides notice to potential offerors that the overall risk assessment generated by the SPRS module will be used to evaluate quotes or offers received in response to the solicitation.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

The DoD does not expect this rule to have an significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the proposed changes made to existing DFARS text and provision merely reflect existing DoD practice, procedures, and systems used by DoD, *i.e.,* the Supplier Performance Risk System in Performance Evaluations (SPRS). However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to revise the Defense Federal Acquisition Regulation Supplement to incorporate the expanded capabilities of SPRS, made possible by recent technical enhancements. SPRS is a DoD enterprise application that retrieves quality and delivery information performance data obtained from Government reporting systems. The system provides three risk assessments for contracting officer use in evaluations: Item, price, and supplier risk assessments.

The objective of the proposed rule is to notify offerors that SPRS collects performance data from a variety of Government sources on awarded contracts, to develop item, price, and supplier risk assessments for contracting officer use during evaluation of quotations or offers. The proposed rule also requires contracting officers to use the supplier risk assessment as a factor in the evaluation of contractor responsibility. The legal basis for the rule is covered under 41 U.S.C 1707, Office of Federal Procurement Policy statute.

The Federal Procurement Data System indicates that in FY17–FY19, DoD awarded 198,038 contracts (both products and services), of which 123,217 were awarded to small businesses (approximately 62%). DoD does not expect small entities will be materially affected by this rule.

The rule does not impose any additional reporting, recordkeeping, and other compliance requirements.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternatives to the rule.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2019–D009), in correspondence.

IV. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 204, 209, 212, 213, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 209, 212, 213, and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 204, 209, 212, 213, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

■ 2. Add subpart 204.7X to read as follows:

SUBPART 204.7X—Supplier Performance Risk System

Sec.
204.7X00 Scope of subpart.
204.7X01 Definitions.
204.7X02 Applicability.
204.7X03 Procedures.
204.7X04 Solicitation provision.

SUBPART 204.7X—Supplier Performance Risk System

204.7X00 Scope of subpart.

This subpart provides policies and procedures for use of the Supplier Performance Risk System (SPRS) risk assessments in the evaluation of a supplier's quotation or offer.

204.7X01 Definitions.

As used in this subpart—

Item risk means the probability that a product or service, based on intended use, will introduce performance risk resulting in safety issues, mission degradation, or monetary loss.

Price risk means the measure of whether a proposed price for a product or service is consistent with historical prices paid for that item or service.

Supplier risk means the probability that an award made to a supplier may subject the procurement to the risk of unsuccessful performance or to supply chain risk (see 239.7301).

204.7X02 Applicability.

Use of SPRS assessments is required for acquisitions using FAR part 13 simplified acquisition procedures, including solicitations for supplies and services using FAR part 12 procedures for the acquisition of commercial items. SPRS retrieves item, price, quality, delivery, and supplier information on contracts from Government reporting systems in order to develop overall risk assessments of suppliers. SPRS is available at *https://www.sprs.csd.disa.mil,* and the SPRS user's guides are available at *https://www.sprs.csd.disa.mil/reference.htmf.*

204.7X03 Procedures.

The contracting officer shall ensure the basis for award includes an evaluation of each supplier's overall risk assessment in SPRS, if applicable. Suppliers without an overall risk assessment in SPRS shall not be evaluated favorably or unfavorably under the risk assessment factor. Contracting officers shall use information available in SPRS on item risk, price risk, and supplier risk as follows:

(a) *Item risk.* (1) Item risk shall be considered to determine whether the procurement of products or services represents a high performance risk to the Government. Item risk is displayed in SPRS with the reason(s) an item is identified as high risk.

(2) Before issuing a solicitation and when evaluating quotations or offers, the contracting officer shall access the SPRS item risk report and review any warnings provided. If there are item risk warnings, the contracting officer shall consider strategies to mitigate risk, such as the following:

(i) Consulting with the program office.

(ii) Including mitigating requirements in the statement of work, as provided by the requiring activity.

(iii) Applying risk mitigation strategies, including FAR and DFARS clauses identified in the SPRS application, as appropriate.

(b) *Price risk.* (1) Price ratings shall be considered as part of determining if a proposed price is consistent with historical prices paid for an item or otherwise creates a risk to the Government.

(2) The contracting officer shall consider strategies to mitigate price risk, such as the following—

(i) Not awarding to suppliers with high price ratings unless there is a way to justify the price through price analysis;

(ii) Utilizing appropriate price negotiation techniques and procedures; and

(iii) Using price reasonableness or price realism techniques at FAR 13.106 or FAR 15.4 when making award decisions.

(c) *Supplier risk.* (1) The contracting officers shall consider supplier risk during the evaluation of a supplier's performance history, to assess the risk of unsuccessful performance, in award decisions. Supplier risk assessments in SPRS include quality, delivery, and other supplier performance information.

(2) See risk mitigation strategies in paragraphs (a)(2) and (b)(2) of this section.

204.7X04 Solicitation provision.

Use the provision at 252.204–70XX, Notice to Prospective Suppliers on the Use of the Supplier Performance Risk System in Performance Evaluations, in solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

PART 209—CONTRACTOR QUALIFICATIONS

■ 3. Amend section 209.105–1 by adding paragraph (3) to read as follows:

209.105–1 Obtaining information.

* * * * *

(3) Contracting officers shall use the supplier risk assessment available in the Supplier Performance Risk System (SPRS) at *https://www.sprs.csd.disa.mil* as a factor in determining responsibility. See 204.7X03(c)(1).

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Amend section 212.301 by—

■ a. Adding paragraph (f)(ii)(K);

■ b. Removing paragraph (f)(v); and

■ c. Redesignating paragraphs (f)(vi) through (xix) as paragraphs (f)(v) through (xviii).

The addition reads as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(ii) * * *

(K) Use the provision at 252.204–70XX, Notice to Prospective Suppliers on Use of the Supplier Performance Risk System in Performance Evaluations, as prescribed in 204.7X04.

* * * * *

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 5. Revise section 213.106–2 to read as follows:

213.106–2 Evaluation of quotations or offers.

(b)(i) For solicitations for supplies and services using FAR part 13 simplified acquisition procedures, including solicitations using FAR part 12 procedures for the acquisition of commercial items, the contracting officer shall ensure—

(A) Supplier Performance Risk System (SPRS) assessments are used for evaluation of a supplier's quotation or

offer. See subpart 204.7X. SPRS is available at *https://www.sprs.csd.disa.mil,* and the SPRS user's guides are available at *https://www.sprs.csd.disa.mil/reference.htm;*

(B) The basis for award shall include an evaluation of each supplier's overall risk assessment in SPRS, if applicable; and

(C) Suppliers without a risk assessment in SPRS are not evaluated favorably or unfavorably under the risk assessment factor.

(D) See 204.7X04 for use of the provision at 252.204–70XX, Notice to Prospective Suppliers on the Use of the Supplier Performance Risk System in Performance Evaluations.

213.106–2–70 [Removed]

■ 6. Remove section 213.106–2–70.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Add section 252.204–70XX to read as follows:

252.204–70XX Notice to Prospective Suppliers on Use of the Supplier Performance Risk System in Performance Evaluations.

As prescribed in 204.7X04, use the following provision: NOTICE TO PROSPECTIVE SUPPLIERS ON USE OF THE SUPPLIER PERFORMANCE RISK SYSTEM IN PERFORMANCE EVALUATIONS (DATE)

(a) *Definitions.* As used in this provision—

Item risk means the probability that a product or service, based on intended use, will introduce performance risk resulting in safety issues, mission degradation, or monetary loss.

Price risk means a measure of whether a proposed price for a product or service is consistent with historical prices paid for that item or service.

Supplier risk means the probability that an award made to a supplier may subject the procurement to the risk of unsuccessful performance or to supply chain risk (see Defense Federal Acquisition Regulation Supplement 239.7301).

(b) The Supplier Performance Risk System (SPRS), available at *https://www.sprs.csd.disa.mil,* will be used in the evaluation of suppliers' performance for acquisitions using Federal Acquisition Regulation (FAR) part 13 simplified acquisition procedures, including solicitations using FAR part 12 procedures for the acquisition of commercial items. SPRS retrieves item, price, quality, delivery, and supplier information on contracts from Government reporting systems in order to develop overall risk assessments.

(c) SPRS risk assessments will be used by the Contracting Officer during the evaluation of quotations or offers received in response to this solicitation as follows:

(1) Item risk shall be considered to determine whether the procurement represents a high performance risk to the Government.

(2) Price risk shall be considered as part of determining if a proposed price is consistent with historical prices paid for an item or otherwise creates a risk to the Government.

(3) Supplier risk, including but not limited to quality and delivery, shall be considered during the evaluation of a supplier's performance history to assess the risk of unsuccessful performance and supply chain risk.

(d) SPRS risk assessments are generated daily for each supplier. Suppliers are able to access their risk assessment by following the access instructions in the SPRS user's guide available at *https://www.sprs.csd.disa.mil/reference.htm.* Suppliers are granted access to SPRS for their own risk assessment classifications only. SPRS reporting procedures and risk assessment methodology are detailed in the SPRS user's guide. The method to challenge a rating generated by SPRS is also provided in the user's guide. SPRS evaluation criteria are available from the reference at *https://www.sprs.csd.disa.mil/pdf/SPRS_DataEvaluationCriteria.pdf.*

(e) The Contracting Officer may consider any other available and relevant information when evaluating a quotation or an offer.

(End of provision)

252.213–7000 [Removed]

■ 8. Remove section 252.213–7000.

[FR Doc. 2020–18645 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS–2020–0031]

RIN 0750–AK97

Defense Federal Acquisition Regulation Supplement: Prohibition on Contracting With Persons That Have Business Operations With the Maduro Regime (DFARS Case 2020–D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a statute that prohibits the Department of Defense from entering into contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 30, 2020, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020–D010, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Search for ''DFARS Case 2020–D010'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2020–D010'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2020–D010 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Kimberly Bass, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Bass, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS, to implement section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116–92). Section 890 prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, subject to exceptions.

II. Discussion and Analysis

This rule proposes to add section DFARS 225.7019, Prohibition on Contracting with the Maduro Regime. This section provides to contracting officers a new solicitation provision and contract clause for use in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, unless an exception applies.

A. Solicitation Provision and Contract Clause

Per the new solicitation provision, DFARS 252.225–70XX, Representation Regarding Business Operations with the Maduro Regime, an offeror represents, by submission of its offer, that the offeror does not conduct any prohibited business operations with persons or entities with the Maduro regime or the government of Venezuela, or the offeror has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury. The clause, DFARS 252.225–70YY, Prohibition Regarding Business Operations with the Maduro Regime, prohibits DoD contractors from entering into a contract or subcontract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, subject to the listed exceptions, as a condition of the contract.

B. Definitions

Definitions are added for the terms ''Agency or instrumentality of the government of Venezuela,'' ''Business operations,'' ''Government of Venezuela,'' and ''Person,'' as set out in the regulatory text at the end of this document.

C. Exceptions

Exceptions to the prohibition are provided to include contracts that are—

- Jointly determined by the Secretary of Defense and the Secretary of State to be necessary for certain humanitarian or disaster relief purposes or vital to the national security interests of the United States;
- Related to the operation and maintenance of the United States Government's consular offices and diplomatic posts in Venezuela; or
- Awarded to a person that has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury, that otherwise would be prohibited.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule proposes to create a new provision and a new clause: (1) DFARS 252.225–70XX, Representation Regarding Business Operations with the Maduro Regime; and (2) DFARS 252.225–70YY, Prohibition Regarding Business Operations with the Maduro Regime.

DoD plans to apply the provision and the clause to solicitations, contracts, or subcontracts below the simplified acquisition threshold (SAT) and to the acquisition of commercial items, including commercially available off-the-shelf (COTS) items, as defined at FAR 2.101. This DFARS rule implements section 890 of the NDAA for FY 2020. Section 890 prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to exceptions.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 exempts contracts and subcontracts for the acquisition of commercial items (including COTS items) from provisions of law enacted after October 13, 1994, that, as determined by the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), set forth policies, procedures, requirements, or restrictions for the acquisition of property or services unless—

- The provision of law—
  - Provides for criminal or civil penalties;
  - Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 2533a or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 2533b; or
  - Specifically refers to 10 U.S.C. 2375 and states that it shall apply to contracts and subcontracts for the acquisition of commercial items (including COTS items); or
- USD (A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial items from the applicability of the provision.

This authority has been delegated to the Principal Director, Defense Pricing and Contracting.

C. Applicability

Section 890 of the NDAA for FY 2020 is silent on applicability to contracts and subcontracts in amounts no greater than the SAT or for the acquisition of commercial items. Also, the statute does not provide for civil or criminal penalties. Therefore, it does not apply to contracts or subcontracts in amounts not greater than the SAT or to the acquisition of commercial items unless the Principal Director, Defense Pricing and Contracting, makes a written determination as provided in 41 U.S.C. 1905 and 10 U.S.C. 2375.

Not applying this rule to contracts and subcontracts below the SAT and for the acquisition of commercial items, including COTS items, would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule to prohibit business operations with the Maduro Regime with an authority of the government of Venezuela. This is particularly true with regard to the acquisition of fuel and petroleum, procurements which are usually commercial items. To not include the acquisition of fuel and petroleum within this prohibition or not applying the prohibition below the SAT will unacceptably diminish the impact of these sanctions on the Maduro regime, the government of Venezuela that is not recognized by the United States Government as the legitimate government of Venezuela. Consequently, DoD plans to apply the rule to contracts and subcontracts below the SAT and for the acquisition of commercial items, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not

subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not expected to be significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Nevertheless, an initial regulatory flexibility analysis has been performed and summarized as follows:

The rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a statute that prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to exceptions.

The objective and legal basis for the rule is to implement section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 which prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to exceptions for contracts that are—

- Jointly determined by the Secretary of Defense and the Secretary of State to be necessary for certain humanitarian or disaster relief purposes or vital to the national security interests of the United States;
- Related to the operation and maintenance of the United States Government's consular offices and diplomatic posts in Venezuela; or
- Awarded to a person that has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury, that otherwise would be prohibited.

DoD reviewed the Federal Procurement Data System (FPDS) data for fiscal years (FY) 2017, 2018, and 2019 (including contracts or subcontracts that do not exceed the simplified acquisition threshold) to determine the estimated impact of the rule on U.S. small businesses. There were no DoD actions reported to FPDS during the period FY 2017 through FY 2019, where the vendor is located in Venezuela or the place of performance is Venezuela.

It is expected that this rule will not impact small businesses.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the rule that would meet the requirements of the statute.

DoD invites comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2020–D010), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by adding paragraphs (f)(ix)(GG) and (HH) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(ix) * * *

(GG) Use the provision at 252.225–70XX, Representation Regarding Business Operations with the Maduro Regime, as prescribed in 225.7019–5(a), to comply with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92).

(HH) Use the clause at 252.225–70YY, Prohibition Regarding Business Operations with the Maduro Regime, as prescribed in 225.7019–5(b), to comply with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92).

* * * * *

PART 225—FOREIGN ACQUISITION

■ 3. Add sections 225.7019, 225.7019–1, 225.7019–2, 225.7019–3, 225.7019–4, and 225.7019–5 to subpart 225.70 to read as follows:

* * * * *

Sec.

* * * * *

225.7019 Prohibition on contracting with the Maduro regime.

225.7019–1 Definitions.

As used in this section—

Agency or instrumentality of the government of Venezuela means an agency or instrumentality of a foreign state as defined in section 28 U.S.C. 1603(b), with each reference in such section to a foreign state deemed to be a reference to Venezuela.

Business operations means engaging in commerce in any form, including acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Government of Venezuela means the government of any political subdivision of Venezuela, and any agency or instrumentality of the government of Venezuela.

Person means—

(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group;

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3)); and

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) or (2) of this definition.

225.7019–2 Prohibition.

In accordance with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), DoD

is prohibited from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, except as provided in 225.7019–3 or 225.7019–4.

225.7019–3 Exceptions.

The prohibition in 225.7019–2 does not apply if—

(a) The person has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury; or

(b) The acquisition is related to the operation and maintenance of the United States Government's consular office and diplomatic posts in Venezuela.

225.7019–4 Joint determination.

(a) The prohibition in section 225.7019–2 does not apply to an acquisition jointly determined by the Secretary of Defense and Secretary of State to be—

(1) Necessary for purposes of—

(i) Providing humanitarian assistance to the people of Venezuela;

(ii) Disaster relief and other urgent lifesaving measures; or

(iii) Carrying out noncombatant evacuations; or

(2) Vital to the national security interests of the United States.

(b) Follow the procedures at PGI 225.7019–4(b) when entering into a contract on the basis of a joint determination.

225.7019–5 Solicitation provision and contract clause.

(a) Use the provision at 252.225–70XX, Representation Regarding Business Operations with the Maduro Regime, in solicitations that include the clause at 252.225–70YY, Prohibition Regarding Business Operations with the Maduro Regime, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

(b) Unless an exception at 225.7019–3 applies or a joint determination has been made in accordance with 225.7019–4, use the clause at 252.225–70YY, Prohibition Regarding Business Operations with the Maduro Regime, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Add section 252.225–70XX to read as follows:

252.225–70XX Representation Regarding Business Operations with the Maduro Regime.

As prescribed in 225.7019–5(a), use the following provision:

REPRESENTATION REGARDING BUSINESS OPERATIONS WITH THE MADURO REGIME (DATE)

(a) *Definitions.* As used in this provision—

Agency or instrumentality of the government of Venezuela means an agency or instrumentality of a foreign state as defined in section 28 U.S.C. 1603(b), with each reference in such section to a foreign state deemed to be a reference to Venezuela.

Business operations means engaging in commerce in any form, including acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Government of Venezuela means the government of any political subdivision of Venezuela, and any agency or instrumentality of the government of Venezuela.

Person means—

(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group;

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3)); and

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) or (2) of this definition.

(b) *Prohibition.* In accordance with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), DoD is prohibited from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, unless the person has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(c) *Representation.* By submission of its offer, the Offeror represents that the Offeror—

(1) Does not have any business operations with an authority of the Maduro regime or the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government; or

(2) Has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(End of provision)

■ 5. Add section 252.225–70YY to read as follows:

252.225–70YY Prohibition Regarding Business Operations with the Maduro Regime.

As prescribed in 225.7019–5(b), use the following clause:

PROHIBITION REGARDING BUSINESS OPERATIONS WITH THE MADURO REGIME (DATE)

(a) *Definitions.* As used in this clause—

Agency or instrumentality of the government of Venezuela means an agency or instrumentality of a foreign state as defined in section 28 U.S.C. 1603(b), with each reference in such section to a foreign state deemed to be a reference to Venezuela.

Business operations means engaging in commerce in any form, including acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Government of Venezuela means the government of any political subdivision of Venezuela, and any agency or instrumentality of the government of Venezuela.

Person means—

(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group;

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3)); and

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) or (2) of this definition.

(b) *Prohibition.* In accordance with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), DoD is prohibited from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, unless the person has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(c) The Contractor shall—

(1) Not have any business operations with an authority of the Maduro regime or the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government; or

(2) Have a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(d) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts, including subcontracts for the acquisition of commercial items.

(End of clause)

[FR Doc. 2020–18633 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227 and 252

[Docket DARS–2019–0048]

RIN 0750–AK71

Defense Federal Acquisition Regulation Supplement: Validation of Proprietary and Technical Data (DFARS Case 2018–D069)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019, which amended the statutory presumption of development exclusively at private expense for commercial items in the procedures governing the validation of asserted restrictions on technical data.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 30, 2020, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D069, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2018–D069.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2018–D069'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2018–D069 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Jennifer D. Johnson, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement section 865 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232), which repeals several years of congressional adjustments to the statutory presumption of development at private expense for commercial items in the validation procedures at paragraph (f) of 10 U.S.C. 2321. DoD hosted public meetings to obtain the views of interested parties with notice published in the **Federal Register** on August 16, 2019, at 84 FR 41953. In addition, DoD published an advance notice of proposed rulemaking (ANPR) on September 13, 2019, at 84 FR 48513, providing draft DFARS revisions and requesting any written public comments by November 12, 2019.

The presumption of development funding at private expense for commercial items was established in 1994 by section 8106 of the Federal Acquisition Streamlining Act (FASA) (Pub. L. 103–355). This statutory presumption has been amended numerous times, including by section 802(b) of the NDAA for FY 2007 (Pub. L. 109–364), section 815(a)(2) of the NDAA for FY 2008 (Pub. L. 110–181), section 1071(a)(5) of the NDAA for FY 2015 (Pub. L. 113–291), section 813(a) of the NDAA for FY 2016 (Pub. L. 114–92), and most recently by section 865.

The DFARS implementation of this mandatory presumption has evolved accordingly to track the statutory changes, with the primary coverage found at paragraph (c) of section 227.7103–13, Government right to review, verify, challenge, and validate asserted restrictions, and paragraph (b) of the clause at 252.227–7037, Validation of Restrictive Markings on Technical Data. There is no DFARS coverage applying such a presumption regarding development funding for commercial computer software because, as a matter of policy also dating back to the FASA time frame, the underlying procedures for challenging and validating asserted restrictions have not been applied to commercial computer software—only to noncommercial computer software (*e.g.,* section 227.7203–13, Government right to review, verify, challenge, and validate asserted restrictions, and the clause at 252.227–7019, Validation of Asserted Restrictions—Computer Software).

II. Discussion and Analysis

DoD reviewed the public comments submitted in writing, and also as discussed by the attendees at the public meeting on November 15, 2019, in the development of the proposed rule. Only one respondent provided a written public comment. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the ANPR

Language was added to clarify DFARS 227.7103–13(c). The proposed revisions clarify that the statutory threshold for all challenges, including those for commercial items, is that a contracting officer must have reasonable grounds to question the validity of the asserted restriction. In recognition of the higher burden to sustain a challenge for commercial items, the text was revised to require a contracting officer to include, to the maximum extent practicable, sufficient information in the challenge notice to reasonably demonstrate that the commercial item was not developed exclusively at private expense. The proposed revisions require the contracting officer to provide, in order to sustain a challenge, information demonstrating that the commercial item was not developed exclusively at private expense. Additionally, a change to DFARS 227.7103–13(d)(4) is proposed, in the case of commercial item acquisitions, to direct the contracting officer to DFARS 227.7103–13, paragraph (c)(2).

Changes were made to 252.227–7037(b) to clarify that the presumption of development at private expense for commercial items applies to the issuance of a challenge. A revision is proposed in paragraph (e)(1)(i) of DFARS 252.227–7037 to clarify that, for commercial items, the challenge notice will include, to the maximum extent practicable, sufficient information to reasonably demonstrate that the commercial item was not developed at private expense. In paragraphs (f) and (g)(2)(i) of 252.227–7037, revisions are proposed to explain that, in order to sustain a challenge for commercial items, the contracting officer will provide information demonstrating that the commercial item was not developed exclusively at private expense.

B. Analysis of Public Comments

Comment: The respondent requests two specific changes: (1) A substitution of language so that a contracting officer

needs to provide information to the contractor that a commercial item was not developed exclusively at private expense before challenging an assertion in DFARS 227.7103–13(c), and (2) replacement of the word ''will'' with the word ''shall'' in paragraph (b) of the clause at DFARS 252.227–7037. The respondent recommends a change to clarify that a contracting officer must provide information to the contractor that a commercial item was not developed exclusively at private expense in order to challenge an assertion.

Response: DoD generally agrees that, as a matter of policy, sufficient information should be provided to a contractor to reasonably demonstrate that the commercial item was not developed exclusively at private expense. Therefore, paragraph (c) in DFARS 227.7103–13 is revised to clarify a need for transparency, to the maximum extent practicable, when a contracting officer challenges any assertion.

Regarding the respondent's recommended change of the word ''will'' to the word ''shall'' in paragraph (b) of the clause, the requested changes cannot be made pursuant to the FAR drafting conventions regarding the use of the terms ''shall'' and ''will'' in clauses and provisions. For consistency in the regulations, ''shall'' is the preferred term to use in provisions and clauses to indicate an obligation to act on the part of an offeror or contractor. To indicate an obligation for the Government to act, the term ''will'' is used. Accordingly, the word ''shall'' is replaced with ''will'' throughout the clause at DFARS 252.227–7037, where the Government is to perform an action.

C. Technical Amendments

References in the DFARS text to ''subsection'' are changed to ''section''. One editorial correction is made to a cross-reference in the introductory text to clause 252.227–7037. The reference to ''27.7104(e)(5)'' is corrected to read ''227.7104(e)(5)''. In the clause, ''shall'' is changed to ''will'' when providing direction to the contracting officer.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

DoD intends to apply the requirements of section 865 of the NDAA for FY 2019 to contracts at or below the simplified acquisition threshold and to acquisitions of commercial items, including commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Title 41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. Title 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

DoD has determined that it is in the best interest of the Federal Government to apply the statutory requirements regarding the presumption of development at private expense for commercial items in validations of asserted restrictions to acquisitions at or below the simplified acquisition threshold; *i.e.,* the section 865 revisions to the presumption scheme do not alter the applicability of the underlying validation procedures. The validation procedures are necessary to ensure that the license rights granted to the Government are consistent with the applicable data rights clauses, and therefore affect both parties' substantive legal rights. Moreover, within the validation procedures, the presumption of development at private expense for commercial items is designed primarily to protect the contractors' interests and thus should remain applicable to acquisitions at or below the simplified acquisition threshold.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

Title 10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items (including COTS items) and is intended to limit the applicability of laws to contracts for the acquisition of commercial items, including COTS items. Title 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

Therefore, given that the requirements of section 865 of the NDAA for FY 2019 were enacted to return to a presumption of development exclusively at private expense for commercial items, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because implementation of section 865 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 provides for a presumption of development exclusively at private expense under a contract for commercial items. Section 865 clarifies that burden is shifted to the Government to provide information that

the commercial item was not developed exclusively at private expense. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to implement section 865 of the NDAA for FY 2019 (Pub. L. 115–232), which revised 10 U.S.C. 2321. Section 865 repeals amendments to 10 U.S.C. 2321(f) made by the NDAAs for FY 2007 through FY 2016. The impact is to return the coverage at DFARS 227.7103–13 and 252.227–7037 substantially back to the original Federal Acquisition Streamlining Act-implementing language with regard to the presumption of development exclusively at private expense. Section 865 also codifies and revises DoD challenges to contractor-asserted restrictions on technical data pertaining to a commercial item, *i.e.,* DoD is required to presume that the contractor or subcontractor has justified the asserted restriction on the basis that the item was developed exclusively at private expense, regardless of whether the contractor or subcontractor submits a justification in response to the Government's challenge notice. In such a case, the challenge to the use or release restriction may be sustained only if information provided by DoD demonstrates that the item was not developed exclusively at private expense.

The objective of the proposed rule is to implement section 865 of the NDAA for FY 2019.

This proposed rule will apply to small entities that have contracts with DoD requiring delivery of technical data. Based on data from Electronic Data Access for FY 2017 through FY 2019, DoD estimates that 43,939 contractors may be impacted by the changes in this proposed rule. Of those entities, approximately 23,181 (53 percent) are small entities.

This proposed rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities. The DFARS text and clause that are proposed to be amended are covered by OMB Control Number 0704–0369. The changes in this proposed rule are expected to have negligible impact on the burdens already covered by the OMB clearance.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives which would accomplish the stated objectives of the applicable statute.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018–D069), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply to this rule; however, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704–0369, entitled ''DFARS: Subparts 227.71, Rights in Technical Data; and Subpart 227.72, Rights in Computer Software and Computer Software Documentation, and related provisions and clauses of the Defense Federal Acquisition Regulation Supplement (DFARS).''

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 227 and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 227 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 2. Amend section 227.7103–13 by—

■ a. In paragraph (c)(1) removing the third sentence;

■ b. Revising paragraph (c)(2); and

■ c. In paragraphs (d)(2)(i) and (d)(4), removing ''subsection'' wherever it appears and adding ''section'' in each place; and

■ d. In paragraph (d)(4), adding a sentence after the first sentence.

The revision and addition read as follows:

227.7103–13 Government right to review, verify, challenge, and validate asserted restrictions.

* * * * *

(c) * * *

(2) *Commercial items—presumption regarding development exclusively at private expense.* 10 U.S.C. 2320(b)(1) and 2321(f) establish a presumption and procedures regarding validation of asserted restrictions for technical data related to commercial items on the basis of development exclusively at private expense. Contracting officers shall presume that a commercial item was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice. The contracting officer shall not challenge a contractor's assertion that a commercial item was developed exclusively at private expense unless the Government can specifically state the reasonable grounds to question the validity of the assertion. The challenge notice shall, to the maximum extent practicable, include sufficient information to reasonably demonstrate that the commercial item was not developed exclusively at private expense. In order to sustain the challenge, the contracting officer shall provide information demonstrating that the commercial item was not developed exclusively at private expense. A contractor's or subcontractor's failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction.

(d) * * *

(4) * * * For commercial items, also see paragraph (c)(2) of this section.

* * *

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.227–7037 by—

■ a. In the introductory text, removing ''27.7104(e)(5)'' and adding ''227.7104(e)(5)'' in its place;

■ b. Removing the clause date ''(SEP 2016)'' and adding ''(DATE)'' in its place;

■ c. Revising paragraph (b);

■ d. In paragraph (c), removing ''paragraph (b)(1)'' and adding ''paragraph (b)'' in its place;

■ e. In paragraphs (d)(2), (e)(1) introductory text, (e)(2) and (4), (g)(1), and (h)(2)(i) and (ii), removing ''shall'' and adding ''will'' in its place wherever it appears; and

■ f. Revising paragraphs (e)(1)(i), (f), and (g)(2)(i).

The revisions read as follows:

252.227–7037 Validation of Restrictive Markings on Technical Data.

* * * * *

(b) *Commercial items—presumption regarding development exclusively at private expense.* The Contracting Officer will presume that the Contractor's or a subcontractor's asserted use or release restrictions with respect to a commercial item are justified on the basis that the item was developed exclusively at private expense. The Contracting Officer will not issue a challenge unless there are reasonable grounds to question the validity of the assertion that the commercial item was

not developed exclusively at private expense.

* * * * *

(e) * * *

(1) * * *

(i) State the specific grounds for challenging the asserted restriction, including, for commercial items, to the maximum extent practicable, sufficient information to reasonably demonstrate that the commercial item was not developed exclusively at private expense;

* * * * *

(f) *Final decision when Contractor or subcontractor fails to respond.* Upon a failure of a Contractor or subcontractor to submit any response to the challenge notice the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract. In order to sustain the challenge for commercial items, the Contracting Officer will provide information demonstrating that the commercial item was not developed exclusively at private expense. This final decision will be issued as soon as possible after the expiration of the time period of paragraph (e)(1)(ii) or (e)(2) of this clause. Following issuance of the final decision, the Contracting Officer will comply with the procedures in paragraphs (g)(2)(ii) through (iv) of this clause.

(g) * * *

(2)(i) If the Contracting Officer determines that the validity of the restrictive marking is not justified, the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract. In order to sustain the challenge for commercial items, the Contracting Officer will provide information demonstrating that the commercial item was not developed exclusively at private expense. Notwithstanding paragraph (e) of the Disputes clause, the final decision will be issued within sixty (60) days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

* * * * *

[FR Doc. 2020–18640 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227 and 252

[Docket DARS–2019–0043]

RIN 0750–AK84

Defense Federal Acquisition Regulation Supplement: Small Business Innovation Research Program Data Rights (DFARS Case 2019–D043)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: DoD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the data rights portions of the Small Business Innovation Research Program and Small Business Technology Transfer Program Policy Directives.

DATES: Interested parties should submit written comments to the address shown below on or before October 30, 2020, to be considered in the formation of any proposed rule.

ADDRESSES: Submit written comments identified by DFARS Case 2019–D043, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2019–D043.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2019–D043'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D043 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Jennifer D. Johnson, OUSD(A–S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is seeking information from experts and interested parties in Government and the private sector to assist in the development of a revision to the DFARS to implement the intellectual property (*e.g.,* data rights) portions of the revised Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program Policy Directives. The Small Business Administration (SBA) issued a notice of proposed amendments to the SBIR Program and STTR Program policy directives, which included combining the two directives in a single document, on April 7, 2016, at 81 FR 20483. The final combined SBIR/STTR Policy Directive was published on April 2, 2019, at 84 FR 12794, and became effective on May 2, 2019.

The final Policy Directive includes several revisions affecting the data rights coverage, which require corresponding revisions to the DFARS. For example, the new Policy Directive:

- Establishes a single, non-extendable, 20-year SBIR/STTR data protection period, rather than a 4-year period that can be extended indefinitely;
- Grants the Government licensed use for Government purposes after the expiration of the SBIR/STTR data protection period, rather than unlimited rights;
- Establishes or revises several important definitions to harmonize the terminology used in the Policy Directive and the Federal Acquisition Regulations (FAR) and DFARS implementations, while allowing for agency-specific requirements (*e.g.,* agency-specific statutes).

In drafting these revisions, DoD also considered the recommendations of the Government-Industry Advisory Panel on Technical Data Rights (Section 813 Panel) established by section 813 of the National Defense Authorization Act for FY 2016. The Section 813 Panel addressed SBIR data rights issues in its final report at Paper 21, ''Small Business Innovation Research (SBIR) (Flow-down to Suppliers; Inability to Share with Primes; Evaluation).''

DoD also hosted a public meeting on December 20, 2019, to obtain the views of interested parties in accordance with the notice published in the **Federal Register** on November 25, 2019, at 84 FR 64878.

II. Discussion and Analysis

An initial draft of the proposed revisions to the DFARS to implement

the SBA's SBIR/STTR Policy Directive is available in the Federal eRulemaking Portal at *http://www.regulations.gov,* by searching for ''DFARS Case 2019–D043'', selecting ''Open Docket Folder'' for RIN 0750–AK84, and viewing the ''Supporting Documents''. The strawman is also available at *https://www.acq.osd.mil/dpap/dars/change_notices.html* under the publication notice for DFARS Case 2019–D043. The following is a summary of DoD's proposed approach and the feedback DoD is seeking from industry and the public.

The SBIR and STTR programs are governed by 15 U.S.C. 638, which includes specialized coverage regarding intellectual property developed under those programs. More specifically, the law requires that the SBIR and STTR program policy directives allow a small business concern to ''[retain] the rights to data generated by the concern in the performance of an SBIR [or STTR] award for a period of not less than 4 years'' (see 15 U.S.C. 638, paragraphs (j)(1)(B)(v), (j)(2)(A), and (p)(2)(B)(v)). This retention of rights applies even in cases when the development work is being paid for entirely at Government expense to meet the needs of the SBIR/STTR contract.

In contrast, the DoD statutory and regulatory approach to allocating data rights in non-SBIR/STTR contracts is based primarily on the source of development funding for the technology (*i.e.,* development of the item or process to which the technical data pertains; or development of the computer software). When the technology is developed entirely at Government expense, the Government is granted an ''unlimited rights'' license; for development exclusively at private expense, the Government is granted ''limited rights'' in technical data, and ''restricted rights'' in computer software; and for development with a mix of private and Governments funds, the Government receives ''Government purpose rights.'' However, for certain types of data that generally do not contain detailed proprietary information that require greater protection, the Government receives unlimited rights regardless of the development funding (*e.g.,* form, fit, or function data; data necessary for operation, maintenance, installation, or training (OMIT data); and computer software documentation).

Accordingly, the implementation of the SBIR/STTR approach to allowing the small business to retain rights in SBIR/STTR data must generally function as an exception to the otherwise applicable DFARS approach based on development funding (see, *e.g.,* 10 U.S.C. 2320(a)(2)(A)). In general, this means that the small business SBIR/STTR contractor retains greater rights (during the SBIR/STTR data protection period) than it otherwise would retain for technology developed even entirely at Government expense under the contract. The specific nature and scope of the retention of rights (*e.g.,* what license is granted to the Government), the duration of the SBIR/STTR data protection period, and the Government's license rights after the expiration of the protection period have evolved over time, including important revisions in the final SBIR/STTR policy directive.

A. SBIR/STTR Data Protection Period

The new Policy Directive revises the SBIR/STTR protection period to start at the award of a SBIR or STTR contract and end 20 years thereafter. This period cannot be extended. Previously, the policy directives specified that the protection period for each SBIR or STTR contract was 4 years. However, if any SBIR/STTR data generated under such a contract was also referenced and protected under a subsequent SBIR/STTR contract awarded prior to the expiration of the protection period from the earlier contract, then the protection period for that data was extended for an additional 4 years. There was no limit to the number of times the protection period could be extended under these circumstances, but in each case the extension only covered the portion of the data that was referenced and protected in the subsequent award. This process, whereby a SBIR or STTR award could extend the protection period for data originally generated under a prior SBIR or STTR contract, is commonly referred to as ''daisy-chaining'' the individual protection periods.

The current DFARS implementation for the SBIR program provides a 5-year protection period for SBIR data, with the protection starting at contract award and ending 5 years ''after the completion of the project.'' To implement the daisy-chaining idea allowing for extension of the protection period, the term ''end of the project'' is interpreted to mean the end of the last contract in which the relevant SBIR data is referenced and protected.

The draft revisions to the DFARS implement the new protection period in a manner analogous to that used in the new Policy Directive by defining a new term, ''SBIR/STTR data protection period,'' (see 252.227–7018(a)(22)). The new definition performs two primary functions. It describes the nature of the protection (*i.e.,* the protection against unauthorized use and disclosure as more specifically set forth in the defined term ''SBIR/STTR data rights''). In addition, the new definition identifies when those protections start and stop (*i.e.,* starting at contract award and ending 20 years after that). In anticipation of potential confusion regarding whether this new 20-year period can be extended, the draft DFARS revisions also add clarifying statements that ''[t]his protection period is not extended by any subsequent SBIR/STTR contracts under which any portion of that SBIR/STTR data are used or delivered,'' and ''[t]he SBIR/STTR data protection period of any such subsequent SBIR/STTR contract applies only to the SBIR/STTR data that are developed or generated under that subsequent contract.''

B. U.S. Government Rights at Expiration of SBIR/STTR Data Protection Period

The new Policy Directive provides that after the end of the SBIR/STTR data protection period, the Government receives a license authorizing use and disclose of the SBIR/STTR data for U.S. Government purposes, but not for commercial purposes. Previously, the Government received unlimited rights upon expiration of the protection period. The draft DFARS amendments implement this change by granting the Government the existing defined license of ''Government purpose rights'' at the end of the SBIR/STTR data protection period (see draft revisions at 252.227–7018(a)(16), (c)(2)(i)(B), and (c)(2)(ii)(B)). Additional revisions cover the situation in which the Government received Government purpose rights in non-SBIR/STTR data that was developed with mixed funding (see draft revisions at 252.227–7018(c)(2)(i)(A) and (c)(2)(ii)(A)).

C. Definitions

The new Policy Directive added or revised definitions for several data rights terms, including the following: computer database, computer programs, computer software, computer software documentation, data, form fit and function data, operations maintenance installation or training (OMIT) data, prototype, SBIR/STTR computer software rights, SBIR/STTR data, SBIR/STTR data rights, SBIR/STTR protection period, SBIR/STTR technical data rights, technical data, and unlimited rights. In doing so, the SBA sought to harmonize the definitions used in the Policy Directive and the FAR and DFARS, while allowing the implementation in the FAR and DFARS to be tailored as necessary to incorporate agency-specific requirements (*e.g.,* required by agency-specific statutes). For example, the FAR

and DFARS both use the defined terms ''limited rights'' and ''restricted rights'' to describe the Government's license in technical data and computer software, respectively, related to technology developed exclusively at private expense. However, due in part to DoD-unique requirements contained in the DoD technical data statutes at 10 U.S.C. 2320 and 2321, the DFARS defines these terms differently than the FAR. To recognize such differences, the Policy Directive does not use or define those terms, instead creating new terms that attempt to capture the features that are common to both the FAR and DFARS definitions, but allowing for agency-specific tailoring in appropriate circumstances.

For example, the SBA's new defined term ''SBIR/STTR Technical Data Rights'' includes the authority for the Government to make a use or release of the data that is ''[n]ecessary to support certain narrowly-tailored essential Government activities for which law or regulation permits access of a non-Government entity to a contractor's data developed exclusively at private expense, non-SBIR/STTR Data, such as for emergency repair and overhaul.'' (Policy Directive Section 3, definition (ii), paragraph (2)(i); see also the definition of ''SBIR/STTR Computer Software Rights'' at paragraph (ee)(2)(ii)(B)). This approach allows the DFARS implementation to continue to rely on its existing definitions of limited rights and restricted rights, including in the definition of ''SBIR/STTR data rights'' at draft 252.227–7018(a)(23).

D. Omission of Required Restrictive Markings

The SBIR/STTR Policy Directive reinforces the absolute requirement to place restrictive markings on SBIR/STTR data delivered with SBIR/STTR data rights. When data is delivered without the required restrictive markings, it is presumed to have been delivered with unlimited rights. However, the Government has, for decades, provided a procedure for correction of inadvertently unmarked data, at 227.7103–10(c) and 227.7203–10(c). The draft revisions include these procedures in new paragraph (g)(2) in the clause at 252.227–7018.

E. Applicability and Flowdown of SBIR/STTR Clauses

A key issue that is discussed in the Section 813 Panel's SBIR Paper, and reinforced in the new Policy Directive, is the need to clarify the applicability of the SBIR/STTR rules to all phases of those programs. In particular, there is concern that the appropriate SBIR/STTR clause(s) may not be used consistently when the contracted activity to be covered by the SBIR or STTR rules is only occurring in performance of a lower-tier subcontract. In this case, the activity at the prime contract or higher-tier subcontract levels would not otherwise be treated as a SBIR or STTR project, and those contracts or subcontracts likely would not typically include the required SBIR/STTR clause(s) for flowdown purposes.

To clarify and address the applicability and flowdown of the necessary SBIR/STTR clauses, the draft revisions include changes to—

(i) Relocate and clarify the prescription for the relevant SBIR/STTR clauses at new 227.7104–2;

(ii) Clarify the applicability and flowdown of the data rights clauses at draft revised 252.227–7013(l), 252.227–7014(l), 252.227–7015(f), and 252.227–7018(l); and

(iii) Add a new paragraph (b), ''Applicability,'' to each of the primary data rights clauses to describe the scope of coverage of each clause at 252.227–7013(b), 252.227–7014(b), 252.227–7015(b), and 252.227–7018(b).

The overall intended operation of these draft revisions is to reinforce that contracts and subcontracts should include all of the appropriate data rights clauses that are necessary to allocate rights in all types of technical data and computer software relevant to the overall scope of work, and that when multiple such clauses are used, each clause governs only the appropriate type of technical data or computer software that is within scope of that clause. This approach, which may be referred to as ''apportionment'' of the applicable clause(s), is modeled after such an approach already implemented in the DFARS to address the applicability of the clauses at 252.227–7013 and 252.227–7015 to technical data pertaining to commercial items for which the Government has paid for any portion of the development (*e.g.,* 227.7102–4(b) and 227.7103–6(a)).

DoD also considered an alternative approach to addressing the scope and applicability of the SBIR/STTR clauses, and seeks public comment on this alternative. Specifically, the alternative approach would be to revise the scope of the primary SBIR/STTR clause at 252.227–7018 so that it applies ONLY to SBIR/STTR data, and does not include allocations of rights for any non-SBIR/STTR data. This would significantly streamline the clause at 252.227–7018. However, it would also require the incorporation and flowdown of all other clauses that are necessary to govern any non-SBIR/STTR data that may be delivered under the contract or subcontract. This approach would depart from the long-standing DFARS text for implementing the SBIR program rules, in which the primary SBIR clause is designed to cover all forms of data to be delivered, including non-SBIR data (*e.g.,* data not generated under the SBIR contract).

F. STTR-Specific Coverage

As noted, one element of the new Policy Directive is that it now covers the combination of both the SBIR Program and STTR Program. The DFARS coverage at 227.7104 has traditionally referenced only the SBIR program, and does not currently include any STTR-specific coverage. The draft revisions expand this coverage to address both programs by: (1) Adding references to STTR for coverage that applies both to SBIR and STTR (*e.g.,* revising ''SBIR'' to ''SBIR/STTR''); and (2) adding new coverage for STTR-unique requirements. For example, the STTR Program requires additional activities, both preaward and postaward, for STTR contractors to submit information to confirm that the allocation of intellectual property rights between the STTR offeror/contractor and its partnering research institution do not conflict with the STTR solicitation or contract. New STTR-only definitions, regulatory, and provision/clause coverage is provided in the draft revisions at 227.7104–1(c); 227.7104–2(e); new provision at 252.227–70XX; and new clause at 252.227–70YY.

G. Prototypes

The new Policy Directive provides for special considerations regarding the handling (*e.g.,* disclosure, reverse engineering) of prototypes generated under SBIR and STTR awards, to avoid effects that may appear to be inconsistent with the SBIR and STTR program objectives. The draft DFARS revisions recognize and reference this guidance in new 227.7104–1(e).

H. Additional Administrative or Technical Revisions

In the course of making the foregoing revisions, additional edits are made to address administrative issues (*e.g.,* citations and cross-references) and make technical corrections, including the following:

(1) *Organization.* The overall coverage for the SBIR/STTR programs in 227.7104 was reorganized into two subjections: 227.7104–1 for rights in SBIR or STTR data; and 227.7104–2 for the prescriptions for provisions and clauses.

(2) *Unlimited rights categories.* The list of data types for which the Government receives unlimited rights in the SBIR/STTR clause at 252.227–7014 was corrected to harmonize with the description of those categories throughout the DFARS (see revisions at 252.227–7018(c)(1)(v)–(vii); compare 252.227–7013(c)(1)(vii)–(ix), 252.227–7014(c)(1)(ii)).

(3) *Markings.* The restrictive markings for SBIR/STTR data rights and Government purpose rights were revised to reflect the substantive changes.

I. Prohibition on Preaward Negotiation

Another specialized policy exception for the SBIR/STTR programs is that negotiation of specialized license agreements is prohibited as a condition of award, and thus is generally permitted only after award (see Policy Directive section 8(b)(6)). The implementation of this limitation was included in the draft revisions published for public comment as an advance notice of proposed rulemaking for DFARS case 2018–D071, Negotiation of Price for Technical Data and Preference for Specially Negotiated Licenses (84 FR 60988).

J. Comments Sought Regarding any Increase or Decrease in Burden and Costs

In addition to seeking public comment on the substance of the draft DFARS revisions, DoD is also seeking information regarding any corresponding change in the burden, including associated costs or savings, resulting from contractors and subcontractors complying with the draft revised DFARS implementation. More specifically, DoD is seeking information regarding any anticipated increase or decrease in such burden and costs relative to the burden and costs associated with complying with the current DFARS implementing language.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2020–18641 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 245 and 252

[Docket DARS–2020–0026]

RIN 0750–AK92

Defense Federal Acquisition Regulation Supplement: Property Loss Reporting in the Procurement Integrated Enterprise Environment (DFARS Case 2020–D005)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to replace a legacy software application used for reporting loss of Government property with new capabilities developed within the DoD enterprise-wide, eBusiness platform, Procurement Integrated Enterprise Environment.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 30, 2020, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020–D005, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Search for ''DFARS Case 2020–D005'' under the heading ''Enter keyword or ID'' and select ''Search.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2020–D005'' on any attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2020–D005 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Kimberly R. Ziegler, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 571–372–6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to replace the Defense Contract Management Agency (DCMA) eTool application used to report the loss of Government property with the new Government-Furnished Property (GFP) module in the Procurement Integrated Enterprise Environment (PIEE). The DCMA eTool application is a self-contained, legacy application that has numerous limitations, to include its inability to share data with other internal or external DoD business systems or to respond to changes in regulation, policies, and procedures. DoD developed the GFP module within the PIEE to house the GFP lifecycle to address these limitations and to provide the Department with the end-to-end accountability for all GFP transactions within a secure, single, integrated system.

II. Discussion and Analysis

The clause at DFARS 252.245–7002, Reporting Loss of Government Property, directs DoD contractors to use the Defense Contract Management Agency (DCMA) eTool software application for reporting loss of Government-furnished property (GFP). This rule proposes to revise the clause at DFARS 252.245–7002 to direct contractors to use the property loss function within the GFP module in the PIEE, instead of the DCMA eTool, when reporting loss of Government-furnished property. There are no changes to the data to be reported, only the application in which it is submitted. The new application is based upon newer technology that will provide contractors with a much more efficient process to submit data for their reports. For instance, contractors will not be required to enter the same data into multiple fields, the system will automatically populate data fields throughout the process. This one improvement will save contractors time and reduce the potential for errors during manual entry.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This proposed rule does not create any new provisions or clauses, nor does it change the applicability of any existing provisions or clauses included in solicitations and contracts valued at or below the simplified acquisition threshold, or for commercial items, including commercially available off-the-shelf items.

IV. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule is not creating any new requirements for contractors, it is merely changing the software application contractors use to electronically report property losses under existing policies and practices. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The Department of Defense is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to replace a legacy software application used for reporting loss of Government property with new capabilities developed within the DoD enterprise-wide, eBusiness platform, Procurement Integrated Enterprise Environment (PIEE).

The objective of the case is to transition property loss reporting from a stand-alone, legacy software application to the PIEE, a fully integrated, DoD enterprise-wide eBusiness platform. Use of the new system functionality will enable DoD to address numerous audit findings and security concerns.

This rule will likely affect some small business concerns that are provided Government-furnished property in the performance of their contracts and those who experience a loss which must be reported in the PIEE. Data generated from the DCMA eTool for fiscal years (FY) 2017 through 2019 indicates that an average of 3,765 loss cases are submitted each year. Of those 3,765 loss cases, 52% or 1,958 cases are filed by the top 7 large business entities, while 48% or 1,807 make up all others which may include unique small business entities.

Data generated from the Federal Procurement Data System (FPDS) for fiscal years 2017 through 2019, indicates that DoD has awarded an average of 34,463 contracts that contain the two applicable Government property clauses FAR 52.245–1 and DFARS 252.245–7002. Of those applicable contracts, DoD has awarded approximately 16,966 contracts to an average of 4,009 unique small entities during the three-year period. This would equate to 4 applicable contracts awarded to each unique small business entity.

While there is no way to identify how many property loss cases are attributable specifically to unique small business concerns, it can be assumed that 11% of applicable contracts have had a property loss case reported (3,765/34,463). If the top 7 large business entities are removed from the equation, the number is reduced to 5% (1,807/34,463). We can therefore presume that approximately 5% of the 16,966 or 848 contracts awarded to 212 small business entities may require a property loss case.

The rule does not impose any new reporting, recordkeeping, or compliance requirements. The replacement of the application used for the approved information collection requirements is intended to maintain the status quo and potentially reduce compliance requirements over time due to the technological advances in the PIEE. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no practical alternatives available to meet the objectives of the rule.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2020–D005) in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act does apply. The proposed change to the DFARS does not impose new information collection requirements that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.* By replacing the software application used for reporting property loss, the status quo for the current information collection requirements are maintained under OMB clearance number 9000–0075, Government Property. OMB 9000–0075 provides approval for collections of information under FAR clause 52.245–1, Government Property, which requires reporting of Government-property losses. DFARS clause 252.245–7002 is used in conjunction with FAR 52.245–1, and merely stipulates that DoD will electronically report any property losses as required by FAR 52.245–1 using the PIEE portal.

List of Subjects in 48 CFR Parts 245 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 245 and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 245 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 245—GOVERNMENT PROPERTY

■ 2. Amend section 245.102 by—

■ a. In paragraph (4)(i) removing ''GFP'' and adding ''Government-furnished property'' in its place; and

■ b. Revising paragraph (5).

The revision reads as follows:

245.102 Policy.

* * * * *

(5) *Reporting loss of Government property.* The Government-Furnished Property module of the Procurement Integrated Enterprise Environment is the DoD data repository for reporting loss of Government property in the possession of contractors. The requirements and procedures for reporting loss of Government property to the Government-Furnished Property module are set forth in the clause at 252.245–7002, Reporting Loss of Government Property, prescribed at 245.107.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.245–7002 by—

■ a. Removing the clause date of ''(DEC 2017)'' and adding ''(DATE)'' in its place; and

■ b. Revising paragraph (b)(1).

The revision reads as follows:

252.245–7002 Reporting Loss of Government Property.

* * * * *

(b) * * *

(1) The Contractor shall use the property loss function in the Government-Furnished Property (GFP) module of the Procurement Integrated Enterprise Environment (PIEE) for reporting loss of Government property. Reporting value shall be at unit acquisition cost. Current PIEE users can access the GFP module by logging into their account. New users may register for access and obtain training on the PIEE home page at *https://wawf.eb.mil/piee-landing.*

* * * * *

[FR Doc. 2020–18639 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 216 and 229

[Docket No. 200819–0222]

RIN 0648–BG55

Guidelines for Safely Deterring Marine Mammals

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

ACTION: Proposed rule.

SUMMARY: The Marine Mammal Protection Act (MMPA) allows for specified persons to employ measures to deter marine mammals from damaging fishing gear and catch, damaging personal or public property, or endangering personal safety, as long as these measures do not result in death or serious injury of marine mammals. The MMPA directs the Secretary of Commerce, through NOAA's NMFS, to publish a list of ''guidelines'' for use in safely deterring marine mammals under NMFS' jurisdiction and to recommend ''specific measures,'' which may be used to nonlethally deter marine mammals listed under the Endangered Species Act (ESA). While the guidelines and specific measures are not mandatory, the MMPA provides protection from liability under the MMPA for take resulting from such deterrence measures by specifying that any actions taken to deter marine mammals that are consistent with the guidelines or specific measures are not a violation of the act. NMFS has not evaluated these deterrents for effectiveness. This rulemaking also includes prohibitions on certain deterrent methods that NMFS has determined, using the best available scientific information, would have a significant adverse effect on marine mammals.

DATES: Comments must be received by October 30, 2020.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2020–0109, by either of the following methods:

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

1. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0109;*

2. Click the ''Comment Now!'' icon, complete the required fields;

3. Enter or attach your comments.

Mail: Submit written comments to Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

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

The NMFS Acoustic Deterrents Web Tool is available and accessible via the internet at: *https://jmlondon.shinyapps.io/NMFSAcousticDeterrentWebTool/.*

Copies of the draft Environmental Assessment (EA) prepared in support of this action are available and accessible via the internet at: *https://www.regulations.gov/.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to NMFS Office of Protected Resources and by email to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Kristy Long, Office of Protected Resources, 301–427–8402; Amy Scholik-Schlomer, Office of Protected Resources, 301–427–8402. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

The deterrence provisions of the MMPA (16 U.S.C. 1361 *et seq.*) provide an exception to otherwise prohibited acts, allowing specified persons to deter a marine mammal from damaging fishing gear and catch, damaging personal or public property, or endangering personal safety, so long as those deterrents do not result in the death or serious injury of a marine mammal. NMFS has defined ''serious injury'' as any injury that will likely result in death (50 CFR 229.2) and has developed a process and policy to distinguish serious from non-serious injuries (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations#distinguishing-serious-from-non-serious-injury-of-marine-mammals*).

Specifically, MMPA section 101(a)(4)(A) allows the owner of fishing gear or catch, the owner of private property, or an employee or agent of such owner (''specified persons''), to deter marine mammals from damaging fishing gear or catch or private property, respectively. Additionally, it allows any person to deter a marine mammal from endangering personal safety and any government employee to deter a marine mammal from damaging public property. The appropriate use of deterrents is allowed under these circumstances so long as any such use does not result in mortality or serious injury of a marine mammal. Section 101(a)(4)(A) does not allow the use of deterrents by any other person or entity or for any other purpose than those expressly enumerated.

MMPA section 101(a)(4)(B) directs the Secretary of Commerce, through NMFS, to publish a list of guidelines for use in safely deterring marine mammals and to recommend specific measures which may be used to non-lethally deter marine mammals listed as endangered or threatened under the ESA. Section 101(a)(4)(B) provides protection from liability from take, including mortality and serious injury, resulting from actions to deter marine mammals that are consistent with such guidelines and specific measures by specifying that such actions are not a violation of the MMPA. Compliance with the recommended specific measures would not necessarily provide protection from

liability under the ESA for the taking of ESA-listed marine mammals (see Classification section). The statute uses the terms ''guidelines'' and recommended ''specific measures,'' which indicates that these measures are not mandatory and only need to be complied with if an individual or entity wanted protection from liability under section 101(a)(4)(B) in the event of a marine mammal serious injury or mortality. Although they are guidelines and recommended specific measures, the statute nevertheless requires that the guidelines be published in the **Federal Register** and developed after notice and an opportunity for public comment.

Although the guidelines and recommended specific measures are not mandatory, as described above, MMPA section 101(a)(4)(C) allows that NMFS may prohibit certain deterrence methods if NMFS determines, using the best scientific information available, and subsequent to public comment, that the deterrence measure has a significant adverse effect on marine mammals.

Specified persons may choose to deter marine mammals using deterrents that are not included in the guidelines, recommended specific measures, or prohibitions. However, if a marine mammal is killed or seriously injured as a result of deterrence actions outside those specified in the guidelines or specific measures, the protection from liability provided in section 101(a)(4)(B) would not apply.

To implement the statutory provisions and inform development of these guidelines, NMFS initially solicited public input on which deterrents to evaluate and consider for approval (79 FR 74710, December 16, 2014). NMFS requested information on: The specifications (*e.g.,* source and frequency levels, pulse rate, type of fencing, size of flags, etc.) for each deterrent or technique, which marine mammal species or species group (large cetaceans, small cetaceans, pinnipeds) would be deterred, how a deterrent would be employed (*e.g.,* attached to fishing gear, launched some distance from a marine mammal), any evidence that the deterrent would not result in mortality or serious injury, and any other implementation considerations. We received a range of comments and requests from non-governmental organizations, private sector companies and product developers, fishery management councils, commercial and recreational fishermen, and representatives of the merchant shipping and maritime trade industry. For example, multiple respondents urged NMFS to ensure any prohibitions and guidelines were not too specific as to limit the ability to develop new technologies or products and to consider geographical and species variation inherent in the deterrent process. There were also general requests for NMFS to consider including acoustic devices along with the range of deterrents currently in use so commercial and recreational fishermen would have advice on and multiple options to deter different species under a variety of conditions, and potential protection from liability for take resulting from their use. NMFS considered information from this public comment period to assist with determining which methods and technologies are appropriate for these guidelines.

Separate from the provisions provided in the MMPA section 101(a)(4) for non-lethally deterring marine mammals, section 109(h) allows designated Federal, state, and local government officials or employees to take marine mammals in the course of their duties. Specifically, section 109(h) states that nothing in MMPA Title I or Title IV prevents a Federal, state, or local government official or employee, or person designated under section 112(c) from taking, in the course of their duties, a marine mammal in a humane manner (including euthanasia) if such taking is for the: (1) Protection or welfare of the mammal, (2) protection of the public health and welfare, or (3) nonlethal removal of nuisance animals. Any takes occurring under the authority of section 109(h) must be reported to the NMFS within 60 days pursuant to 50 CFR 216.22(b). These proposed guidelines and recommended specific measures pertain to members of the public deterring marine mammals for reasons outlined in MMPA section 101(a)(4) and do not apply to situations covered under section 109(h), such as deterring marine mammals from a hazardous area (*e.g.,* an oil spill).

As a result of the protections afforded by the MMPA since 1972, many species of marine mammals, certain stocks of pinnipeds (seals and sea lions) in particular, are increasing in abundance in the United States. Many marine mammals feed mostly on fish. In recent years, frustration by fishermen and property owners stemming from conflicts with marine mammals has increased, particularly as some populations of marine mammals have increased in certain areas. In many areas, harbor seals and gray seals haul out on beaches commonly used by humans, increasing the chances of negative interactions between marine mammals and humans. Additionally, pinnipeds (*e.g.,* California sea lions, Steller sea lions) regularly haul out on docks, sometimes damaging the docks and posing a threat to humans trying to access their property.

In some fisheries, marine mammals regularly remove catch or bait (depredation) from fishing gear, and some species (primarily pinnipeds) take fish from aquaculture pens. Over 30 species of odontocetes (toothed whales, dolphins, porpoises) are known to engage in depredation. For example, some individuals in populations of sperm, killer, false killer, and pilot whales around the world have become adept at removing a variety of fish species from longline hooks, a behavior also exhibited by other toothed whales and dolphins in a wide range of fisheries. Other species take catch from trawl or gill nets. Regardless of gear type, depredation can lead to marine mammal bycatch, with some marine mammals dying or becoming seriously injured. Depredation can significantly affect the volume and quality of commercial and recreational catch and may contribute to fishermen taking retaliatory actions, such as intentionally shooting and killing marine mammals. NMFS has numerous stranding records documenting animals killed or injured by lethal take from gunshots, particularly of bottlenose dolphins in the NMFS Southeast Region and California sea lions in the NMFS West Coast Region. These proposed guidelines and recommended specific measures are intended to provide tools for fishermen and property owners to protect fishing gear, catch, and property, while also reducing intentional lethal takes and serious injuries of marine mammals. Further, this action would reduce unlawful take by prohibiting the use of those deterrent methods that we have determined will result in significant adverse effects to marine mammals.

Tribal Treaty Fishing

Several Indian tribes located in the Pacific Northwest have entered into treaties with the United States that expressly reserve the right to fish at their usual and accustomed grounds and stations. As explained in prior notices, these tribal treaty fisheries are conducted under the authority of the treaties and managed by the relevant tribe. See, *e.g.,* 2010 NMFS List of Fisheries (74 FR 58859, November 16, 2009). In recognition of the sovereign authority of treaty fishing tribes over the conduct of their fisheries, NMFS proposes that the specific prohibitions in these regulations not apply to tribal fishermen participating in a treaty fishery. The guidelines may

nevertheless serve as a resource for treaty tribes and tribal fishermen to inform methods for safely deterring marine mammals in the conduct of treaty fisheries and would still provide protection from liability for take resulting from deterrence actions taken consistent with these guidelines and recommended specific measures.

Alaska Natives

NMFS intends that this proposed rule will have no impact or effect on Alaska Native take of marine mammals for subsistence purposes or the creating and selling of authentic Alaska Native articles of handicrafts and clothing, as provided under MMPA section 101(b).

Practice Avoidance Before Deterrence

NMFS strongly encourages fishermen, private property owners, and government officials to practice avoidance techniques prior to attempting to deter any marine mammal. Avoiding interactions is the safest method for preventing death or serious injury to marine mammals and the most definitive way to minimize risk to human safety. Fishermen can modify fishing operations to avoid or minimize interactions with marine mammals by adjusting tow and haul times or duration of sets. Specific areas known or thought to be occupied by marine mammals should be avoided and all effort should be made to avoid setting or placing fishing gear and catch in areas where marine mammals are sighted. Trawling, trolling, or hauling gear in the vicinity of marine mammals should also be avoided and must cease when transiting through a group of marine mammals to avoid unlawful take. NMFS strongly encourages fishermen to avoid discarding fish in the vicinity of marine mammals or known haulout locations, particularly given the prohibition on feeding marine mammals found at 50 CFR 216.3. Finally, while observing marine mammals, NMFS strongly encourages compliance with all regional viewing guidelines to further reduce impacts to marine mammals.

Gear Modifications To Deter Marine Mammals

Gear modifications are any alterations to existing fishing gear intended to reduce bycatch and/or depredation. Simple gear modifications include changing the material or the characteristics of gear used (*e.g.,* weak circle hooks), changing the color of the gear, reducing line length or strength, and adding materials to gear. Pursuant to MMPA section 101(a)(4), fishermen do not need authorization to modify gear and/or fishing practices to protect fishing gear, catch, or bait from marine mammals, so long as any such modified gear and/or fishing practices do not result in the death or serious injury of a marine mammal and are consistent with the prohibitions included in this rulemaking; therefore, NMFS did not consider modifications to fishing gear as a deterrent.

Types of Deterrents

In general, deterrents fall into two categories, ''non-acoustic'' or ''acoustic.'' Non-acoustic deterrents target senses other than hearing to deter a marine mammal. Non-acoustic deterrents could be visual, physical barriers, electrical, chemosensory, or tactile. Visual deterrent methods rely on a marine mammal's visual acuity and perception of a change in their immediate environment to elicit a flight or avoidance behavior. Physical barriers prevent an animal from gaining access to an area. Chemosensory deterrents used on marine mammals often focus on taste to induce an aversion response. In addition to chemical repellents applied through consumption mechanisms, chemicals used for predator control can also be aerosolized or applied through an inhalation route of entry. Tactile deterrent methods typically involve physically creating pain or discomfort to induce aversion with the goal of eliciting flight behaviors (Scordino 2010). Tactile deterrents can be propelled through the use of a multitude of devices to extend the deterrent potential beyond what would be possible with manual use (*e.g.,* throwing or striking by hand).

Acoustic deterrents, which can produce sound underwater or in air, fall into two main categories, impulsive and non-impulsive, based on their potential to affect marine mammal hearing sensitivity (*i.e.,* cause a permanent threshold shift, (PTS)). Impulsive acoustic deterrents (*e.g.,* seal bombs, firecrackers, banging pipes, bird bangers) produce sounds that are typically transient, brief (less than 1 second), broadband (produce sound over a wide frequency range), and consist of high peak sound pressure with rapid rise time and rapid decay (peak sound increases and dissipates quickly) and generally have an increased capacity to affect marine mammal hearing sensitivity. Some impulsive deterrents contain explosives (*e.g.,* underwater firecrackers) while others do not (*e.g.,* banging pipes). Non-impulsive acoustic deterrents (*e.g.,* pingers, predator sounds, air horns) typically only have small fluctuations in decibel (dB) level, making them less likely to affect hearing sensitivity compared to impulsive sources (Southall *et al.* 2007; NMFS 2018; Southall *et al.* 2019).

For a description of each deterrent evaluated and how it is used, please see the draft EA prepared under the National Environmental Policy Act (NEPA) for this action (see **ADDRESSES**).

TABLE 1—TYPES OF NON-ACOUSTIC AND ACOUSTIC DETERRENTS EVALUATED

Non-Acoustic Deterrents	
Visual	Air dancers, flags, pinwheels, streamers.
	Bubble curtains.
	Flashing or strobe lights.
	Human attendants.
	Lasers.
	Patrol animals.
	Predator shapes.
	Vessel chasing.
	Vessel patrolling.
	Unmanned aircraft systems.
Physical barriers	Anti-predator netting.
	Containment booms/waterway barriers.
	Gates/closely spaced bars.
	Horizontal bars.
	Rigid fencing in air.
	Swim step protectors.
Chemo-sensory	Chemical irritants.
	Corrosive chemicals.
	Taste deterrents.
Tactile:	
Electrical	Cattle prods.
	Electric fencing in air.
	Electric fencing in water.
	Electrical mats.
	Electrical nets.
	Electroshock weapon technology.
	Underwater electric barriers.
Projectiles used with firearms.	Bullets, plastic bullets, rubber bullets, shotgun shells with rubber shot or balls, BBs, shot pellets, beanbag rounds, sponge grenades.
Projectiles used with compressed air/gas.	BBs, shot pellets, paintballs, sponge grenades, nails, spears.
Other projectiles.	Arrows, darts, spears, foam missiles/rounds, spears, rocks.
Fixed sharp objects.	Nails, barbed wire.
Manual—sharp	Gaffs, hooks, sharp-ended poles, etc.
Manual—blunt	Crowder boards, blunt-tipped poles, brooms, mop handles, butt of a spear gun, etc.
Water	Hose, sprinkler, water gun.
Acoustic Deterrents	
Impulsive:	

TABLE 1—TYPES OF NON-ACOUSTIC AND ACOUSTIC DETERRENTS EVALUATED—Continued

Explosive	Fireworks; bird bangers; bird whistler/screamers; pencil launchers/bear bangers; propane cannons; explosive pest control devices (*i.e.,* seal bombs, cracker shells, bird bombs, underwater firecrackers).
Non-Explosive	Banging objects/passive acoustic in-air deterrents; low-frequency, broadband devices; pulsed power devices.
Non-impulsive	Acoustic alarms (*i.e.,* pingers, transducers); in-air noisemakers; predator sounds/alarm vocalizations using underwater speakers.

Evaluation Criteria and Considerations

Acoustic Deterrents

In analyzing acoustic deterrents, we considered each deterrent's potential to cause acoustic injury (*i.e.,* PTS) as well as direct physical, non-acoustic injury to the lungs and gastrointestinal (GI) tract associated with underwater explosives. The potential for acoustic deterrents to cause acoustic injury was evaluated based upon marine mammal hearing groups using the PTS onset thresholds in NMFS' Technical Guidance (NMFS 2018); see the EA for a list of species included in each of the five hearing groups. We developed an evaluation criterion to compare to these thresholds.

Our evaluation criterion considered whether a deterrent had the potential to result in PTS at distances >100 meters (m) from the source after an hour of exposure. We chose a 100-m distance (*i.e.,* isopleth or a line drawn through all points having equal sound pressure or exposure levels) for two reasons. First, 100 m is a minimum displacement distance for various devices and is a typical distance within which some of these devices are deployed from one another (reviewed in McGarry *et al.* 2020, see Tables 2 and 3). Second, it represents a reasonable distance at which one can sight the most susceptible and difficult to sight marine mammal hearing group (High Frequency (HF) cetaceans; Dall's porpoise, harbor porpoise, dwarf sperm whales, and pygmy sperm whales) with high probability using unaided vision. Based on Roberts *et al.* (2016), the probability of sighting harbor porpoises with unaided vision is high (*i.e.,* detection probability ~ 1) out to around 100 m, after which sighting probability begins to steeply decline. Given this, we conservatively chose to use a 100-m isopleth as it provides reasonable assurance that an acoustic deterrent user would be able to sight the most susceptible and difficult to sight marine mammal species and, as such, all other less susceptible more easily sighted marine mammal species. This is consistent with a recent review of acoustic deterrents by McGarry *et al.* (2020), who determined a 100-m criterion was appropriate to evaluate deterrents for the likelihood of exposure resulting in PTS onset.

The 1-h exposure duration represents a reasonable maximum exposure duration expected for marine mammals from a deterrent device within a 24-hour (h) period (*e.g.,* exposure can be continuous or consist of multiple shorter exposures throughout the day). Our analysis used twice the duration used by the McGarry *et al.* 2020 evaluation (*i.e.,* 30-minutes) to account for the potential for multiple exposures to occur within a day. The PTS onset distances associated with the 1-h exposure duration represents the distance from the deterrent a marine mammal would have to remain for an hour to potentially experience PTS. If an animal occurs farther from the deterrent, PTS is unlikely to occur. If an animal is closer than 100 m, the likelihood of PTS would depend both on how close the animal gets to the deterrent and how long the animal remains within this isopleth.

To account for incidental exposure of non-targeted marine mammal species, we analyzed all acoustic deterrents for potential acoustic injury impacts to every marine mammal hearing group, regardless of whether the hearing group included targeted or non-targeted marine mammals. Thus, we evaluated specifications in consideration of the most susceptible hearing group.

Acoustic devices were evaluated based on their specific acoustic characteristics, such as source level (underwater: dB re: 1 micropascal (µPa) at 1 m and airborne: dB re: 20 µPa at 1 m), frequency range (*i.e.,* kilohertz (kHz)), signal duration, and silent intervals between signals (inter-pulse interval or minimum silent interval between signals). To determine isopleths, practical geometric spreading (15 log R) was used to model transmission loss through the environment for all underwater sources. The only exceptions were seal bombs and airborne devices, where it was considered more appropriate to rely upon spherical spreading (20 log R) (Attenborough 2014; Wiggins *et al.* 2019). Sound typically propagates through airborne environments via spherical spreading (Attenborough 2014), and recent field measurements of seal bomb detonations underwater support using spherical spreading to describe transmission loss (Wiggins *et al.* 2019).

NMFS evaluated source levels for various deterrents to determine the maximum source level that would not exceed our 100-m, 1-h criterion. All underwater devices with source levels up to 170 dB, and a maximum 54 percent duty cycle (*i.e.,* producing sound for less than 32 minutes within an hour), met the evaluation criterion.

For acoustic deterrents that involve the use of underwater explosives, NMFS also evaluated the potential for severe lung injury, slight lung injury, and gastrointestinal tract injury (DoN 2017). Quantitative mortality criteria (severe lung injury) resulting from exposure to sound are only available for underwater explosives. Lung injury thresholds are dependent on animal mass (*i.e.,* smaller mass individuals are more susceptible than those with higher mass). Therefore, we evaluated underwater impulsive explosive acoustic deterrents based on conservative assumptions: (1) That the animal was at the surface, and (2) the smallest mass representative calf or pup in each hearing group was exposed (DoN 2017). Thus, when evaluating explosive deterrents, we considered the criteria (lung, GI tract, or PTS) resulting in the largest isopleth.

Some acoustic deterrents have specifications that can be manipulated or adjusted by the user. For example, a user can control the distance a deterrent is deployed from a marine mammal and/or the time (*i.e.,* silent interval) between deployments. Additionally, deterrents may have multiple or programmable settings (*e.g.,* duty cycle, silent interval between signals, and sound type/variety). For manually-deployed deterrents (*e.g.,* hand held devices where the silent interval between signals can be controlled), we determined the minimum silent interval needed to meet the evaluation criterion (*i.e.,* onset of PTS >100-m, 1-h), for a single deterrent device, for all marine mammal hearing groups. For programmable devices capable of producing output with a range of characteristics (*e.g.,* adjustable source level or produced a broad range of frequencies), we evaluated the device by using the maximum potential value for each characteristic, recognizing that many combinations of specifications are possible, and determined the minimum silent interval, for a given device, needed to meet the evaluation criterion

for all marine mammal hearing groups. This allowed us to evaluate the maximum potential impact of a given deterrent as well as how any deterrents capable of exceeding our criterion may be deployed in ways that are safe and within our criterion.

In addition to acoustic injury, NMFS also considered secondary impacts (*e.g.,* chronic stress, displacement from important habitat, decreased fitness).

Non-Acoustic Deterrents

We evaluated non-acoustic deterrents for the likelihood they would impact marine mammals and the potential severity of those impacts. Severity was assessed as lethal (mortality or serious injury) or sub-lethal including whether the impact was primary (*e.g.,* physical trauma, trauma, toxicity) or secondary (*e.g.,* infection, chronic stress, displacement from important habitat, decreased fitness). We evaluated whether a potential injury would be serious according to the NMFS Policy for Distinguishing Serious from Non-Serious Injury of Marine Mammals (77 FR 3233; January 23, 2012). Deterrents not likely to result in mortality or serious injury were included in the guidelines or recommended specific measures.

Other Considerations

To evaluate some categories of deterrents mentioned below, NMFS relied on information on effects on humans and other animals (*e.g.,* cows) when that information was not available for marine mammals. For visual strobe or flashing lights, NMFS proposes to include lights that are used for humans because pinnipeds and likely cetaceans have similar visual acuity to humans (Scholtyssek *et al.* 2007, Levenson and Schusterman 1999). For electric fencing in air, NMFS proposes to include a maximum of 3,000 volts (V), consistent with industry standards for deterring livestock with skin 1 millimeter (mm) thick, as pinnipeds generally have thicker skin and underlying blubber when compared to livestock (*e.g.,* Steller sea lion skin has been measured as 5 mm (Jonker 1996)). For electric mats, NMFS proposes to include low voltage 24V direct current as that is safe for humans. For using paintballs and sponge grenades to deter pinnipeds, NMFS considered typical deployment practices for humans (not shooting another person with paintballs within 3 m and sponge grenades within 10 m) as well as the acoustic impacts (*e.g.,* minimum of 14 m for paintballs and sponge grenades meets our evaluation criterion for phocids (earless seals) related to PTS for air rifles). In general, there are two types of paintballs; those considered ''low impact'' (*i.e.,* 0.50 caliber) and those considered standard (*i.e.,* 0.68 caliber). The recommended minimum age for playing paintball varies (sometimes as young as 6 years old) and low impact paintballs are often recommended for children younger than 10–12 years old; therefore, the expected impacts to pinnipeds would be less than those experienced by human children because pinnipeds are much larger. Sponge grenades can be deployed using low velocity hand held launchers or high velocity automatic, mounted launchers. NMFS is proposing to include low velocity sponge grenades (40 x 46 mm) deployed using hand held launchers.

All airborne acoustic deterrents evaluated had source levels <142 dB for impulsive deterrents and <158 dB for non-impulsive deterrents, all of which meet the acoustic evaluation criterion. As noted above, NMFS proposes to include underwater acoustic deterrents with minimum distances and silent intervals to ensure that the acoustic evaluation criterion are met.

Proposed Guidelines for Deterring Marine Mammals

NMFS proposes the following guidelines (Tables 2 and 3) to deter marine mammals that are not listed under the ESA; these guidelines include deterrents for marine mammals not listed as threatened or endangered. For using deterrents to target each of the three taxa, mysticetes (baleen whales), odontocetes (toothed whales, dolphins, porpoises), and pinnipeds (seals and sea lions), the proposed guidelines include types of deterrents within a particular category of deterrents. Additionally, we include associated implementation provisions that must be followed to allow the individual to take advantage of the protection from liability provided in section 101(a)(4)(B); this is particularly noteworthy for acoustic deterrents where minimum distances and/or a minimum silent intervals are specified. For acoustic deterrents, the minimum distances and silent intervals vary according to each marine mammal hearing group: High-frequency cetaceans (HF), mid-frequency (MF) cetaceans, low-frequency (LF) cetaceans, phocid pinnipeds (earless seals), and otariid pinnipeds (eared seals and sea lions).

General Guidelines

Anyone attempting to deter a marine mammal should consider their own personal safety, that of others in the vicinity, and the safety of the marine mammal. When operating a vessel, captains should use extreme caution when maneuvering around marine mammals, as they may surface in unexpected places. If a marine mammal approaches a vessel, the captain should put the engine in neutral to avoid striking the animal. Deterrent users must cease using a deterrent if an animal demonstrates any sign of aggression (*e.g.,* charging, lunging), as this could compromise human safety as well as marine mammal safety. If deterrent attempts are unsuccessful, NMFS strongly encourages users to temporarily suspend the activity (*e.g.,* fishing), giving the animal a chance to leave the area before resuming that activity.

NMFS has not evaluated these deterrents for effectiveness. NMFS recommends that users start with less impactful techniques first (*e.g.,* visual, physical barriers, in-air noisemakers, water deterrents), before using more impactful deterrents (*e.g.,* tactile—projectiles, explosives). Additionally, animal size should be taken into consideration. More impactful deterrents should be limited to adult animals (*e.g.,* adult male Steller sea lion on a dock that is endangering personal safety). Users should take into consideration the size of the animal with respect to human safety, particularly when using certain deterrents in close proximity to animals (*e.g.,* crowder boards).

Summary of Guidelines

TABLE 2—LIST OF NON-ACOUSTIC DETERRENTS FOR NON-ESA MARINE MAMMALS INCLUDED IN THE GUIDELINES

	Mysticetes	Odontocetes	Pinnipeds
Visual	Bubble curtains	Bubble curtains	Bubble curtains.
	Flashing or strobe lights	Flashing or strobe lights	Air dancers, flags, pinwheels, and streamers.
	Predator shapes	Predator shapes	Flashing or strobe lights.
	Vessel patrolling	Vessel patrolling	Human attendants.
	Unmanned Aircraft Systems	Unmanned Aircraft Systems	Predator shapes.

TABLE 2—LIST OF NON-ACOUSTIC DETERRENTS FOR NON-ESA MARINE MAMMALS INCLUDED IN THE GUIDELINES—Continued

	Mysticetes	Odontocetes	Pinnipeds
Physical barriers.	Containment booms, waterway barriers, and log booms.	Containment booms, waterway barriers, and log booms.	Vessel patrolling. Unmanned Aircraft Systems. Containment booms, waterway barriers, and log booms. Gates or closely spaced poles. Horizontal bars/bull rails. Rigid fencing in air. Swim step protectors.
Tactile—Electrical.	None	None	Electric fencing (in air). Low voltage electric mats.
Tactile—Projectile.	Foam projectiles with toy guns	Foam projectiles with toy guns	Foam projectiles with toy guns. Paintballs with paintball guns. Sponge grenades with hand held launcher. Blunt objects with slingshot.
Tactile—Manual.	Blunt objects—blunt tip poles, brooms, mop handles, etc.	Blunt objects—blunt tip poles, brooms, mop handles, etc.	Blunt objects—blunt tip poles, brooms, mop handles, etc.
Tactile—Water.	Water hoses, sprinklers, water guns	Water hoses, sprinklers, water guns	Water hoses, sprinklers, water guns.

TABLE 3—LIST OF ACOUSTIC DETERRENTS FOR NON-ESA MARINE MAMMALS INCLUDED IN THE GUIDELINES

	Mysticetes	Odontocetes	Pinnipeds
Impulsive—Explosives.	None	None	Aerial pyrotechnics/fireworks. Bird bangers, bird whistlers/screamers, bear bangers using pencil launcher, propane cannons. Cracker shells, bird bombs, seal bombs, underwater firecrackers.
Impulsive—Non-Explosives.	Banging objects (*e.g.,* Oikomi pipes) underwater.	Banging objects (*e.g.,* Oikomi pipes) underwater.	Banging objects (*e.g.,* Oikomi pipes)/in-air passive acoustic devices (*e.g.,* hanging chains, cans). Low frequency, broadband devices. Pulsed power devices.
Non-Impulsive (<170 dB RMS).	Acoustic alarm (*i.e.,* pingers/transducers). Predator sounds/alarm vocalizations using underwater speakers.	Acoustic alarms (*i.e.,* pingers/transducers). Predator sounds/alarm vocalizations using underwater speakers.	Acoustic alarms (*i.e.,* pingers/transducers). Air horns, in-air noisemakers, sirens, whistles. Predator sounds/alarm vocalizations using underwater speakers.

Deterrents used in air (air dancers, gates, bull rails, aerial pyrotechnics, bird bombs, etc.) are included in the guidelines for pinnipeds only because seals and sea lions routinely spend time out of the water. With respect to cetaceans, underwater cracker shells, seal bombs, pulsed power devices, and low frequency, broadband deterrents could result in onset of PTS at distances close to 100 m, which is our evaluation criterion; therefore, in order to take advantage of the protection from liability provided in section 101(a)(4)(B), anyone using these devices to target pinnipeds, must first conduct a thorough scan for cetaceans in all directions as noted below and maintain the specified minimum silent interval.

Programmable Devices and the NMFS Acoustic Deterrent Web Tool

Many devices allow the user to manipulate various settings or characteristics of the device. In order to take advantage of the protection from liability provided in section 101(a)(4)(B), any underwater non-impulsive devices capable of producing sound ≥ 170 dB root mean square (RMS) must be evaluated and approved via the Acoustic Deterrent Web Tool before attempting to use the deterrent. Users seeking protection from liability under section 101(a)(4)(B) must visit NMFS' online Acoustic Deterrent Web Tool and enter the settings they intend to use for a particular device. If the settings meet the evaluation criterion (onset of PTS >100 m, 1-h), the Web Tool will produce a certificate indicating that its use in the specified manner is consistent with these guidelines such that any resultant mortality or serious injury of a marine mammal is not a violation of the MMPA. If the specifications do not meet NMFS' criteria for approval, the user would not obtain a certificate and any resultant mortality or serious injury of a marine mammal could be a violation of the MMPA. The proposed Web Tool is available on the internet at *https://jmlondon.shinyapps.io/NMFSAcousticDeterrentWebTool/.*

Additional Specifications

For many deterrents included in the guidelines, we include additional specifications to further minimize the

risk of injury to marine mammals as a condition of effectuating the protection from liability under section 101(a)(4)(B). For acoustic deterrents, to reduce potentially harmful impacts to the target marine mammals and other sensitive marine mammals in the vicinity, minimum deployment distances as well as silent intervals are required (Tables 4–7). When deploying acoustic deterrents, users in close proximity to each other and/or on the same vessel must coordinate deploying any acoustic deterrents that have a minimum silent interval to ensure compliance with the requirements. For acoustic deterrents targeting pinnipeds, there are separate distances required for each group of pinnipeds. Phocids (earless seals) have lower PTS thresholds than otariids (eared seals and sea lions); thus, if both taxa are present, the user is required to comply with the minimum distance for phocids. Additionally, for several types of deterrents (*e.g.,* explosives), there are additional municipal, state, and/or Federal requirements for using and possessing such deterrents. These guidelines and recommended specific measures do not exempt users from any such requirements. For example, in the Southeastern United States, possessing and using explosives for fishing in various contexts is prohibited by state regulations in all states from North Carolina through Texas, as well as by Federal regulations under the Magnuson-Stevens Fishery Conservation and Management Act. In other words, compliance with this regulation and section 101(a)(4)(A) does not obviate the user's obligation to comply with all other applicable local, state, and Federal requirements related to the use of deterrents. The additional implementation measures that are included in this rule in order to effectuate the protection from liability provided in section 101(a)(4)(B) are summarized below.

Visual Deterrents

Flashing lights or strobe lights. Flashing or strobe lights used to deter marine mammals must conform to any standards established by Federal law.

Flags, pinwheels, and streamers. Flags, pinwheels, and streamers used to deter pinnipeds must ensure, to the best ability of the user, that the materials will stay intact and securely fastened; all such products must be installed and maintained in such a manner as to reduce the risk of entanglement or ingestion.

Vessel patrolling. When patrolling fishing gear or property with a vessel, the user must maintain a consistent and ''safe speed'' (as the term is defined in 33 CFR.83.06 and the International Regulations for Preventing Collisions at Sea 1972 (*see* 33 U.S.C. 1602)), compliance with any and all applicable speed limitations, and a fixed direction to avoid coming into contact with a marine mammal.

UAS (Unmanned aircraft system). Only vertical takeoff and landing aircraft are allowed for deterring marine mammals. Devices must be in good working order and operated consistent with the manufacturer's specifications. Users shall fly UASs no closer than 5 m from an animal. UAS altitude adjustments shall be made away from animals or conducted slowly when above animals. A UAS shall hover over a target marine mammal only long enough to deter the animal and should not come into direct contact with the animal. Users shall abide by applicable approach regulations for threatened and endangered marine mammals in 50 CFR 223.214 and 224.103, and any other applicable approach regulations for marine mammals such as those at 50 CFR 216.19 and 15 CFR 922.184.

Physical Barrier Deterrents

Containment booms, waterway barriers, and log booms. Any containment booms, waterway barriers, and log booms used to deter marine mammals must be constructed, installed, secured and maintained to reduce the risk of entanglement or entrapment. In-water lines should be kept stiff, taut, and non-looping. Booms/barriers should not block major egress and ingress points for marine mammals in channels, rivers, passes, and bays.

Rigid fencing in air, horizontal bars/bull rails, and gates or closely spaced poles. Any fencing, rails, gates, and poles used to deter pinnipeds must be constructed, installed, and maintained in such a manner as to ensure spacing, height, and/or width would not result in entrapment or entanglement.

Tactical—Electrical Deterrents

Electric fencing (in air). Electric fencing used to deter pinnipeds on land shall be no more than 3,000 V and properly maintained to ensure required voltage and reduce the risk of entanglement or entrapment.

Electric mats. Electric mats used to deter pinnipeds shall not exceed 24 V nominal.

Tactile—Projectile Deterrents

Foam projectiles with toy guns. When using foam projectiles with toy guns to deter marine mammals, the deterrent must strike the posterior end of an animal's body, taking care to avoid the animal's head and/or blowhole.

Paintballs with paintball guns. When using paintballs to deter pinnipeds, only non-toxic and water-soluble paintballs may be deployed using paintball guns at a minimum of 14 m from a phocid and 3 m from an otariid, and the paintball must strike the posterior end of an animal's body, taking care to avoid the animal's head.

Sponge grenades using handheld launcher. Sponge grenades used to deter pinnipeds must be deployed at a minimum distance of 14 m from a phocid and 10 m from an otariid and the sponge grenade must strike the posterior end of an animal's body, taking care to avoid the animal's head.

Blunt objects with slingshot. When using blunt objects with a sling shot to deter pinnipeds, users must strike an area near an animal first before striking the posterior end of an animal's body, taking care to avoid the animal's head. Blunt objects deployed via sling shot must not be sharp or metallic.

Tactile—Manual Deterrents

Blunt objects. Blunt objects (*e.g.,* poles, broom, and mop handles) used to deter marine mammals must be deployed using a prodding motion. Such deterrents are only appropriate in situations where an animal is directly pursuing a person, dock, vessel, or fishing gear, or attempting to haul out on a dock or vessel. Users must impact the posterior end of an animal's body (or the chest of a pinniped), taking care to avoid the animal's head and/or blowhole.

Tactile—Water Deterrents

Water deterrents. When using water deterrents, users must first strike an area near the animal before striking the animal; then the user must strike the posterior end of an animal's body, taking care to avoid the animal's head and/or blowhole.

Acoustic Impulsive Explosive Deterrents

Impulsive explosives. For the protection from liability provided in section 101(a)(4)(A) to apply, impulsive explosives are allowed only for deterring pinnipeds and only under certain conditions. When deploying approved impulsive explosives, users must abide by minimum distance and silent intervals as well as several other requirements included below. For all explosives, users must:

- Obtain all necessary permits or authorizations from local, state, and/or Federal authorities and make them available for inspection upon request by any authorized officer; and
- Deploy approved explosives behind a pinniped by the appropriate minimum

distance, taking care to avoid deploying an explosive in front of the animal, in the direction the animal is traveling, or in the middle of a group of animals.

For seal bombs, users must abide by the following:

1. Conduct a visual scan in all directions for cetaceans within 100 m; if the user cannot see 100 m due to darkness or weather conditions, then seal bombs are prohibited;

2. If cetaceans (whales, dolphins, porpoises) are sighted within 100 m of the user, then seal bombs are prohibited;

3. The visual scan must be repeated in all directions before each subsequent deployment; and

4. If both pinniped taxa are present, the minimum distance for phocids shall apply.

For cracker shells deployed underwater, the requirements are the same as those for deploying seal bombs, except the required visual scans are for determining whether HF cetacean species (*i.e.,* Dall's porpoise, harbor porpoise, pygmy sperm whales, and dwarf sperm whales), as opposed to all cetaceans for seal bombs, are within a 100-m of the user.

TABLE 4—MINIMUM SILENT INTERVALS AND DISTANCES WHEN DEPLOYING UNDERWATER ACOUSTIC IMPULSIVE EXPLOSIVES FOR DETERRING PINNIPEDS

Deterrent	Minimum silent interval between deployments	Minimum distance from phocids (m)	Minimum distance * from otariids (m)
Cracker shell	6 minutes	3	** 2
Seal bomb	180 seconds	20	2
Underwater firecracker	1 second	** 2	** 2

* If both phocid and otariid pinnipeds are observed in the area, then the minimum distance for phocids is required.
** Distance is based on physical proximity instead of acoustic effects.

Because Steller sea lions from both the endangered western distinct population segment (DPS) as well as the eastern DPS, which is not ESA-listed, occur east of 144° W longitude and north of latitude 55°49′22.00″ N (the area north of the southern tip of Coronation Island) and cannot be visually distinguished, impulsive explosives deployed underwater (*e.g.,* seal bombs, cracker shells, underwater firecrackers) are not included in the guidelines for deterring any Steller sea lions in all areas west of 144° W longitude and north of latitude 55°49′22.00″ N east of 144° W longitude.

For airborne explosives such as bird bombs and cracker shells, users must aim in the air above the animal and abide by the required minimum distances in Table 5.

TABLE 5—MINIMUM DISTANCES WHEN DEPLOYING AIRBORNE ACOUSTIC IMPULSIVE EXPLOSIVES FOR DETERRING PINNIPEDS

Deterrent	Phocid Pinniped Minimum Distance (m)	Otariid Pinniped Minimum Distance * (m)
Aerial pyrotechnics/fireworks	23	2
Bear bangers using pencil launcher	2	** 2
Bird banger	23	2
Bird bomb	8	** 2
Bird whistler/screamer	5	** 2
Cracker shells	24	2
Propane cannon	2	** 2

* If both phocid and otariid pinnipeds are observed in the area, then the minimum distance for phocids is required.
** Distance is based on physical proximity instead of acoustic effects.

Acoustic Impulsive Non-Explosive Deterrents

For *impulsive non-explosives,* NMFS is not proposing additional specifications for banging objects in air beyond the minimum distances and silent intervals described in Table 6. For banging objects underwater, pulsed power devices, and low frequency broadband devices, users are required to conduct a visual scan in all directions for either all cetaceans when using low frequency, broadband devices or HF cetaceans (*i.e.,* Dall's porpoise, harbor porpoise, pygmy sperm whales, and dwarf sperm whales) for pulsed power devices or banging objects underwater as described above for impulsive explosives.

TABLE 6—MINIMUM DISTANCES AND SILENT INTERVALS WHEN DEPLOYING ACOUSTIC IMPULSIVE NON-EXPLOSIVES FOR DETERRING EACH HEARING GROUP

Deterrent	Source level (RMS SPL)	Minimum silent interval between signals	LF cetacean minimum distance (m)	MF cetacean minimum distance (m)	HF cetacean minimum distance (m)	Phocid pinniped minimum distance (m)	Otariid pinniped minimum distance (m)
Pulsed Power Device	220 dB	1200 seconds (20 minutes).				1	1
Low frequency, broadband device	219 dB	300 seconds				5	1
Low frequency, broadband device	215 dB	120 seconds				5	1
Low frequency, broadband device	208 dB	30 seconds				4	1
Banging objects underwater	n/a	18 seconds	11	3		8	2
Banging objects in air	n/a	n/a	n/a	n/a	n/a	24	2

Note: A blank cell indicates that particular deterrent is not included in the guidelines or specific measures for that taxon.

Acoustic Non-Impulsive Deterrents

For airborne non-impulsive deterrents, Table 7 denotes minimum distances for phocids based on hearing sensitivity and minimum distances for otariids based on physical proximity to ensure people keep a safe distance from the animal.

TABLE 7—MINIMUM DISTANCES WHEN DEPLOYING AIRBORNE NON-IMPULSIVE ACOUSTIC DETERRENTS FOR PINNIPEDS

Deterrent	Phocid pinniped minimum distance (m)	Otariid pinniped minimum distance * (m)
Air horn	4	** 2
In-air noise maker (*e.g.,* vuvuzela)	5	** 2
Sirens	2	** 2
Whistles	3	** 2

* If both phocid and otariid pinnipeds are observed in the area, then the minimum distance for phocids is required.
** Distance is based on physical proximity instead of acoustic effects.

Proposed Recommended Specific Measures for Deterring ESA-Listed Marine Mammals

A summary of the recommended specific measures proposed for ESA-listed marine mammals is in Table 8. NMFS proposes to include all of the above guidelines as recommended specific measures for deterring ESA-listed mysticetes (baleen whales). Persons deterring marine mammals are still required to abide by existing approach regulations for humpback whales in Alaska, North Atlantic right whales, western Steller sea lions, and killer whales in Washington pursuant to 50 CFR 223.214 and 224.103, and any other applicable approach regulations for marine mammals such as those at 50 CFR 216.19 and 15 CFR 922.184. For ESA-listed odontocetes, NMFS proposes recommended specific measures for the Cook Inlet DPS of beluga whales, the Main Hawaiian Islands Insular DPS of false killer whales, the Southern Resident DPS of killer whales, and sperm whales. For ESA-listed pinnipeds, NMFS proposes recommended specific measures for the western DPS of Steller sea lions and the Hawaiian monk seal; for all other species of ESA-listed pinnipeds, NMFS proposes to include all of the above guidelines as recommended specific measures. The western DPS of Steller sea lions is defined as Steller sea lions born west of 144° W longitude. In recent years, western DPS Steller sea lions have also been documented east of 144° W longitude. Western DPS Steller sea lions east of 144° W longitude commonly occur from Cape Suckling through Yakutat and northern southeast Alaska to 55°49′22.00″ N latitude, but are rarely found south of 55°49′22.00″ N latitude (north of the southern tip of Coronation Island) (Jemison *et al.* 2018, Hastings *et al.* 2020). Therefore, NMFS proposes recommended specific measures for all areas occupied by western DPS animals, both east and west of 144° W, except for airborne acoustic impulsive explosives, which are proposed only for deterring Steller sea lions east of 144° W longitude and north of 55°49′22.00″ N latitude.

TABLE 8—RECOMMENDED SPECIFIC MEASURES FOR DETERRING ESA-LISTED MARINE MAMMALS

	ESA-listed mysticetes	ESA-listed odontocetes				ESA-listed pinnipeds		
		CI Beluga	Insular FKW	SRKW	Sperm whales	HMS	WSSL	All others
Non-Acoustic Deterrents								
Visual:								
Air dancers, flags, pinwheels, streamers						✓	✓	✓
Bubble curtains	✓	✓	✓	✓	✓	✓	✓	✓
Flashing or strobe lights	✓	✓	✓	✓	✓	✓	✓	✓
Human attendants								
Predator shapes	✓	✓	✓	✓	✓	✓	✓	✓
Vessel patrolling	✓	✓	✓	✓	✓	✓	✓	✓
Unmanned aircraft systems	✓	✓	✓	✓	✓	✓	✓	✓

TABLE 8—RECOMMENDED SPECIFIC MEASURES FOR DETERRING ESA-LISTED MARINE MAMMALS—Continued

	ESA-listed mysticetes	ESA-listed odontocetes				ESA-listed pinnipeds		
		CI Beluga	Insular FKW	SRKW	Sperm whales	HMS	WSSL	All others
Physical barriers:								
Rigid fencing in air						✓	✓	✓
Horizontal bars/bull rails						✓	✓	✓
Gates/closely spaced bars						✓	✓	✓
Containment booms/waterway barriers	✓			✓	✓	✓	✓	✓
Swim step protectors						✓	✓	✓
Tactile:								
Projectiles:								
Paintballs and sponge grenades used with air rifle or airsoft gun						✓	✓	✓
Foam missiles/rounds with toy guns	✓			✓	✓	✓	✓	✓
Blunt objects with slingshot							✓	✓
Manual:								
Crowder boards, blunt-tipped poles, brooms, mop handles, etc.	✓		✓		✓	✓	✓	✓
Electrical:								
Electric fencing in air						✓	✓	✓
Electrical mats						✓	✓	✓
Water:								
Hose, sprinkler, water gun	✓	✓	✓	✓	✓	✓	✓	✓
Acoustic Deterrents								
Impulsive:								
Explosive:								
Aerial pyrotechnics/fireworks; bird bangers; bird whistler/screamers; bear bangers used with pencil launchers							✓	✓
Propane cannons							✓	✓
Explosive pest control devices (*i.e.,* seal bombs, cracker shells, bird bombs, underwater firecrackers)								✓
Non-Explosive:								
Low-frequency, broadband devices						✓	✓	✓
Pulsed power devices						✓	✓	✓
Banging objects underwater	✓			✓	✓	✓	✓	✓
Banging objects in-air/passive acoustic deterrents						✓	✓	✓
Non-impulsive:								
Underwater devices <170dB including acoustic alarms (*i.e.,* pingers, transducers)	✓			✓	✓	✓	✓	✓
Air horns, in-air noisemakers, sirens, whistles						✓	✓	✓
Predator sounds/alarm vocalizations using underwater speakers	✓			✓	✓	✓	✓	✓

Note: Cells with check marks indicate the specific measure is approved for that taxa or species; blank cells indicate those deterrents are not included as specific measures.

List of Abbreviations in Table 8: CI—Cook Inlet; FKW—false killer whale; HMS—Hawaiian monk seal; SRKW—Southern Resident killer whale; WSSL—western Steller sea lion.

Reporting Requirement

NMFS is proposing a reporting requirement for any marine mammals that are observed to have been injured or killed in the course of deterrence under the guidelines and recommended specific measures. This requirement to submit a form either online or via postage-paid mailing is similar to the requirement for commercial fishermen to report marine mammals incidentally killed or injured during commercial fishing operations. This will provide information to evaluate whether the guidelines and recommended specific measures are working as intended for safely deterring marine mammals.

If a marine mammal is observed injured or killed during or as a result of using a deterrent included in the guidelines or recommended specific measures, that injury or death must be reported to NMFS within 48 hours in order for the protection from liability in section 101(a)(4)(B) to apply. If finalized, NMFS intends that, for commercial fishing vessel owners and operators, reporting requirements for deterrent-related mortality and injury of marine mammals will be integrated with existing reporting requirements under MMPA section 118(e). Specifically, NMFS would seek to revise the existing form (Office of Management and Budget (OMB) number 0648–0292) to request additional information regarding deterrent use during the next update per the collection of information requirements of the Paperwork Reduction Act (PRA). Reporting requirements are applicable to all vessel owners and operators regardless of commercial fishery category on the MMPA List of Fisheries (*i.e.,* Category I, Category II, or Category III).

For anyone other than a commercial fisherman engaging in deterrence, when reporting a mortality or injury under this provision the following information would be required:

1. The name and address of the person deterring the marine mammal(s);

2. The vessel name, and Federal, state, or tribal registration numbers of the registered vessel and/or the saltwater angler registration number if deterrence occurred during fishing;

3. A description of the fishery, including gear type and target, or of the property where the deterrence occurred;

4. A description of the deterrent including number of attempts/deployments, specifications of devices, and any other relevant characteristics;

5. The species and number of each marine mammal incidentally killed or injured or a description (and/or photograph or video if available) of the animal(s) killed or injured if the species is unknown;

6. The disposition of the animal (*e.g.,* injured or dead, type of wounds);

7. The date, time, and approximate geographic location where the mortality or injury occurred; and

8. Other relevant information such as the behavior of the animal in response to the deterrent, other protected species in the vicinity, etc.

Prohibitions

NMFS has determined that a number of deterrents and associated deterrence activities would result in significant adverse effects to marine mammals (Table 9). Specifically, NMFS finds that the deterrents listed in Table 9 are likely to result in mortality, serious injury, and/or permanent hearing loss. Additionally, several prohibitions are included to cross-reference with other pre-existing prohibitions concerning the particular species or other parts of the regulations relevant to marine mammals. Information on these prohibitions are detailed in Chapter 4 of the draft EA.

TABLE 9—PROHIBITIONS ON DETERRING MARINE MAMMALS

General Prohibitions		
Target a deterrent action at a marine mammal calf or pup. Striking a marine mammal's head or blowhole when attempting to deter a marine mammal. Deploying or attempting to deploy a deterrent into the middle of a group of marine mammals. Feeding or attempting to feed a marine mammal in a manner prohibited by 50 CFR 226.3 even for the purposes of deterrence. Deterring or attempting to deter any marine mammal demonstrating signs of aggression, including charging or lunging, except when necessary to deter a marine mammal from endangering personal safety. Approaching certain ESA-listed marine mammals, including humpback whales in Alaska, North Atlantic right whales, western Steller sea lions, and killer whales in Washington, pursuant to 50 CFR 223.214 and 224.103.		
Mysticetes	Odontocetes	Pinnipeds
Non-Acoustic Deterrents		
Vessel chasing. Using any chemical irritants, corrosive chemicals, and other taste deterrents to deter marine mammals. Sharp objects. Using a firearm, bow, or spear gun for deterring mysticetes.	Vessel chasing. Using any chemical irritants, corrosive chemicals, and other taste deterrents to deter marine mammals. Sharp objects. Using a firearm, bow, or spear gun for deterring odontocetes.	Patrol animals. Vessel chasing. Using any chemical irritants, corrosive chemicals, and other taste deterrents to deter marine mammals. Sharp objects. Using a firearm, except for bird bombs and cracker shells. Discharging a firearm at or within 100 yards (91.4 m) of a Steller sea lion west of 144° W longitude.
Acoustic Deterrents		
Any impulsive explosives.	Any impulsive explosives.	Any impulsive explosives not included in the guidelines or specific measures. Seal bombs, underwater cracker shells, banging objects underwater, pulsed power devices, or low frequency broadband devices when visibility is <100m (*e.g.,* at night, fog).
Any non-impulsive device with an underwater source level ≥170 dB RMS, unless that device has been evaluated and approved by NMFS or via the NMFS Acoustic Deterrent Web Tool	Any non-impulsive device with an underwater source level. ≥170 dB RMS, unless that device has been evaluated and approved by NMFS or via the NMFS Acoustic Deterrent Web Tool.	Any non-impulsive device with an underwater source level ≥170 dB RMS, unless that device has been evaluated and approved by NMFS or via the NMFS Acoustic Deterrent Web Tool.

Revising MMPA Provisions at §§ 229.4 and 229.5

NMFS proposes to revise 50 CFR 229.4 and 229.5 to ensure consistency between these guidelines and recommended specific measures and the existing regulations for commercial fisheries under the MMPA. NMFS proposes to clarify that persons engaged in Category I, II, and III fisheries must comply with all deterrence prohibitions and are encouraged to follow the guidelines and recommended specific measures in 50 CFR part 216 to safely deter marine mammals from damaging fishing gear, catch, or other private property or from endangering personal safety.

Request for Public Comment

NMFS requests public comment on these proposed guidelines, recommended specific measures, and prohibitions and the topics noted below.

- Any deterrents not included in the proposed guidelines, recommended specific measures, or prohibitions that should be considered.
- Specifications and typical deployment practices for all acoustic devices, but particularly the acoustic specifications for paintball guns and airsoft guns.
- The design and usability of the NMFS Acoustic Deterrents Web Tool.
- Underwater source level associated with cracker shells.
- Signal duration associated with propane cannons, air rifles, low frequency broadband devices, and cowbells or other passive acoustic deterrents.
- Silent intervals and/or signal durations associated with numerous underwater acoustic alarms (see Appendix B in EA for more detail).
- Whether NMFS should consider only allowing ''low impact'' (*i.e.,* 0.50 caliber) paintballs or allow both low and higher impact (*i.e.,* 0.68 caliber) paintballs for pinnipeds.
- Whether paint balls and sponge grenades should be allowed for endangered Hawaiian monk seals.

- Whether the proposed specific measures for endangered Hawaiian monk seals are appropriate in the Hawaiian cultural context.
- The impacts this rulemaking may have on tribal and Alaska Native communities.

References Cited

A complete list of all references cited in this proposed rule can be found on the Federal e-Rulemaking Portal at *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0109,* and is available upon request from the NMFS Office of Protected Resources (see **ADDRESSES**).

Classification

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule would not have a significant economic impact on a substantial number of small entities. Any entity with combined annual fishery landing receipts less than $11 million is considered a small entity for purposes of the Regulatory Flexibility Act (50 CFR 200.2). Under this $11 million standard, all entities subject to this action are considered small entities.

This action proposes guidelines for safely deterring marine mammals under NOAA's jurisdiction (*e.g.,* whales, dolphins, seals, and sea lions) and recommends specific measures for safely deterring marine mammals listed under the ESA. It also proposes prohibitions on deterrent methods that would have a significant adverse effect on marine mammals. The proposed rule does not require that property owners, commercial fishermen, or recreational fishermen deter marine mammals; if members of the public choose to deter marine mammals from endangering personal safety, damaging private or public property, or damaging fishing gear or catch consistent with the guidelines and recommended specific measures, those persons would be protected from liability under section 101(a)(4)(B) if a marine mammal is killed or seriously injured as a result of such deterrence. Therefore, the proposed rule would not have a significant economic impact on a substantial number of small entities. Because this proposed rule would not have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis is not required and was not prepared.

Paperwork Reduction Act

This proposed rule contains a collection-of-information requirement subject to review and approval by OMB under the PRA. This requirement has been submitted to OMB for approval. Public reporting burden for (marine mammal mortality and injury report) is estimated to average 15 minutes per individual response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS Office of Protected Resources at the **ADDRESSES** above, by email to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

Executive Order 12866, Regulatory Planning and Review, and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This proposed rule has been determined to be not significant for the purposes of Executive Orders 12866 and 13563. This rule is not expected to be an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

National Environmental Policy Act

NMFS prepared a draft EA for this proposed rule that discussed the potential impacts of this action on the environment. In addition to the no action alternative (status quo), one alternative (preferred and the basis of this proposed rule) is analyzed.

NMFS identified Alternative 2, issuing national guidelines and specific measures for safely deterring marine mammals as well as prohibitions, as the preferred alternative for the proposed action. Under Alternative 2, NMFS would issue national guidelines prescribing methods and technologies to safely deter marine mammals, as well as specific measures for safely deterring endangered or threatened marine mammals, in a manner that would allow fishermen and property owners to protect their catch, fishing gear, and property without killing or seriously injuring marine mammals. Alternative 2 also includes prohibitions of certain deterrents that NMFS has determined would have a high adverse effect on marine mammals.

Under the No Action alternative, Alternative 1, NMFS does not issue guidelines or specific measures for safely deterring marine mammals or promulgate prohibitions on deterrents that we have determined would have a high adverse effect on marine mammals, thereby maintaining the status quo. The MMPA requires NMFS to establish guidelines for safely deterring marine mammals and specific measures for ESA-listed marine mammals. Therefore, Alternative 1 is inconsistent with the statutory obligation under the MMPA to prescribe guidelines and specific measures for safely deterring marine mammals from endangering personal safety, and damaging property, fishing gear, or catch.

The preferred alternative, Alternative 2, would not result in any high adverse impacts on the human environment, including protected marine populations, commercial fisheries, fishermen, or other regulatory programs. Additionally, certain deterrents that have a significant adverse effect on marine mammals would be prohibited.

A copy of the draft EA is available from NMFS (see **ADDRESSES**).

Endangered Species Act

There are 22 marine mammal species under NMFS jurisdiction that are listed as endangered or threatened under the ESA that may be affected by this rulemaking. There is also critical habitat designated for seven of those species where deterrents may be used. NMFS will consult internally pursuant to section 7 of the ESA on issuing these guidelines and recommended specific measures. NMFS will conclude the consultation prior to a determination on the issuance of the final rulemaking.

Coastal Zone Management

This proposed rule would not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

List of Subjects

50 CFR Part 216

Administrative practice and procedure, Alaska, Exports, Fish, Fisheries, Fishing, Fishing vessels, Imports, Indians, Labeling, Marine mammals, Reporting and recordkeeping requirements.

50 CFR Part 229

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, 50 CFR parts 216 and 229 are proposed to be amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1371 *et seq.,* unless otherwise noted.

■ 2. Add subpart J to part 216 to read as follows:

Subpart J—Authorization for Deterring Marine Mammals Under the Marine Mammal Protection Act of 1972

Sec.

Subpart J—Authorization for Deterring Marine Mammals Under the Marine Mammal Protection Act of 1972

§ 216.110 Basis and purpose.

(a) The regulations in this subpart implement section 101(a)(4) of the Marine Mammal Protection Act (MMPA) of 1972, as amended, 16 U.S.C. 1371(a)(4). Provided deterrence actions do not result in death or serious injury, section 101(a)(4) provides exceptions to the prohibition against take of marine mammals for:

(1) The owner of fishing gear or catch, or an employee or agent of such owner, to deter a marine mammal from damaging the gear or catch;

(2) The owner of other private property, or an agent, bailee, or employee of such owner, to deter a marine mammal from damaging private property;

(3) Any person, to deter a marine mammal from endangering personal safety; or

(4) A government employee, to deter a marine mammal from damaging public property.

(b) This subpart provide guidelines and recommended specific measures designed to safely deter marine mammals without causing death or serious injury. While this subpart and recommended specific guidelines in this subpart are not required, individuals are protected from liability under section 101(a)(4)(B) for actions to deter marine mammals that are consistent with the guidelines or specific measures in this subpart even if a marine mammal is killed or seriously injured as a result of the action.

(c) This subpart also prohibit the use of certain deterrent methods that the Agency has determined have a significant adverse effect on marine mammals.

§ 216.111 Scope.

(a) The regulations in this subpart apply only to those marine mammals under the jurisdiction of the National Marine Fisheries Service (NMFS).

(b) The regulations in this subpart do not apply to section 109(h) of the Marine Mammal Protection Act or the regulations promulgated in § 216.22.

(c) The regulations in this subpart do not apply to take of a marine mammal if such taking is imminently necessary in self-defense or to save the life a person in immediate danger pursuant to section 101(c) of the Marine Mammal Protection Act.

(d) The regulations in this subpart do not apply to tribal fishermen participating in a fishery pursuant to a treaty between the Indian tribe and the United States.

(e) Lasers; underwater electrical fencing, nets, and barriers; electric prods; electroshock weapon technology, and any other deterrent not specifically identified for a given taxa are not included in the guidelines or recommended specific measures in this subpart for deterring marine mammals. Any person using such deterrents does so at their own risk and is liable for any resulting mortality or serious injury of a marine mammal.

§ 216.112 Definitions.

In addition to the definitions in the Marine Mammal Protection Act and in § 216.3, and unless otherwise defined in this chapter, the terms in this chapter have the following meaning:

Acoustic alarm means any acoustic non-impulsive deterrent, including but not limited to pingers and transducers.

Acoustic deterrent means any deterrent that produces sound either in air or underwater.

Acoustic deterrent web tool means a web-based tool for a deterrent user to calculate the potential for a programmable non-impulsive device to induce onset of permanent threshold shift for marine mammals. If the device meets the evaluation criteria, a certificate documenting the device as specified would be issued. The evaluation criterion considers whether a deterrent has the potential to result in a permanent threshold shift (based on each marine mammal hearing group) at distances > 100 meters from the source after an hour of exposure.

Aerial pyrotechnic means a device that creates an exothermic chemical reaction to make heat, light, gas, smoke, and/or sound in air, commonly referred to as fireworks in air.

Approved means that the use of the deterrent method has been evaluated by NMFS and that any mortality or serious injury of a marine mammal resulting from the use of that method will not be a violation of the MMPA if the user has followed NMFS's guidelines or recommendations for the use of that method in this subpart.

Bird bomb means a pyrotechnic device, an impulsive explosive acoustic deterrent, which is designed to detonate in air and is discharged from a handheld launcher, similar to a starter pistol, using 6 mm 0.22 caliber firing caps to propel cartridges from a single-shot launcher.

Chemo-sensory deterrent means any deterrent that pertains to the sensing of chemicals by taste, including non-regulated substances (*e.g.,* hot sauce, vinegar) and chemical irritants and corrosive chemicals as defined by the Occupational Safety and Health Administration.

Cracker shell means a pyrotechnic device, an impulsive explosive acoustic deterrent, which is discharged from a 12-gauge shotgun and detonates in air or just below the surface in water.

Electrical deterrent means any deterrent that produces electricity as a means to deter a marine mammal upon contact.

Explosive means the same as defined in 27 CFR 555.11, any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion. The term includes, but is not limited to, dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses,

squibs, detonating cord, igniter cord, and igniters.

Firearm means any weapon, such as a pistol or rifle, capable of firing a missile or projectile using an explosive as a propellant.

Impulsive acoustic deterrent means any acoustic deterrent that produces sounds that are typically transient, brief, broadband, and consist of high peak sound pressure with rapid rise time and decay.

Impulsive explosive acoustic deterrent means any acoustic impulsive deterrent that contains an explosive as defined in this section. This term includes explosive pest control devices, as that term is defined by the U.S. Department of Alcohol, Tobacco, and Firearms, such as bird bombs, cracker shells, seal bombs, and underwater firecrackers.

Impulsive non-explosive acoustic deterrent means any acoustic impulsive deterrent that does not contain an explosive, including the following:

(1) Banging pipes or other objects;

(2) Low frequency, broadband deterrents; and

(3) Pulsed power devices.

Manually-deployed means any deterrent used by hand.

Non-impulsive acoustic deterrent means any acoustic deterrent that produces sounds that can be broadband, narrowband, or tonal, brief or prolonged, continuous or intermittent, and typically do not have high peak sound pressure, including the following:

(1) Acoustic alarms;

(2) In-air noisemakers;

(3) Predator sounds or marine mammal alarm vocalizations emitted by underwater speakers; and

(4) Passive acoustic in-air deterrents.

Physical barrier means any object that blocks passage by a marine mammal, including the following:

(1) Containment booms, waterway barriers, and log booms;

(2) Gates or closely spaced poles;

(3) Horizontal bars such as bull rails;

(4) Rigid fencing; and

(5) Swim-step protectors.

Safe speed means the same as defined under 33 CFR 83.06 and the International Regulations for Preventing Collisions at Sea 1972 (see 33 U.S.C. 1602).

Seal bomb means an impulsive explosive acoustic deterrent that is thrown by hand, contains no more than 40 grains of explosive material housed in a sealed cardboard tube, fitted with a waterproof fuse, and weighted to sink below the surface of the water before detonating underwater.

Sling shot means a Y-shaped stick or frame with an elastic strap attached to the prongs, used for manually flinging small projectiles such as rocks.

Tactile deterrent means any deterrent that physically comes in contact with a marine mammal, whether deployed manually or projected by an accompanying device, including the following:

(1) Electrical deterrents;

(2) Projectiles used with firearms;

(3) Projectiles used with compressed air or gas;

(4) Projectiles deployed with any other device;

(5) Sharp or blunt objects, fixed in place or manually deployed; and

(6) Water deterrents.

Underwater firecracker means a pyrotechnic device that is an impulsive explosive acoustic deterrent, designed with a fuse and water-resistant casing that allows the device to detonate at the surface of the water or underwater. Underwater firecrackers are similar to seal bombs, but have a much shorter fuse.

Visual deterrent means any deterrent that relies on a marine mammal's visual acuity and perception, including the following:

(1) Air dancers, flags, pinwheels, and streamers;

(2) Bubble curtains;

(3) Flashing lights or strobe lights;

(4) Human attendants;

(5) Patrol animals;

(6) Predator shapes;

(7) Vessel chasing;

(8) Vessel patrolling; and

(9) Unmanned aircraft systems.

§ 216.113 Guidelines for safely deterring marine mammals.

(a) *General.* (1) The guidelines in this section for safely deterring marine mammals must be followed in order for the protection for liability, provided under section 101(a)(4)(B) of the MMPA to apply even if death or serious injury of a marine mammal results from such deterrence. The guidelines in this section apply to all marine mammals under NMFS' jurisdiction that are not listed as threatened or endangered under the Endangered Species Act of 1973.

(2) [Reserved]

(b) *Mysticetes.* (1) Visual deterrents, including bubble curtains; flashing or strobe lights; predator shapes; vessel patrolling; and unmanned aircraft systems (UASs), are approved to deter mysticetes provided the user abides by the following:

(i) Flashing or strobe lights must conform to any standards established by Federal law.

(ii) Vessel patrolling of fishing gear is approved provided the user maintains a consistent and safe speed, in compliance with any and all applicable speed limitations, and fixed direction to avoid coming into contact with the whale.

(iii) UAS are approved provided the user abides by the following:

(A) Only vertical takeoff and landing aircraft are allowed;

(B) Users shall fly UASs no closer than 5 m from an animal;

(C) UAS altitude adjustments shall be made away from animals or conducted slowly when above animals;

(D) A UAS shall hover over a target animal only long enough to deter the animal and shall not come in direct contact with the animal; and

(E) When deploying a UAS, users shall follow approach regulations for threatened and endangered marine mammals, including humpback whales in Alaska and North Atlantic right whales, pursuant to 50 CFR 223.214 and 224.103 and any other applicable approach regulations for marine mammals, and shall adhere to those approach requirements in the event any such requirement conflicts with the provisions of this subpart.

(2) Physical barriers, including containment booms, waterway barriers, and log booms, are approved to deter mysticetes provided the user abides by the following:

(i) All containment booms, waterway barriers, and log booms shall be constructed, installed, and maintained to reduce the risk of entanglement or entrapment of marine mammals.

(ii) Lines in the water shall be kept stiff, taut, and non-looping.

(iii) Booms/barriers must not block major egress and ingress points in channels, rivers, passes, and bays.

(3) Tactile deterrents, including foam projectiles propelled by a toy gun; blunt objects, such as blunt tip poles and brooms, deployed manually; and water hoses, sprinklers, and water guns, are approved to deter mysticetes provided the user abides by the following:

(i) Blunt objects must be deployed using a prodding motion.

(ii) Tactile deterrents must only strike the posterior end of an animal's body, taking care to avoid the animal's head and blowhole.

(iii) Water deterrents must impact near an animal before striking the animal.

(4) Impulsive non-explosive acoustic deterrents, including banging objects underwater, are approved for deterring mysticetes provided the user abides by the following:

(i) The user must first conduct a visual scan in all directions for other marine mammals within 100 m; if the user cannot see 100 m due to darkness or weather conditions, banging objects underwater is not allowed.

(ii) If Dall's porpoise, harbor porpoise, pygmy sperm whales, or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater is not allowed.

(iii) If no Dall's porpoise, harbor porpoise, pygmy sperm whales, or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater must occur at least 11 m from a mysticete with a minimum of 18 seconds between strikes.

(5) Non-impulsive acoustic deterrents pursuant to paragraphs (b)(5)(i) and (ii) of this section are approved.

(i) Acoustic alarms, predator sounds and alarm vocalizations of marine mammals emitted by underwater speakers with source levels <170 dB root mean square sound pressure level (RMS) are approved for mysticetes; any such emission by underwater speakers capable of producing sound ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use such underwater speakers.

(ii) Any non-impulsive acoustic deterrent capable of producing underwater sound ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use the device. If the device meets the evaluation criteria, the user will receive a certificate authorizing use of the device as specified. The certificate must be maintained onsite and be available for inspection upon request by any authorized officer.

(c) *Odontocetes.* (1) Visual deterrents, including bubble curtains, flashing or strobe lights, predator shapes, vessel patrolling, and UASs, are approved to deter odontocetes provided the user abides by the following:

(i) Flashing or strobe lights must conform to any standards established by Federal law.

(ii) Vessel patrolling of fishing gear is approved provided the user maintains a consistent and safe speed, in compliance with any and all applicable speed limitations, and fixed direction to avoid coming into contact with the odontocete.

(iii) UAS are approved provided the user abides by the following:

(A) Only vertical takeoff and landing aircraft are allowed;

(B) Users shall fly UASs no closer than 5 m from an animal;

(C) UAS altitude adjustments shall be made away from animals or conducted slowly when above animals;

(D) A UAS shall hover over a target animal only long enough to deter the animal and shall not come in direct contact with the animal; and

(E) When deploying a UAS from a motorized or non-motorized vessel, users shall follow approach regulations for killer whales in Washington at 50 CFR 224.103(e) and any other applicable approach regulations for marine mammals, and shall adhere to those approach requirements in the event any such requirement conflicts with the provisions of this subpart.

(2) Physical barriers, including containment booms, waterway barriers, and log booms, are approved to deter odontocetes provided the user abides by the following:

(i) All containment booms, waterway barriers, and log booms shall be constructed, installed, and maintained to reduce the risk of entanglement or entrapment of marine mammals.

(ii) Lines in the water shall be kept stiff, taut, and non-looping.

(iii) Booms/barriers must not block major egress and ingress points in channels, rivers, passes, and bays.

(3) Tactile deterrents, including foam projectiles propelled by a toy gun; blunt objects, such as blunt tip poles and brooms, deployed manually; and water hoses, sprinklers, and water guns, are approved to deter odontocetes provided the user abides by the following:

(i) Blunt objects must be deployed using a prodding motion.

(ii) Tactile deterrents must only strike the posterior end of an animal's body, taking care to avoid the animal's head and blowhole.

(iii) Water deterrents must impact near an animal before striking the animal.

(4) Impulsive non-explosive acoustic deterrents, including banging objects underwater are approved for deterring odontocetes, except for Dall's porpoise, harbor porpoise, pygmy sperm whales, and dwarf sperm whales, provided the user abides by the following:

(i) The user must first conduct a visual scan in all directions for other marine mammals within 100 m; if the user cannot see 100 m due to darkness or weather conditions, banging objects underwater is not allowed.

(ii) If Dall's porpoise, harbor porpoise, pygmy sperm whales or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater is not allowed.

(iii) If no Dall's porpoise, harbor porpoise, pygmy sperm whales, or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater must occur at least 3 m from any other species of odontocete with a minimum of 18 seconds between strikes.

(5) Non-impulsive acoustic deterrents pursuant to paragraphs (c)(5)(i) and (ii) of this section are approved.

(i) Acoustic alarms and predator sounds and alarm vocalizations of marine mammals emitted by underwater speakers with source levels <170dB RMS are approved for odontocetes; any such emissions by underwater speakers capable of producing sounds ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use such underwater speakers.

(ii) Any non-impulsive acoustic deterrent capable of producing underwater sound ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use the device. If the device meets the evaluation criteria, the user will receive a certificate authorizing use of the device as specified. The certificate must be maintained onsite and be available for inspection upon request by any authorized officer.

(d) *Pinnipeds.* (1) Visual deterrents, including air dancers, flags, pinwheels, and streamers; bubble curtains; flashing or strobe lights; human attendants; predator shapes; vessel patrolling; and UASs, are approved to deter pinnipeds provided the user abides by the following:

(i) Flags, pinwheels, and streamers must be installed and maintained to reduce the risk of entanglement or entrapment of marine mammals.

(ii) Flashing or strobe lights must conform to any standards established by Federal law.

(iii) Vessel patrolling of fishing gear or property is approved provided the user maintains a consistent and safe speed, in compliance with any and all applicable speed limitations, and fixed direction to avoid coming into contact with the pinniped.

(iv) UAS are approved provided the user abides by the following:

(A) Only vertical takeoff and landing aircraft are allowed;

(B) Users shall fly UASs no closer than 5 m from an animal;

(C) UAS altitude adjustments shall be made away from animals or conducted slowly when above animals;

(D) A UAS shall hover over a target animal only long enough to deter the animal and shall not come in direct contact with the animal; and

(E) When deploying a UAS, users shall follow approach regulations for endangered Steller sea lions in 50 CFR 224.103(d) and any other applicable approach regulations for marine mammals, and shall adhere to those approach requirements in the event any

such requirement conflicts with the provisions of this subpart.

(2) Physical barriers, including containment booms, waterway barriers, and log booms, are approved to deter pinnipeds provided the user abides by the following:

(i) All containment booms, waterway barriers, and log booms shall be constructed, installed, and maintained to reduce the risk of entanglement or entrapment of marine mammals.

(ii) Lines in the water shall be kept stiff, taut, and non-looping.

(iii) Booms/barriers must not block major egress and ingress points in channels, rivers, passes, and bays.

(3) Tactile deterrents pursuant to paragraphs (d)(3)(i) through (vi) of this section are approved.

(i) Electric deterrents, including electric mats and electric fences are approved for pinnipeds provided the user abides by the following:

(A) Electric mats shall not exceed 24V nominal; and

(B) Electric fences shall be no more than 3000V and properly maintained to ensure required voltage and reduce the risk of entanglement or entrapment.

(ii) Foam projectiles propelled by a toy gun are approved for deterring pinnipeds provided the foam projectile only strikes the posterior end of an animal's body, taking care to avoid the animal's head.

(iii) Non-toxic and water-soluble paintballs deployed using paintball guns and low velocity sponge grenades deployed using hand-held launchers are approved for deterring pinnipeds provided the user abides by the following:

(A) Paintballs must be deployed at a minimum distance of 14 m from a phocid and 3 m from an otariid;

(B) Sponge grenades must be deployed at a minimum distance of 14 m from a phocid and 10 m from an otariid; and

(C) The paintball or sponge grenade must only strike the posterior end of an animal's body, taking care to avoid the animal's head.

(iv) Blunt objects such as rocks deployed via sling shot are approved for deterring pinnipeds provided the user abides by the following:

(A) Blunt objects must first impact near an animal before striking the animal;

(B) Blunt objects must only strike the posterior end of an animal's body taking care to avoid the animal's head; and

(C) Blunt objects deployed via sling shot must not be sharp or metallic.

(v) Blunt objects, such as blunt tip poles and brooms, deployed manually, are approved for deterring pinnipeds provided the user abides by the following:

(A) Blunt objects must be deployed using a prodding motion; and

(B) Blunt objects must only impact the chest or strike the posterior end of an animal's body, taking care to avoid the animal's head.

(vi) Water deterrents, including hoses, sprinklers, and water guns, are approved to deter pinnipeds provided they impact near an animal before striking the posterior end of the animal's body, taking care to avoid the animal's head.

(4) Impulsive explosive acoustic deterrents pursuant to paragraphs (d)(4)(i) through (vi) of this section are approved.

(i) Aerial pyrotechnics, bird bangers, bird whistlers and screamers, and bear bangers used with pencil launchers, are approved for deterring pinnipeds provided they have a source level below 142 dB RMS and the user abides by the following:

(A) Aerial pyrotechnics and bird bangers must detonate in air a minimum of 23 m from a phocid and a minimum of 2 m from an otariid; if both taxa are present, the minimum distance for phocids shall apply;

(B) Bird whistlers and screamers must detonate in air a minimum of 5 m from a phocid and a minimum of 2 m from an otariid; if both taxa are present, the minimum distance for phocids shall apply;

(C) Bear bangers deployed by pencil launchers must detonate in air a minimum of 2 m from a pinniped; users shall aim in the air above and between themselves and the pinniped; and

(D) All necessary permits or authorizations from local, state, and/or Federal authorities have been obtained, must be maintained onsite, and be available for inspection upon request by any authorized officer.

(ii) Propane cannons are approved for deterring pinnipeds provided the propane cannon is deployed at least 2 m from a pinniped.

(iii) Cracker shells discharged from a 12-gauge shotgun are approved for deterring pinnipeds, except for Steller sea lions in all areas west of 144° W longitude and east of 144° W longitude north of 55°49′22.00″ N latitude, provided the user abides by the following:

(A) For airborne cracker shells, cracker shells must detonate in air at least 24 m away from a phocid and at least 2 m away from an otariid; if both taxa are present, the minimum distance for phocids shall apply.

(B) For deploying cracker shells underwater:

(*1*) The user must first conduct a visual scan in all directions for Dall's porpoise, harbor porpoise, pygmy sperm whales and dwarf sperm whales within 100 m; if the user cannot see 100 m due to darkness or weather conditions, cracker shells shall not be deployed underwater;

(*2*) If Dall's porpoise, harbor porpoise, pygmy sperm whales or dwarf sperm whales are sighted within 100 m of the user, cracker shells shall not be deployed underwater;

(*3*) If no Dall's porpoise, harbor porpoise, pygmy sperm whales or dwarf sperm whales are sighted within 100 m of the user, underwater cracker shells must detonate at least 3 m away from a phocid and at least 2 m away from an otariid; if both taxa are present, the minimum distance for phocids shall apply;

(*4*) Cracker shells must detonate behind the target animal to deter from the rear and must not strike the animal or detonate in the path of or toward the head of the animal; and

(*5*) Users are permitted to deploy cracker shells only once every 6 minutes and must repeat the visual scan in all direction as required in this subsection prior to each deployment of cracker shells.

(C) All necessary permits or authorizations from local, state, and/or Federal authorities have been obtained, must be maintained onsite, and be available for inspection upon request by any authorized officer.

(iv) Bird bombs discharged from a shot launcher pistol are approved provided the user abides by the following:

(A) The bird bombs must detonate in air at least 8 m away from a phocid and at least 2 m away from an otariid; if both taxa are present, the minimum distance for phocids shall apply; and

(B) All necessary permits or authorizations from local, state, and/or Federal authorities have been obtained, must be maintained onsite, and be available for inspection upon request by any authorized officer.

(v) Underwater firecrackers are approved for deterring pinnipeds, except for Steller sea lions in all areas west of 144° W longitude and east of 144° W longitude north of 55°49′22.00″ N latitude, provided the user abides by the following:

(A) The underwater firecracker must detonate a minimum of 2 m behind a pinniped, meaning the firecracker must not strike the animal or detonate in front of the animal; and

(B) All necessary permits or authorizations from local, state, and/or Federal authorities have been obtained,

must be maintained onsite, and be available for inspection upon request by any authorized officer.

(vi) Seal bombs are approved for deterring pinnipeds, except for Steller sea lions in all areas west of 144° W longitude and east of 144° W longitude north of 55°49′22.00″ N latitude, provided the user abides by the following:

(A) The user must first conduct a visual scan in all directions for cetaceans within 100 m before deploying a seal bomb; if the user cannot see 100 m due to darkness or weather conditions, a seal bomb shall not be deployed;

(B) If cetaceans are sighted within 100 m of the user, a seal bomb shall not be deployed;

(C) If no cetaceans are sighted within 100 m of the user, a seal bomb must detonate at least 20 m away from a phocid and at least 2 m away from an otariid; if both taxa are present, the minimum distance for phocids shall apply;

(D) Users are permitted to deploy only one seal bomb per 3-minute interval and must repeat the visual scan in all directions as required in this subsection prior to each deployment;

(E) Users must manually deploy seal bombs behind an animal by the appropriate minimum distance described in paragraph (d)(4)(vi)(C) of this section, meaning the seal bomb must detonate behind an animal and not strike an animal or detonate in front of the animal, in the direction the animal is traveling, or in the middle of a group of animals; and

(F) All necessary permits or authorizations from local, state, and/or Federal authorities have been obtained, must be maintained onsite, and be available for inspection upon request by any authorized officer.

(5) Impulsive non-explosive acoustic deterrents pursuant to paragraphs (d)(5)(i) thorough (iii) of this section are approved.

(i) Banging objects underwater is approved for deterring pinnipeds provided the user abides by the following:

(A) The user must first conduct a visual scan in all directions for other marine mammals within 100 m; if the user cannot see 100 m due to darkness or weather conditions, banging objects underwater is not allowed;

(B) If Dall's porpoise, harbor porpoise, pygmy sperm whales or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater is not allowed; and

(C) If no Dall's porpoise, harbor porpoise, pygmy sperm whales, or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater must occur at least 8 m away from a phocid and at least 2 m away from an otariid with a minimum of 18 seconds between strikes; if both taxa are present, the minimum distance for phocids shall apply.

(ii) Banging objects in air, such as bells and in-air passive acoustic deterrents, are approved for deterring pinnipeds provided the user maintains a minimum distance of at least 24 m from a phocid and at least 2 m from otariid; if both taxa are present, the minimum distance for phocids shall apply.

(iii) Low frequency, broadband devices and pulsed power devices with the following specifications are approved for deterring pinnipeds provided the user abides by the following:

(A) The user must first conduct a visual scan in all directions for cetaceans within 100 m before deploying low frequency, broadband devices and pulsed power devices; if the user cannot see 100 m due to darkness or weather conditions, low frequency, broadband devices and pulsed power devices shall not be deployed;

(B) If cetaceans are sighted within 100 m of the user, low frequency, broadband devices and pulsed power devices shall not be deployed; and

(C) If no cetaceans are sighted within 100 m of the user, low frequency, broadband devices and pulsed power devices must maintain the appropriate silent interval and engage the devices according to the minimum distances specified in Table 1 to this paragraph (d)(5)(iii)(C); if both phocids and otariids are present, the minimum distance for phocids shall apply.

TABLE 1 TO PARAGRAPH (d)(5)(iii)(C)—MINIMUM SILENT INTERVALS AND DISTANCES FOR LOW FREQUENCY, BROADBAND AND PULSED POWER DEVICES

Deterrent	Source level (RMS SPL)	Minimum silent interval between signals	Phocid pinniped minimum distance	Otariid pinniped minimum distance
Pulsed Power Device	220 dB	1200 seconds (20 minutes).	1 meter	1 meter.
Low frequency, broadband device	219 dB	300 seconds	5 meters	1 meter.
Low frequency, broadband device	215 dB	120 seconds	5 meters	1 meter.
Low frequency, broadband device	208 dB	30 seconds	4 meters	1 meter.

(6) Non-impulsive acoustic deterrents pursuant to paragraphs (d)(6)(i) through (iii) of this section are approved.

(i) Acoustic alarms, predator sounds and alarm vocalizations of marine mammals emitted by underwater speakers with source levels <170 dB RMS are approved for pinnipeds; any such emission by underwater speakers capable of producing sounds ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use such underwater speakers.

(ii) Any non-impulsive acoustic deterrent capable of producing underwater sound ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use the device. If the device meets the evaluation criteria, the user will receive a certificate authorizing use of the device as specified. The certificate must be maintained onsite and be available for inspection upon request by any authorized officer.

(iii) Air horns, in-air noisemakers, sirens, and whistles with source levels <158 dB RMS are approved for deterring pinnipeds provided the user abides by the following:

(A) Air horns must be deployed at least 4 m away from a phocid and at least 2 m from an otariid; if both taxa are present, the minimum distance for phocids shall apply;

(B) In-air noisemakers must be deployed at least 5 m away from a phocid and at least 2 m from an otariid; if both taxa are present, the minimum distance for phocids shall apply;

(C) Sirens must be deployed at least 2 m away from a phocid and from an otariid; and

(D) Whistles must be deployed at least 3 m away from a phocid and at least 2 m from an otariid; if both taxa are

present, the minimum distance for phocids shall apply.

§ 216.114 Specific measures for deterring threatened and endangered marine mammals.

(a) *General.* This section includes specific measures that are approved for deterring certain threatened and endangered marine mammals. The specific measures in this section must be followed in order for the protection from liability provided by MMPA section 101(a)(4)(A) to apply should the death or serious injury of a marine mammal listed as endangered or threatened under the Endangered Species Act result from the deterrence action.

(b) *Mysticetes.* All deterrents included in the guidelines in § 216.113(b) are allowed for deterring mysticetes listed as threatened or endangered under the Endangered Species Act subject to the specified use conditions identified in § 216.113(b).

(c) *Odontocetes*—(1) *Beluga whales, Cook Inlet Distinct Population Segment.* (i) Visual deterrents pursuant to paragraphs (c)(1)(i)(A) through (E) of this section are approved.

(A) Bubble curtains are approved.

(B) Flashing or strobe lights are approved provided the lights conform to any standards established by Federal law.

(C) Predator shapes are approved.

(D) Vessel patrolling of fishing gear is approved provided the user maintains a consistent and safe speed, in compliance with any and all applicable speed limitations, and fixed direction to avoid coming into contact with the whale.

(E) UAS are approved provided the user abides by the following:

(*1*) Only vertical takeoff and landing aircraft are allowed;

(2) Users shall fly UASs no closer than 5 m from an animal;

(*3*) UAS altitude adjustments shall be made away from animals or conducted slowly when above animals; and

(*4*) A UAS shall hover over a target animal only long enough to deter the animal and shall not come in direct contact with the animal.

(ii) Water hoses, sprinklers, and water guns are approved tactile deterrents provided the user abides by the following:

(A) Tactile deterrents must only strike the posterior end of an animal's body, taking care to avoid the animal's head and blowhole; and

(B) Water deterrents must impact near an animal before striking the animal.

(2) *False killer whales, Main Hawaiian Islands Insular Distinct Population Segment.* (i) Visual deterrents pursuant to paragraphs (c)(2)(i)(A) through (E) of this section are approved.

(A) Bubble curtains are approved.

(B) Flashing or strobe lights are approved provided the lights conform to any standards established by Federal law.

(C) Predator shapes are approved.

(D) Vessel patrolling of fishing gear is approved provided the user maintains a consistent and safe speed, in compliance with any and all applicable speed limitations, and fixed direction to avoid coming into contact with the whale.

(E) UAS are approved provided the user abides by the following:

(*1*) Only vertical takeoff and landing aircraft are allowed;

(*2*) Users shall fly UASs no closer than 5 m from an animal;

(*3*) UAS altitude adjustments shall be made away from animals or conducted slowly when above animals; and

(*4*) A UAS shall hover over a target animal only long enough to deter the animal and shall not come in direct contact with the animal.

(ii) Blunt objects, such as blunt tip poles and brooms, deployed manually as well as water hoses, sprinklers, and water guns are approved tactile deterrents provided the user abides by the following:

(A) Blunt objects must be deployed using a prodding motion;

(B) Tactile deterrents must only strike the posterior end of an animal's body, taking care to avoid the animal's head and blowhole; and

(C) Water deterrents must impact near an animal before striking the animal.

(3) *Killer whales, Southern Resident Distinct Population Segment.* (i) Visual deterrents pursuant to paragraphs (c)(3)(i)(A) through (E) of this section are approved.

(A) Bubble curtains are approved.

(B) Flashing or strobe lights are approved provided the lights conform to any standards established by Federal law.

(C) Predator shapes are approved.

(D) Vessel patrolling of fishing gear is approved provided the user maintains a consistent and safe speed, in compliance with any and all applicable speed limitations, and fixed direction to avoid coming into contact with the whale.

(E) UAS are approved provided the user abides by the following:

(*1*) Only vertical takeoff and landing aircraft are allowed;

(*2*) Users shall fly UASs no closer than 5 m from an animal;

(*3*) UAS altitude adjustments shall be made away from animals or conducted slowly when above animals;

(*4*) A UAS shall hover over a target animal only long enough to deter the animal and shall not come in direct contact with the animal; and

(*5*) When deploying a UAS from a motorized or non-motorized vessel, users shall follow approach regulations for killer whales in Washington at 50 CFR 224.103(e), and shall adhere to those approach requirements in the event any such requirement conflicts with the provisions of this subpart.

(ii) Containment booms, waterway barriers, and log booms are approved physical barriers provided the user abides by the following:

(A) All containment booms, waterway barriers, and log booms shall be constructed, installed, and maintained to reduce the risk of entanglement or entrapment of marine mammals;

(B) Lines in the water shall be kept stiff, taut, and non-looping; and

(C) Booms/barriers must not block major egress and ingress points in channels, rivers, passes, and bays.

(iii) Foam projectiles propelled by a toy gun and water hoses, sprinklers, and water guns, are approved tactile deterrents provided the user abides by the following:

(A) Tactile deterrents must strike the posterior end of an animal's body, taking care to avoid the animal's head and blowhole; and

(B) Water deterrents must impact near an animal before striking the animal.

(iv) Impulsive non-explosive acoustic deterrents pursuant to paragraph (c)(3)(iv)(A) of this section are approved.

(A) Banging objects underwater is approved for deterring Southern Resident killer whales provided the user abides by the following:

(*1*) The user must first conduct a visual scan in all directions for other odontocetes within 100 m; if the user cannot see 100 m due to darkness or weather conditions, banging objects underwater is not allowed;

(*2*) If Dall's porpoise, harbor porpoise, pygmy sperm whales or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater is not allowed; and

(*3*) If no Dall's porpoise, harbor porpoise, pygmy sperm whales, or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater must occur no closer than required approach distances pursuant to 50 CFR 224.103(e) with a minimum of 18 seconds between strikes.

(B) [Reserved]

(v) Non-impulsive acoustic deterrents pursuant to paragraphs (c)(3)(v)(A) and (B) of this section are approved.

(A) Acoustic alarms and predator sounds and alarm vocalizations of

marine mammals emitted by underwater speakers with source levels <170 dB RMS are approved; any such emission by underwater speakers capable of producing sounds ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use such underwater speakers.

(B) Any non-impulsive acoustic deterrent capable of producing underwater sound ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use the device. If the device meets the evaluation criteria, the user will receive a certificate authorizing use of the device as specified. The certificate must be maintained onsite and be available for inspection upon request by any authorized officer.

(4) *Sperm whales.* (i) Visual deterrents pursuant to paragraphs (c)(4)(i)(A) through (E) of this section are approved.

(A) Bubble curtains are approved.

(B) Flashing or strobe lights are approved provided the lights conform to any standards established by Federal law.

(C) Predator shapes are approved.

(D) Vessel patrolling of fishing gear is approved provided the user maintains a consistent and safe speed, in compliance with any and all applicable speed limitations, and fixed direction to avoid coming into contact with the whale.

(E) UAS are approved provided the user abides by the following:

(*1*) Only vertical takeoff and landing aircraft are allowed;

(*2*) Users shall fly UASs no closer than 5 m from an animal;

(*3*) UAS altitude adjustments shall be made away from animals or conducted slowly when above animals; and

(*4*) A UAS shall hover over a target animal only long enough to deter the animal and shall not come in direct contact with the animal.

(ii) Containment booms, waterway barriers, and log booms are approved physical barriers provided the user abides by the following:

(A) All containment booms, waterway barriers, and log booms shall be constructed, installed, and maintained to reduce the risk of entanglement or entrapment of marine mammals;

(B) Lines in the water shall be kept stiff, taut, and non-looping; and

(C) Booms/barriers must not block major egress and ingress points in channels, rivers, passes, and bays.

(iii) Foam projectiles propelled by a toy gun; blunt objects, such as blunt tip poles, brooms, deployed manually; and water hoses, sprinklers, and water guns, are approved tactile deterrents provided the user abides by the following:

(A) Blunt objects must be deployed using a prodding motion;

(B) Tactile deterrents must only strike the posterior end of an animal's body, taking care to avoid the animal's head and blowhole; and

(C) Water deterrents must impact near an animal before striking the animal.

(iv) Impulsive non-explosive acoustic deterrents pursuant to paragraph (c)(4)(iv)(A) of this section are approved.

(A) Banging objects underwater is approved for deterring sperm whales provided the user abides by the following:

(*1*) The user must first conduct a visual scan in all directions for other odontocetes within 100 m; if the user cannot see 100 m due to darkness or weather conditions, banging objects underwater is not allowed;

(*2*) If Dall's porpoise, harbor porpoise, pygmy sperm whales or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater is not allowed; and

(*3*) If no Dall's porpoise, harbor porpoise, pygmy sperm whales, or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater must occur at least 3 m from the whale with a minimum of 18 seconds between strikes.

(B) [Reserved]

(v) Non-impulsive acoustic deterrents pursuant to paragraphs (c)(4)(v)(A) and (B) of this section are approved.

(A) Acoustic alarms and predator sounds and alarm vocalizations of marine mammals emitted by underwater speakers with source levels <170 dB RMS are approved; any such emission by underwater speakers capable of producing sounds ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use such underwater speakers.

(B) Any non-impulsive acoustic deterrent capable of producing underwater sound ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use the device. If the device meets the evaluation criteria, the user will receive a certificate authorizing use of the device as specified. The certificate must be maintained onsite and be available for inspection upon request by any authorized officer.

(d) *Pinnipeds.* All deterrents included in the guidelines in § 216.113(d) are recommended specific measures for deterring pinnipeds listed as threatened or endangered under the Endangered Species Act identified in that subsection except for the Hawaiian monk seal and western Distinct Population of Steller sea lions in paragraphs (d)(1) and (2) of this section.

(1) *Hawaiian monk seal.* (i) Air dancers, flags, pinwheels, and streamers; bubble curtains; flashing or strobe lights; human attendants; predator shapes; vessel patrolling; and UASs, are approved visual deterrents for Hawaiian monk seals provided the user abides by the following:

(A) Flags, pinwheels, and streamers must be installed and maintained to reduce the risk of entanglement or entrapment of marine mammals.

(B) Flashing or strobe lights must conform to any standards established by Federal law.

(C) Vessel patrolling of fishing gear or property is approved provided the user maintains a consistent and safe speed, in compliance with any and all applicable speed limitations, and fixed direction to avoid coming into contact with a Hawaiian monk seal.

(D) UAS are approved provided the user abides by the following:

(*1*) Only vertical takeoff and landing aircraft are allowed;

(*2*) Users shall fly UASs no closer than 5 m from an animal;

(*3*) UAS altitude adjustments shall be made away from animals or conducted slowly when above animals; and

(*4*) A UAS shall hover over a target animal only long enough to deter the animal and shall not come in direct contact with the animal.

(ii) Containment booms, waterway barriers, and log booms are approved physical barriers to deter Hawaiian monk seals provided the user abides by the following:

(A) All containment booms, waterway barriers, and log booms shall be constructed, installed, and maintained to reduce the risk of entanglement or entrapment of seals;

(B) Lines in the water shall be kept stiff, taut, and non-looping; and

(C) Booms/barriers must not block major egress and ingress points in channels, rivers, passes, and bays.

(iii) Tactile deterrents pursuant to paragraphs (d)(1)(iii)(A) through (E) of this section are approved.

(A) Electric mats and electric fences are approved for Hawaiian monk seals provided the user abides by the following:

(*1*) Electric mats shall not exceed 24V nominal; and

(*2*) Electric fences shall be no more than 3000V and properly maintained to ensure required voltage and reduce the risk of entanglement or entrapment.

(B) Foam projectiles propelled by a toy gun are approved for deterring

Hawaiian monk seals provided the foam projectile only strikes the posterior end of an animal's body, taking care to avoid the animal's head.

(C) Non-toxic and water-soluble paintballs deployed using paintball guns and low velocity sponge grenades deployed using hand-held launchers are approved for deterring Hawaiian monk seals provided the user abides by the following:

(*1*) Paintballs must be deployed at a minimum distance of 14 m from a phocid and 3 m from an otariid;

(*2*) Sponge grenades must be deployed at a minimum distance of 14 m from a phocid and 10 m from an otariid; and

(*3*) The paintball or sponge grenade must strike the posterior end of an animal's body, taking care to avoid the animal's head.

(D) Blunt objects, such as blunt tip poles, brooms, deployed manually, are approved for deterring Hawaiian monk seals provided the user abides by the following:

(*1*) Blunt objects must be deployed using a prodding motion; and

(*2*) Blunt objects must only impact the chest or strike the posterior end of an animal's body, taking care to avoid the animal's head.

(E) Water hoses, sprinklers, and water guns are approved to deter Hawaiian monk seals provided the user impacts an area near an animal before striking the posterior end of the animal's body, taking care to avoid the animal's head.

(iv) Impulsive non-explosive acoustic deterrents pursuant to paragraphs (d)(1)(iv)(A) through (C) of this section are approved.

(A) Banging objects underwater is approved for deterring Hawaiian monk seals provided the user abides by the following:

(*1*) The user must first conduct a visual scan in all directions for other marine mammals within 100 m; if the user cannot see 100 m due to darkness or weather conditions, banging objects underwater is not allowed;

(*2*) If Dall's porpoise, harbor porpoise, pygmy sperm whales or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater is not allowed; and

(*3*) If no Dall's porpoise, harbor porpoise, pygmy sperm whales, or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater must occur at least 8 m away from a Hawaiian monk seal.

(B) Banging objects in air, such as bells, and in-air passive acoustic deterrents, such as aluminum cans, are approved for deterring Hawaiian monk seals provided the user maintains a distance of at least 2 m from the seal.

(C) Low frequency, broadband devices and pulsed power devices with the following specifications are approved for deterring Hawaiian monk seals provided the user abides by the following:

(*1*) The user must first conduct a visual scan in all directions for cetaceans within 100 m before deploying low frequency, broadband devices and pulsed power devices; if the user cannot see 100 m due to darkness or weather conditions, low frequency, broadband devices and pulsed power devices shall not be deployed;

(*2*) If cetaceans are sighted within 100 m of the user, low frequency, broadband devices and pulsed power devices shall not be deployed;

(*3*) If no cetaceans are sighted within 100 m of the user, low frequency, broadband devices and pulsed power devices must maintain the appropriate silent interval and engage the devices according to the minimum distances specified in Table 2 to this paragraph (d)(1)(iv)(C)(*3*); if both phocids and otariids are present, the minimum distance for phocids shall apply.

TABLE 2 TO PARAGRAPH (d)(1)(iv)(C)(*3*)—MINIMUM SILENT INTERVALS AND DISTANCES FOR LOW FREQUENCY, BROADBAND AND PULSED POWER DEVICES

Deterrent	Source level (RMS SPL)	Minimum silent interval between signals	Phocid pinniped minimum distance	Otariid pinniped minimum distance
Pulsed Power Device	220 dB	1,200 seconds (20 minutes).	1 meter	1 meter.
Low frequency, broadband device	219 dB	300 seconds	5 meters	1 meter.
Low frequency, broadband device	215 dB	120 seconds	5 meters	1 meter.
Low frequency, broadband device	208 dB	30 seconds	4 meters	1 meter.

(v) Non-impulsive acoustic deterrents pursuant to paragraphs (d)(1)(v)(A) through (C) of this section are approved.

(A) Acoustic alarms, predator sounds and alarm vocalizations of marine mammals emitted by underwater speakers with source levels <170 dB RMS are approved for Hawaiian monk seals; any such emission by underwater speakers capable of producing sounds ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use such underwater speakers.

(B) Any non-impulsive acoustic deterrent capable of producing underwater sound ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use the device. If the device meets the evaluation criteria, the user will receive a certificate authorizing use of the device as specified. The certificate must be maintained onsite and be available for inspection upon request by any authorized officer.

(C) Air horns, in-air noisemakers, sirens, and whistles with source levels <158 dB RMS are approved for deterring Hawaiian monk seals provided the user abides by the following:

(*1*) Air horns must be deployed at least 4 m away from a Hawaiian monk seal;

(*2*) In-air noisemakers must be deployed at least 5 m away from a Hawaiian monk seal;

(*3*) Sirens must be deployed at least 2 m away from a Hawaiian monk seal; and

(*4*) Whistles must be deployed at least 3 m away from a Hawaiian monk seal.

(2) *Steller sea lion, western Distinct Population Segment (DPS).* The specific measures in this paragraph (d)(2) apply in Alaska where western DPS Steller sea lions commonly occur (all areas west of 144° W longitude and east of 144° W longitude north of 55°49′22.00″ N) latitude unless otherwise specified in this section.

(i) Air dancers, flags, pinwheels, and streamers; bubble curtains; flashing or strobe lights; human attendants; predator shapes; vessel patrolling; and UASs, are approved visual deterrents to deter western DPS Steller sea lions provided the user abides by the following:

(A) Flags, pinwheels, and streamers must be installed and maintained to

reduce the risk of entanglement or entrapment of marine mammals.

(B) Flashing or strobe lights must conform to any standards established by Federal law.

(C) Vessel patrolling of fishing gear or property is approved provided the user maintains a consistent and safe speed, in compliance with any and all applicable speed limitations, and fixed direction to avoid coming into contact with the pinniped.

(D) UAS are approved provided the user abides by the following:

(*1*) Only vertical takeoff and landing aircraft are allowed;

(*2*) Users shall fly UASs no closer than 5 m from an animal;

(*3*) UAS altitude adjustments shall be made away from animals or conducted slowly when above animals;

(*4*) A UAS shall hover over a target animal only long enough to deter the animal and shall not come in direct contact with the animal; and

(*5*) When deploying a UAS, users shall follow approach regulations for endangered Steller sea lions in 50 CFR 224.103(d) and any other applicable approach regulations for marine mammals, and shall adhere to those approach requirements in the event any such requirement conflicts with the provisions of this subpart.

(ii) Containment booms, waterway barriers, and log booms are approved physical barriers to deter western Steller sea lions provided the user abides by the following:

(A) All containment booms, waterway barriers, and log booms shall be constructed, installed, and maintained to reduce the risk of entanglement or entrapment of marine mammals;

(B) Lines in the water shall be kept stiff, taut, and non-looping; and

(C) Booms/barriers must not block major egress and ingress points in channels, rivers, passes, and bays.

(iii) Tactile deterrents pursuant to paragraphs (d)(2)(iii)(A) through (F) of this section are approved.

(A) Electric mats and electric fences are approved for western Steller sea lions provided the user abides by the following:

(*1*) Electric mats shall not exceed 24V nominal; and

(*2*) Electric fences shall be no more than 3000V and properly maintained to ensure required voltage and reduce the risk of entanglement or entrapment.

(B) Foam projectiles propelled by a toy gun are approved for deterring western Steller sea lions provided the foam projectile only strikes the posterior end of an animal's body, taking care to avoid the animal's head.

(C) Non-toxic and water-soluble paintballs deployed using paintball guns and low velocity sponge grenades deployed using hand-held launchers are approved for deterring western Steller sea lions provided the user abides by the following:

(*1*) Paintballs must be deployed at a minimum distance of 14 m from a phocid and 3 m from an otariid;

(*2*) Sponge grenades must be deployed at a minimum distance of 14 m from a phocid and 10 m from an otariid; and

(*3*) The paintball or sponge grenade must only strike the posterior end of an animal's body, taking care to avoid the animal's head.

(D) Blunt objects such as rocks deployed via sling shot are approved for deterring western Steller sea lions provided the user abides by the following:

(*1*) Blunt objects must first impact near an animal before striking an animal.

(*2*) Blunt objects must only strike the posterior end of an animal's body, taking care to avoid the animal's head; and

(*3*) Blunt objects deployed via sling shot must not be sharp or metallic.

(E) Blunt objects, such as blunt tip poles, brooms, deployed manually, are approved for deterring western Steller sea lions provided the user abides by the following:

(*1*) Blunt objects must be deployed using a prodding motion; and

(*2*) Blunt objects must only impact the chest or strike the posterior end of an animal's body, taking care to avoid the animal's head.

(F) Water hoses, sprinklers, and water guns, are approved to deter western Steller sea lions provided the user impacts near an animal before striking the posterior end of the animal's body, taking care to avoid the animal's head.

(iv) Certain airborne impulsive explosive acoustic deterrents are allowed for western Steller sea lions east of 144° W longitude and north of 55°49′22.00″ N latitude as specified in paragraphs (d)(2)(iv)(A) and (B) of this section:

(A) Aerial pyrotechnics, bird bangers, bird whistlers and screamers, and bear bangers used with pencil launchers, are approved provided they have a source level below 142 dB RMS and the user abides by the following:

(*1*) Aerial pyrotechnics and bird bangers must detonate in air a minimum of 23 m from a phocid and a minimum of 2 m from an otariid; if both taxa are present, the minimum distance for phocids shall apply.

(*2*) Bird whistlers and screamers must detonate in air a minimum of 5 m from a phocid and a minimum of 2 m from an otariid; if both taxa are present, the minimum distance for phocids shall apply.

(*3*) Bear bangers deployed by pencil launchers must detonate in air a minimum of 2 m from a pinniped; users shall aim in the air above and between themselves and the pinniped.

(*4*) All necessary permits or authorizations from local, state, and/or Federal authorities have been obtained, must be maintained onsite, and be available for inspection upon request by any authorized officer.

(B) Propane cannons are approved for deterring pinnipeds provided the propane cannon is deployed at least 2 m from a western Steller sea lion.

(v) Impulsive non-explosive acoustic deterrents pursuant to paragraphs (d)(2)(v)(A) through (C) of this section are approved.

(A) Banging objects underwater is approved for deterring western Steller sea lions provided the user abides by the following:

(*1*) The user must first conduct a visual scan in all directions for other marine mammals within 100 m; if the user cannot see 100 m due to darkness or weather conditions, banging objects underwater is not allowed;

(*2*) If Dall's porpoise, harbor porpoise, pygmy sperm whales or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater is not allowed; and

(*3*) If no Dall's porpoise, harbor porpoise, pygmy sperm whales, or dwarf sperm whales are sighted within 100 m of the user, banging objects underwater must occur at least 8 m away from a phocid and at least 2 m away from an otariid with a minimum of 18 seconds between strikes; if both taxa are present, the minimum distance for phocids shall apply.

(B) Banging objects in air, such as bells and in-air passive acoustic deterrents, are approved for deterring western Steller sea lions provided the user maintains a distance of at least 2 m from the animal; if phocids are present the user must maintain a distance of at least 24 m from the phocid.

(C) Low frequency, broadband devices and pulsed power devices with the following specifications are approved for deterring western Steller sea lions provided the user abides by the following:

(*1*) The user must first conduct a visual scan in all directions for cetaceans within 100 m before deploying low frequency, broadband devices and pulsed power devices; if the user cannot see 100 m due to darkness or weather conditions, low frequency, broadband devices and pulsed power devices shall not be deployed;

(*2*) If cetaceans are sighted within 100 m of the user, low frequency, broadband devices and pulsed power devices shall not be deployed;

(*3*) If no cetaceans are sighted within 100 m of the user, low frequency, broadband devices and pulsed power devices must maintain the appropriate silent interval and engage the devices according to the minimum distances specified in Table 3 to this paragraph (d)(1)(v)(C)(*3*); if both phocids and otariids are present, the minimum distance for phocids shall apply.

TABLE 3 TO PARAGRAPH (d)(1)(v)(C)(*3*)—MINIMUM SILENT INTERVALS AND DISTANCES FOR LOW FREQUENCY, BROADBAND AND PULSED POWER DEVICES

Deterrent	Source level (RMS SPL)	Minimum silent interval between signals	Phocid pinniped minimum distance	Otariid pinniped minimum distance
Pulsed Power Device	220 dB	1200 seconds (20 minutes).	1 meter	1 meter.
Low frequency, broadband device	219 dB	300 seconds	5 meters	1 meter.
Low frequency, broadband device	215 dB	120 seconds	5 meters	1 meter.
Low frequency, broadband device	208 dB	30 seconds	4 meters	1 meter.

(vi) Non-impulsive acoustic deterrents pursuant to paragraphs (d)(2)(vi)(A) through (C) of this section are approved.

(A) Acoustic alarms, predator sounds and alarm vocalizations of marine mammals emitted by underwater speakers with source levels <170 dB RMS are approved for western Steller sea lions; any such emission by underwater speakers capable of producing sounds ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use such underwater speakers.

(B) Any non-impulsive acoustic deterrent capable of producing underwater sound ≥170 dB RMS must be evaluated and approved via the NMFS Acoustic Deterrent Web Tool before any attempt is made to use the device. If the device meets the evaluation criteria, the user will receive a certificate authorizing use of the device as specified. The certificate must be maintained onsite and be available for inspection upon request by any authorized officer.

(C) Air horns, in-air noisemakers, sirens, and whistles with source levels <158 dB RMS are approved for deterring western Steller sea lions provided the user abides by the following:

(*1*) Air horns must be deployed at least 4 m away from a phocid and at least 2 m from an otariid; if both taxa are present, the minimum distance for phocids shall apply;

(*2*) In-air noisemakers must be deployed at least 5 m away from a phocid and at least 2 m from an otariid; if both taxa are present, the minimum distance for phocids shall apply;

(*3*) Sirens must be deployed at least 2 m away from a phocid and from an otariid; and

(*4*) Whistles must be deployed at least 3 m away from a phocid and at least 2 m from an otariid; if both taxa are present, the minimum distance for phocids shall apply.

§ 216.115 Prohibitions.

It is unlawful for any person subject to the jurisdiction of the United States to:

(a) Target a deterrent action at a marine mammal calf or pup;

(b) Strike a marine mammal's head or blowhole when attempting to deter a marine mammal;

(c) Deploy or attempt to deploy a deterrent into the middle of a group of marine mammals;

(d) Feed or attempt to feed a marine mammal as defined at § 216.3 for the purposes of deterrence;

(e) Deter or attempt to deter a marine mammal demonstrating any sign of aggression, including charging or lunging, except when necessary to deter a marine mammal from endangering human safety;

(f) Approach certain marine mammals listed under the Endangered Species Act pursuant to 50 CFR 223.214 and 224.103, including humpback whales in Alaska, North Atlantic right whales, western Steller sea lions, and killer whales in Washington, and approach other marine mammals pursuant to any other applicable approach regulations such as those at § 216.19 and 15 CFR 922.184;

(g) Discharge a firearm to deter any marine mammals under NMFS' jurisdiction, except as provided in § 216.113(d)(4)(iii) and (iv);

(h) Discharge a firearm at or within 100 yards (91.4 m) of a Steller sea lion west of 144° W longitude per 50 CFR 224.103(d)(1)(i);

(i) Use a powerhead, as defined at 50 CFR 600.10, to deter a marine mammal;

(j) Use, for deterring a marine mammal, any firearm, airsoft gun, or any other deterrent included in this section that has been altered from its original manufactured condition;

(k) Use any projectiles deployed with a crossbow, bow, or spear gun to deter a marine mammal;

(l) Use any sharp objects to deter a marine mammal;

(m) Use patrol animals, such as guard dogs, for deterring pinnipeds;

(n) Chase any marine mammals with a vessel;

(o) Use any chemical irritants, corrosive chemicals, and other taste or smell deterrents to deter marine mammals;

(p) Deploy explosives for deterring a marine mammal, except as provided in §§ 216.113(d)(4) and 216.114(d)(2)(iv);

(q) Deploy or attempt to deploy explosives without all valid and necessary local, state, and Federal permits onboard or onsite;

(r) Deploy any underwater impulsive deterrents, including seal bombs, underwater cracker shells, banging objects, pulsed power devices, and low frequency broadband devices if visibility <100 m;

(s) Deploy underwater cracker shells or use banging objects underwater if a Dall's porpoise, harbor porpoise, pygmy sperm whale, or dwarf sperm whale has been seen within 100 m in any direction during a visual scan prior to deployment;

(t) Deploy seal bombs, pulsed power devices, or low frequency broadband devices if any cetaceans have been seen within 100 m in any direction during a visual scan prior to deployment;

(u) Deploy any non-impulsive acoustic deterrent, including underwater speakers, capable of producing source levels ≥170 dB RMS unless the certificate of approval from the NMFS Acoustic Deterrent Web Tool is onboard or onsite;

(v) Tamper with NMFS Acoustic Deterrent Web Tool or falsify an approval certificate for any non-impulsive acoustic deterrent capable of

producing underwater sound ≥170 dB RMS;

(w) Fail to comply with the reporting requirements in § 216.116; and

(x) Provide false information to the Assistant Administrator when reporting an injured or dead marine mammal pursuant to § 216.116.

§ 216.116 Reporting requirements.

(a) Any person engaged in deterring a marine mammal must report all observed mortalities and injuries of marine mammals pursuant to any such deterrence under the guidelines or specific measures in this subpart. Reports must be sent within 48 hours after the end of a fishing trip or within 48 hours of an occurrence of mortality or injury. Reports must be submitted to the Assistant Administrator and must provide:

(1) The name and address of the person deterring the marine mammal(s);

(2) The vessel name, and Federal, state, or tribal registration numbers of the registered vessel and/or the saltwater angler registration number if deterrence occurred during fishing;

(3) A description of the fishery, including gear type and target catch, or of the property where the deterrence occurred;

(4) A description of the deterrent, including number of attempts/deployments, specifications of devices, and any other relevant characteristics;

(5) The species and number of each marine mammal killed or injured in the course of deterrence or a description of the animal(s) killed or injured if the species is unknown;

(6) The disposition of the animal (*e.g.,* injured or dead, type of wounds);

(7) The date, time, and approximate geographic location of such occurrence; and

(8) Any other relevant information such as the behavior of the animal in response to the deterrent, other protected species in the area, etc.

(b) [Reserved]

PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

■ 3. The authority citation for part 229 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.;* § 229.32(f) also issued under 16 U.S.C. 1531 *et seq.*

■ 4. In § 229.4, revise paragraph (i) to read as follows:

§ 229.4 Requirements for Category I and II fisheries.

* * * * *

(i) *Deterrence.* Persons engaged in a Category I or II fishery must comply with all deterrence prohibitions in 50 CFR 216.115 and are encouraged to follow the guidelines and recommended specific measures in 50 CFR part 216 to safely deter marine mammals from damaging fishing gear, catch, or other private property or from endangering personal safety.

* * * * *

■ 5. In § 229.5, revise paragraph (e) to read as follows:

§ 229.5 Requirements for Category III fisheries.

* * * * *

(e) *Deterrence.* Persons engaged in a Category III fishery must comply with all deterrence prohibitions in 50 CFR 216.115 and are encouraged to follow the guidelines and recommended specific measures in 50 CFR part 216 to safely deter marine mammals from damaging fishing gear, catch, or other private property or from endangering personal safety.

* * * * *

[FR Doc. 2020–18718 Filed 8–28–20; 8:45 am]

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Notices

Federal Register
Vol. 85, No. 169
Monday, August 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

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Supplemental Nutrition Assistance Program Repayment Demand and Program Disqualification

AGENCY: Food and Nutrition Service, Agriculture (USDA).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on proposed information collections. This is a revision of currently approved information collection requirements associated with initiating collection actions against households who have received an overissuance in the Supplemental Nutrition Assistance Program (SNAP).

DATES: Written comments must be submitted on or before October 30, 2020.

ADDRESSES: Comments may be sent to: Maribelle Balbes, Chief, State Administration Branch, Food and Nutrition Service, U.S. Department of Agriculture, 1320 Braddock Place Alexandria, VA 22314. Comments may also be submitted via email to *SNAPSAB@fns.usda.gov,* or through the federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically. All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 1320 Braddock Place Alexandria, Virginia 22314. All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Evan Sieradzki 703–605–3212.

SUPPLEMENTARY INFORMATION:

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Title: Supplemental Nutrition Assistance Program Repayment Demand and Program Disqualification.

OMB Number: 0584–0492.

Form Number: None.

Expiration Date: March 31, 2021.

Type of Request: Revision of a currently approved collection.

Abstract: Section 13(b) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2022(b)), and Supplemental Nutrition Assistance Program (SNAP) regulations at 7 CFR 273.18 require State agencies to initiate collection action against households that have been overissued benefits. To initiate collection action, State agencies must provide an affected household with written notification informing the household of the claim and demanding repayment. This process is automated in most State agencies. Note that for overissuance claims, this information collection only covers the activities associated with initiating collection.

The burden associated with reporting collections and other claims management information on the FNS–209 form is covered under the Food Program Reporting System OMB number 0584– 0594, expiration date 7/31/2023. The burden associated with referring delinquent claims and receiving collections through the Treasury Offset Program is covered under currently approved OMB number 0584–0446, expiration date 11/30/2022.

SNAP regulations at 7 CFR 273.16(e)(3) require State agencies to investigate any case of suspected fraud and, where applicable, make an Intentional Program Violation (IPV) determination either administratively or judicially. Notifications and activities involved in the IPV process include:

—The State agency providing written notification informing an individual suspected of committing an IPV of an impending administrative disqualification hearing or court action;

—An individual opting to accept the disqualification and waiving the right to an administrative disqualification hearing or court action by signing either a waiver to an administrative disqualification hearing or a disqualification consent agreement in cases of deferred adjudication and returning it to the State agency; and

—Once a determination is made regarding an IPV, the State agency sending notification to the affected individual of the action taken on the administrative disqualification hearing or court decision.

SNAP regulations at 7 CFR 273.16 require State agencies to use disqualified recipient data to ascertain the correct penalty for IPVs, based on prior disqualifications. State agencies determine this by accessing and reviewing records located in the Electronic Disqualified Recipient System (eDRS). eDRS is an automated system developed by FNS that contains records of disqualifications in every State. State agencies are also responsible for updating the system, as required at 7 CFR 237.16, which includes reporting disqualifications in eDRS as they occur and updating eDRS when records are no longer accurate, relevant, or complete.

Summary of Estimated Burden

The burden consists of two major components: The initiation of overissuance collection and actions associated with IPV determinations. The estimated total annual burden for this collection is 135,525.984 hours (93,348.230 SA reporting hours + 21,431.811 SA record keeping hours + 20,745.942 household reporting hours). The net aggregate change to this collection is a decrease of 68,061.307

total burden hours from the currently approved burden of 203,587.291 hours. The estimated total annual responses for this collection is 2,033,844.640 responses (728,248.640 SA reporting total annual response + 641,671.000 SA recordkeeping total annual records + 663,925.000 household reporting total annual responses). The burden hours associated with overissuance collection initiation have decreased due to a decrease in the amount of claims established in fiscal year (FY) 2019. The burden hours associated with IPV activity have decreased slightly as a result of a decreased number of SNAP households that States initiated IPV activity against in FY2019.

Affected Public: State, Local and Tribal government (SA); Individual/Households (I/H).

Respondent Type: SNAP participants.

SA Reporting Burden

States have done these activities for many years. Based on prior experience in how long these activities take, USDA estimates it will take the 53 State SNAP Agencies 8 minutes (0.1336 hours) to issue the types of letters and notices described below. The following is a summary total of the activities described below.

Estimated Number of Respondents: 53.

Estimate Total Number of Responses per Respondent: 13,818.261.

Estimated Total Annual Responses: 728,248.640.

Estimated Time per Response: 0.12818.

Estimated Total Annual Reporting Burden: 93,348.230.

Demand Letter for Overissuance CFR 273.18 (a)(2)

Based on many years of doing these activities, FNS estimates it will take the 53 State SNAP Agencies 8 minutes (0.1336 hours) to issue a Demand Letter, and that they will issue 10,562 letters each, for a total of 74,787.276 hours. The prior approval included 118,171.338 hours. The new burden estimate is 43,384.062 hours less than the previously approved burden amount due to program adjustments.

(53 States * 10,562 letters each * 8 minutes (0.1336 hours) = 74,787.276 hours).

Prior approval 118,171.338 hours—74,787.276 hours = 43,384.062 hours less than the currently approved burden amount).

Notice for Hearing or Prosecution 7 CFR 273.16(e)(3)

FNS estimates that 53 State agencies will issue 807.34 Notices for Hearing or Prosecution for a total of 42,789.00 responses. FNS estimates it will take approximately 8 minutes (0.1336 hours) to issue a Notice for Hearing or Prosecution for an estimated 5,716.61 total hours. The previously approved burden was 5,374.728 hours. This represents an addition of 341.882 additional hours associated with this burden due to program adjustment.

(53 States * 807.34 responses * 8 minutes (0.1336 hours) = 5,716.610 hours). Prior approval 5,374.728 hours—5,716.61 hours = 341.882 hours more than previously approved burden.

Action Taken on Hearing or Court Decision: For IPV Findings 7 CFR 273.16(e)(9)

FNS estimates that 53 State agencies will take action on 815.40 Intentional Program Violation findings for a total of 39,097.00 responses. FNS estimates that it will take approximately 10 minutes (0.167 hours) for a State to take action on a court decision for Intentional Program Violation findings for a total of 6,529.199 annual burden hours. This represents a change of 1,223.289 fewer hours from the previous approved burden of 7,752.488 hours due to program adjustments.

(53 State agencies * 815.4 responses * 10 minutes (0.167 hours) = 6,529.199 hours). Prior approval 7,752.488 hours—6,529.199 hours = 1,223.289 hours less than previously approved burden.

Action Taken on Hearing or Court Decision: For No IPV Findings 7 CFR 273.16(e)(9)

FNS estimates that 53 State agencies will take action on 69.66 instances of no Intentional Program Violations as a result of a hearing or court decision for a total of 3,692.00 total responses. FNS estimates that it will take approximately 5 minutes (0.0835 hours) for a State to take action on a hearing or court decision for no Intentional Program Violation findings for a total of 308.282 annual burden hours. This represents a change of 179.609 additional burden hours from the previously approved burden of 128.674 hours due to program adjustments.

(53 State agencies * 69.66 responses * 5 minutes (0.0835 hours) = 308.282 hours). Prior approval 128.678 hours—308.282 hours = 179.609 additional burden hours than previously reported.

Electronic Disqualified Recipient System Breakout: For eDRS Reporting 7 CFR 273.16(i)(2)(i)

FNS estimates that 53 State agencies will generate reporting from their eDRS system 737.68 times for a total of 39,097.00 annual responses. FNS estimates that it will take approximately 5 minutes (0.0835 hours) for a State to generate reporting from eDRS for a total of 3,264.60 burden hours. This represents a change of 1,533.394 fewer burden hours from the previously approved burden of 4,797.994 hours due to program adjustments.

(53 State agencies * 737.68 responses * 5 minutes (0.0835 hours) = 3,264.600 hours). Prior approval of 4,797.994 hours—3,264.600 hours = 1,533.394 fewer burden hours than previously reported.

Electronic Disqualified Recipient System Breakout: For Editing and Resubmission 7 CFR 272.1(f)(3)

FNS estimates that 53 State agencies will edit and resubmit reporting to eDRS system 88.52 times for a total of 4,691.64 annual responses. FNS estimates that it will take approximately 10 minutes (0.167 hours) for a State to edit and resubmit reporting to eDRS for a total of 783.504 burden hours. This represents a change of 365.739 fewer burden hours from the previously approved 1,149.243 hours due to program adjustments.

(53 State agencies * 88.52 responses * 10 minutes (0.167 hours) = 783.504 hours). Prior approval of 1,149.243 hours—783.504 = 365.739 fewer burden hours than previously reported.

Electronic Disqualified Recipient System Breakout: For Penalty Checks using Mainframe 7 CFR 273.16(i)(4)

FNS estimates that 53 State agencies will use eDRS for penalty checks using the mainframe 737.68 times for a total of 39,097.00 annual responses. FNS estimates that it will take approximately 3 minutes (0.0501 hours) for a State to run a penalty check using the mainframe for a total of 1,958.760 burden hours. This represents a change of 20.661 additional burden hours from the previously approved 1,938.099 hours due to program adjustments.

(53 State agencies * 737.68 responses * 3 minutes (0.0501 hours) = 1,958.760 hours). Prior approval of 1,938.099 hours—1,958.76 hours = 20.661 additional annual burden hours than previously reported.

SA Recordkeeping Burden

Estimated Number of Recordkeepers: 53.

Estimated Total Records per Recordkeeper: 12,107.

Estimated Total Annual Records: 641,671.

Estimated Average # of Hours per Response: 0.0334.

Estimated Total Recordkeeping Hours: 21,431.811

Initiation of Overissuance Collection CFR 272.1(f)

Based on many years of performing these activities, FNS estimates that 53 State agencies will perform recordkeeping for initiating a collection action approximately 10,561.98 times for a total of 559,785.00 annual records. FNS estimates that it will take approximately 2 minutes (0.0334 hours) for a State agency to perform recordkeeping for initiation of a collection action for a total of 18,696.819 burden hours. This represents a change of 10,846.015 fewer burden hours from the previously approved burden of 29,542.834 hours due to program adjustments.

(53 State agencies * 10,561.98 records * 2 minutes (0.0334 hours) = 18,696.819 hours). Prior approval of 29,542.834 hours—18,696.819 hours = 10,846.015 fewer annual burden hours than previously reported.

IPV Determinations CFR 272.1(f)

FNS estimates that 53 State agencies will perform recordkeeping for Intentional program violations (IPVs) 1,545.02 times for a total of 81,886.00 annual records. FNS estimates that it will take approximately 2 minutes (0.0334 hours) for a State agency to update records for IPVs for a total of 2,734.992 annual burden hours. This represents a change of 162.257 fewer annual burden hours from the previously approved burden of 2,897.25 hours due to program adjustments.

(53 State agencies *1,545.02 records * 2 minutes (0.0334 hours) = 2,734.992 hours). Prior approval of 2,897.25 hours—2,734.992 = 162.257 fewer annual burden hours than previously reported.

I/H Reporting Burden

Estimated Number of Respondents: 559,785.

Estimated Number of Responses per Respondent: 1.18604.

Total Number of Annual Responses: 663,925.00.

Estimated Time per Response: 0.03125

Estimated Total Annual Reporting Burden: 20,745.942.

Initiation of Overissuance Collection 7 CFR 273.18(a)(2)

Based on many years of reporting these activities, FNS estimates approximately 559,785 respondents will respond 1 time for a demand letter for overissuance for a total of 559,785 annual responses. FNS estimates that it will take approximately 2 minutes (0.0334 hours) for a respondent to respond to a demand letter for a total estimate of 18,696.819 annual burden hours. This represents a change of 10,846.015 fewer annual burden hours due to a program adjustment from the previously approved burden of 29,542.834 hours.

(559,785 respondents * 1 response per respondent * 2 minutes (0.0334 hours) = 18,696.819 hours). Prior approval of 29,542.834 –18,696.819 = 10,846.015 fewer annual burden hours than previously reported for individuals/households.

Notice for Hearing or Prosecution 7 CFR 273.16(e)(3)

FNS estimates approximately 42,789 respondents will respond 1 time for a notice for hearing or prosecution for a total of 42,789 annual responses. FNS estimates that it will take approximately 1 minute (0.0167 hours) for a respondent to read a notice for hearing or prosecution for a total estimate of 714.065 annual burden hours. This represents a change of 14.488 fewer annual burden hours due to a program adjustment from the previously approved burden of 729.065 hours.

(42,789 respondents * 1 response per respondent * 1 minute (0.0167 hours) = 714.576 hours). Prior approval of 729.065—714.576 = 14.488 fewer annual burden hours than previously reported for individuals/households.

Administrative Disqualification Hearing Waiver 7 CFR 273.16(i)(2)

FNS estimates approximately 15,664 respondents will respond 1 time for an administrative disqualification hearing waiver for a total of 15,664 annual responses. FNS estimates that it will take approximately 2 minutes (0.0334 hours) for a respondent to submit an administrative disqualification hearing waiver for a total estimate of 523.178 annual burden hours. This represents a change of 81.763 fewer annual burden hours due to a program adjustment from the previously approved burden of 604.941 hours.

(15,664 respondents * 1 response per respondent * 2 minutes (0.0334 hours) = 523.178 hours). Prior approval of 604.941—523.178 = 81.763 fewer burden hours than previously reported for individuals/households.

Disqualification Consent Agreement 7 CFR 273.16(i)(2)

FNS estimates approximately 2,898 respondents will respond 1 time for a disqualification consent agreement for a total of 2,898 annual responses. FNS estimates that it will take approximately 2 minutes (0.0334 hours) for a respondent to submit a disqualification consent agreement for a total estimate of 96.793 annual burden hours. This represents a change of 131.963 fewer annual burden hours due to a program adjustment from the previously approved burden of 228.757 hours.

(2,898 respondents * 1 response per respondent * 2 minutes (0.0334 hours) = 96.793 hours). Prior approval of 228.757—96.793 = 131.963 fewer burden hours than previously reported for individuals/households.

Action Taken on Hearing or Court Decision: For IPV Findings 273.16(e)(9)

FNS estimates approximately 39,097 respondents will respond 1 time for an action taken on hearing or court decision for IPV findings for a total of 39,097 annual responses. FNS estimates that it will take approximately 1 minute (0.0167 hours) for a respondent to submit an action taken on hearing or court decision for IPV findings for a total estimate of 652.920 annual burden hours. This represents a change of 54.361 fewer annual burden hours due to a program adjustment from the previously approved burden of 707.281 hours.

(39,097 respondents 1 response per respondent * 1 minute (0.0167 hours) = 652.920 hours). Prior approval of 707.281—652.920 = 54.361 fewer burden hours than previously reported for individuals/households.

Action Taken on Hearing or Court Decision: For No IPV Findings

FNS estimates approximately 3,692 respondents will respond 1 time for an action taken on hearing or court decision for no IPV findings for a total of 3,692 annual responses. FNS estimates that it will take approximately 1 minute (0.0167 hours) for a respondent to submit an action taken on a hearing or court decision for no IPV findings for a total estimate of 61.656 annual burden hours. This represents a change of 39.889 additional annual burden hours due to a program adjustment from the previously approved burden of 21.767 hours.

(3,692 respondents * 1 response per respondent * 1 minute (0.0167 hours) = 61.656 hours). Prior approval 21.767—61.656 = 39.889 additional burden hours than previously reported for individuals/households.

Grand Total Burden Reporting and Recordkeeping Burden: 135,525.984 total burden hours and 2,033,844.640 responses.

Title	CFR section of regulations	Estimated number of respondents	Responses per respondent	Total annual responses (Col. DxE)	Estimated average number of hours per response	Estimated total hours (Col. FxG)	Previously approved	Due to program change	Due to an adjustment	Total difference
STATE AGENCY										
Reporting Burden										
Demand Letter for Overissuance.	273.18(a)(2)	53	10,561.98	559,785.00	0.1336	74,787.276	118,171.338	0.000	−43,384.062	−43,384.062
Notice for Hearing or Prosecution.	273.16(e)(3)	53	807.34	42,789.00	0.1336	5,716.610	5,374.728	0.000	341.882	341.882
Action Taken on Hearing or Court Decision: For IPV Findings.	273.16(e)(9)	53	815.40	39,097.00	0.167	6,529.199	7,752.488	0.000	−1,223.289	−1,223.289
Action Taken on Hearing or Court Decision: For No IPV Findings.	273.16(e)(9)	53	69.66	3,692.00	0.0835	308.282	128.674	0.000	179.609	179.609
Electronic Disqualified Recipient System Breakout: For eDRS Reporting.	273.16(i)(2)(i)	53	737.68	39,097.00	0.0835	3,264.600	4,797.994	0.000	−1,533.394	−1,533.394
Electronic Disqualified Recipient System Breakout: For Editing and Resubmission.	272.1(f)(3)	53	88.52	4,691.64	0.167	783.504	1,149.243	0.000	−365.739	−365.739
Electronic Disqualified Recipient System Breakout: For Penalty Checks using Mainframe.	273.16(i)(4)	53	737.68	39,097.00	0.05010	1,958.760	1,938.099	0.000	20.661	20.661
Total State Agency Reporting Burden.	.....	53	13,818.261	728,248.640	0.12818	93,348.230	139,312.563	0.000	−45,964.332	−45,964.332

Title		Estimated number of record-keepers	Records per recordkeeper	Annual records	Estimated average number of hours per response	Estimated total annual records	Previously approved	Due to program change	Due to an adjustment	Total difference
Recordkeeping Breakout: For initiating Collection Action.	*272.1(f)*	53	10,561.98	559,785.00	0.0334	18,696.819	29,542.834	0.000	−10,846.015	−10,846.015
Recordkeeping Breakout: For IPVs.	*272.1(f)*	53	1,545.02	81,886.00	0.0334	2,734.992	2,897.250	0.000	−162.257	−162.257
Total State Agency Recordkeeping Burden.	.....	53	12,107.000	641,671.000	0.0334	21,431.811	32,440.084	0.000	−11,008.273	−11,008.273

	CFR section of regulations	Estimated number of respondents	Responses per respondent	Total annual responses	Estimated average number of hours per response	Estimated total hours	Previously approved	Due to program change	Due to an adjustment	Total difference
Total State Agency Burden.	.....	53	25,847.540	1,369,919.640	0.0838	114,780.042	171,752.647	0.000	−56,972.605	−56,972.605

Title		Estimated number of respondents	Responses per respondent	Total annual responses (Col. DxE)	Estimated average number of hours per response	Estimated total hours (Col. FxG)	Previously approved	Due to program change	Due to an adjustment	Total difference
HOUSEHOLD										
Reporting Burden										
Demand Letter for Overissuance.	273.18(a)(2) ..	559,785.00	1.00	559,785.00	0.0334	18,696.819	29,542.834	0.000	−10,846.015	−10,846.015
Notice for Hearing or Prosecution.	273.16(e)(3) ..	42,789.00	1.00	42,789.00	0.0167	714.576	729.065	0.000	−14.488	−14.488
Administrative Disqualification Hearing Waiver.	273.16(i)(2) ...	15,664.00	1.00	15,664.00	0.0334	523.178	604.941	0.000	−81.763	−81.763
Disqualification Consent Agreement.	273.16(i)(2) ...	2,898.00	1.00	2,898.00	0.0334	96.793	228.757	0.000	−131.963	−131.963
Action Taken on Hearing or Court Decision: For IPV Findings.	273.16(e)(9) ..	39,097.00	1.00	39,097.00	0.0167	652.920	707.281	0.000	−54.361	−54.361
Action Taken on Hearing or Court Decision: For No IPV Findings.	273.16(e)(9) ..	3,692.00	1.00	3,692.00	0.0167	61.656	21.767	0.000	39.889	39.889
Total Household Reporting Burden.	.....	559,785	1.18604	663,925.000	0.03125	20,745.942	31,834.644	0.000	−11,088.702	−11,088.702
SUMMARY OF BURDEN										
State Agency Level	.....	53	.....	1,369,919.640	.....	114,780.042	171,752.647	0.000	−56,972.605	−56,972.605
Household	.....	559,785	.....	663,925.000	.....	20,745.942	31,834.644	0.000	−11,088.702	−11,088.702
Total Burden This Collection.	.....	559,838	3.63292	2,033,844.640	0.06664	135,525.984	203,587.291	0.000	−68,061.307	−68,061.307

Pamilyn Miller,

Administrator, Food and Nutrition Service.

[FR Doc. 2020–18850 Filed 8–28–20; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers Used for Publication of Legal Notices in the Southwestern Region, Which Includes Arizona, New Mexico, and Parts of Oklahoma and Texas

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: This notice lists the newspapers that will be used by all Ranger Districts, Grasslands, Forests, and the Regional Office of the Southwestern Region to publish legal notices. The intended effect of this action is to inform interested members of the public which newspapers the Forest Service will use to publish notices of proposed actions, notices of decision, and notices of opportunity to file an objection. This will provide the public with constructive notice of Forest Service proposals and decisions, provide information on the procedures to comment or object, and establish the date that the Forest Service will use to determine if comments or objections were timely.

DATES: Publication of legal notices in the listed newspapers will begin on the date of this publication and continue until further notice.

ADDRESSES: Roxanne Turley, Regional Administrative Review Coordinator, Forest

Service, Southwestern Region; 333 Broadway SE, Albuquerque, NM 87102–3498.

FOR FURTHER INFORMATION CONTACT: Roxanne Turley, Regional Administrative Review Coordinator; by phone at 505–842–3178 or email at *roxanne.turley@usda.gov.*

SUPPLEMENTARY INFORMATION: The administrative procedures at 36 CFR 218 and 219 require the Forest Service to publish notices in a newspaper of general circulation. The content of the notices is specified in 36 CFR 218 and 219. In general, the notices will identify: the decision or project, by title or subject matter; the name and title of the official making the decision; how to obtain additional information; and where and how to file comments or objections. The date the notice is published will be used to establish the official date for the beginning of the comment or objection period. Where more than one newspaper is listed for any unit, the first newspaper listed is the primary newspaper of record of which publication date shall be used for calculating the time period to file comment or an objection.

Southwestern Regional Office

Regional Forester

Notices of Availability for Comment and Decisions and Objections affecting New Mexico Forests:—''*Albuquerque Journal*'', Albuquerque, New Mexico, for National Forest System Lands in the State of New Mexico for any projects of Region-wide impact, or for any projects affecting more than one National Forest or National Grassland in New Mexico.

Regional Forester Notices of Availability for Comment and Decisions and Objections affecting Arizona Forests:—''*The Arizona Republic*'', Phoenix, Arizona, for National Forest System lands in the State of Arizona for any projects of Region-wide impact, or for any projects affecting more than one National Forest in Arizona.

Regional Forester Notices of Availability for Comment and Decisions and Objections affecting National Grasslands in New Mexico, Oklahoma, and Texas are listed by Grassland and location as follows: Kiowa National Grassland notices published in:—''*Union County Leader*'', Clayton New Mexico. Rita Blanca National Grassland in Cimarron County, Oklahoma notices published in:—''*Boise City News*'', Boise City, Oklahoma. Rita Blanca

National Grassland in Dallam County, Texas notices published in:—''*The Dalhart Texan*'', Dalhart, Texas. Black Kettle National Grassland in Roger Mills County, Oklahoma notices published in:—''*Cheyenne Star*'', Cheyenne, Oklahoma. Black Kettle National Grassland in Hemphill County, Texas notices published in:—''*The Canadian Record*'', Canadian, Texas. McClellan Creek National Grassland in Gray County, Texas notices published in:—''*The Pampa News*'', Pampa, Texas.

Regional Forester Notices of Availability for Comment and Decisions and Objections affecting only one National Forest or National Grassland unit will appear in the newspaper of record elected by each National Forest or National Grassland as listed below.

Arizona National Forests

Apache-Sitgreaves National Forests

Notices for Availability for Comments, Decisions and Objections by Forest Supervisor, Alpine Ranger District, Black Mesa Ranger District, Lakeside Ranger District, and Springerville Ranger District are published in:—''*The White Mountain Independent*'', Apache County, Arizona.

Clifton Ranger District Notices are published in:—''*Copper Era*'', Clifton, Arizona.

Coconino National Forest

Notices for Availability for Comments, Decisions and Objections by Forest Supervisor, Mogollon Rim Ranger District, and Flagstaff Ranger District are published in:—''*Arizona Daily Sun*'', Flagstaff, Arizona.

Red Rock Ranger District Notices are published in:—''*Red Rock News*'', Sedona, Arizona.

Coronado National Forest

Notices for Availability for Comments, Decisions and Objections by the Forest Supervisor and Santa Catalina Ranger District are published in:—''*The Arizona Daily Star*'', Tucson, Arizona.

Douglas Ranger District Notices for projects occurring within the Chiricahua and Dragoon Mountain Ranges (the Chiricahua and Dragoon Ecosystem Management Areas) are published in:—''*Herald/Review*'', Sierra Vista, Arizona; notices for projects occurring within the Peloncillo Mountain Range (the Peloncillo Ecosystem Management Area) are published in: —''*Hidalgo County Herald*'', Lordsburg, New Mexico.

Nogales Ranger District Notices are published in:—''*Nogales International*'', Nogales, Arizona.

Sierra Vista Ranger District Notices are published in:—''*Herald/Review*'', Sierra Vista, Arizona.

Safford Ranger District Notices are published in:—''*Eastern Arizona Courier*'', Safford, Arizona.

Kaibab National Forest

Notices for Availability for Comments, Decisions and Objections by Forest Supervisor, North Kaibab Ranger District, Tusayan Ranger District, and Williams Ranger District Notices are published in:—''*Arizona Daily Sun*'', Flagstaff, Arizona.

Prescott National Forest

Notices for Availability for Comments, Decisions and Objections by Forest Supervisor, Bradshaw Ranger District, and Chino Valley Ranger District are published in:—''*Daily Courier*'', Prescott, Arizona. Verde Ranger District Notices are published in:—''*Verde Independent*'', Cottonwood, Arizona.

Tonto National Forest

Notices for Availability for Comments, Decisions, and Objections

by Forest Supervisor, Cave Creek Ranger District, and Mesa Ranger District are published in:—''*Arizona Capitol Times*'', in Phoenix, Arizona.

Globe Ranger District Notices are published in:—''*Arizona Silver Belt*'', Globe, Arizona. Payson Ranger District, Pleasant Valley Ranger District and Tonto Basin Ranger District Notices are published in:—''*Payson Roundup*'', Payson, Arizona.

New Mexico National Forests

Carson National Forest

Notices for Availability for Comments, Decisions and Objections by Forest Supervisor, Camino Real Ranger District, Tres Piedras Ranger District and Questa Ranger District are published in:—''*The Taos News*'', Taos, New Mexico.

Canjilon Ranger District and El Rito Ranger District Notices are published in:—''*Rio Grande Sun*'', Espanola, New Mexico.

Jicarilla Ranger District Notices are published in:—''*Farmington Daily Times*'', Farmington, New Mexico.

Cibola National Forest and National Grasslands

Notices for Availability for Comments, Decisions and Objections by Forest Supervisor affecting lands in New Mexico, except the National Grasslands are published in:—''*Albuquerque Journal*'', Albuquerque, New Mexico.

Forest Supervisor Notices affecting National Grasslands in New Mexico, Oklahoma and Texas are published by grassland and location as follows: Kiowa National Grassland in Colfax, Harding, Mora and Union Counties, New Mexico published in:—''*Union County Leader*'', Clayton, New Mexico. Rita Blanca National Grassland in Cimarron County, Oklahoma published in:—''*Boise City News*'', Boise City, Oklahoma. Rita Blanca National Grassland in Dallam County, Texas published in:—''*The Dalhart Texan*'', Dalhart, Texas. Black Kettle National Grassland, in Roger Mills County, Oklahoma published in:—''*Cheyenne Star*'', Cheyenne, Oklahoma. Black Kettle National Grassland, in Hemphill County, Texas, published in:—''*The Canadian Record*'', Canadian, Texas. McClellan Creek National Grassland published in:—''*The Pampa News*'', Pampa, Texas.

Mt. Taylor Ranger District Notices are published in:—''*Cibola County Beacon*'', Grants, New Mexico.

Magdalena Ranger District Notices are published in:—''*El Defensor-Chieftain*'', Socorro, New Mexico.

Mountainair Ranger District Notices are published in:—''*The Independent*'', Edgewood, New Mexico.

Sandia Ranger District Notices are published in:—''*Albuquerque Journal*'', Albuquerque, New Mexico.

Kiowa National Grassland Notices are published in:—''*Union County Leader*'', Clayton, New Mexico.

Rita Blanca National Grassland Notices in Cimarron County, Oklahoma are published in: ''*Boise City News*'', Boise City, Oklahoma while Rita Blanca National Grassland Notices in Dallam County, Texas are published in:—''*Dalhart Texan*'', Dalhart, Texas.

Black Kettle National Grassland Notices in Roger Mills County, Oklahoma are published in: —''*Cheyenne Star*'', Cheyenne, Oklahoma, while Black Kettle National Grassland Notices in Hemphill County, Texas are published in:—''*The Canadian Record*'', Canadian, Texas. McClellan Creek National Grassland Notices are published in:—''*The Pampa News*'', Pampa, Texas.

Gila National Forest

Notices for Availability for Comments, Decisions and Objections by Forest Supervisor, Quemado Ranger District, Reserve Ranger District, Glenwood Ranger District, Silver City Ranger District and Wilderness Ranger District are published in:—''*Silver City Daily Press*'', Silver City, New Mexico.

Black Range Ranger District Notices are published in:—''*Sierra County Sentinel*'', Truth or Consequences, New Mexico.

Lincoln National Forest

Notices for Availability for Comments, Decisions and Objections by Forest Supervisor and the Sacramento Ranger District are published in:—''*Alamogordo Daily News*'', Alamogordo, New Mexico.

Guadalupe Ranger District Notices are published in:—''*Carlsbad Current Argus*'', Carlsbad, New Mexico.

Smokey Bear Ranger District Notices are published in:—''*Ruidoso News*'', Ruidoso, New Mexico.

Santa Fe National Forest

Notices for Availability for Comments, Decisions and Objections by Forest Supervisor, Coyote Ranger District, Cuba Ranger District, Espanola Ranger District,

Jemez Ranger District and Pecos-Las Vegas Ranger District are published in:—''*Albuquerque Journal*'', Albuquerque, New Mexico.

Jacqueline Emanuel,

Acting Associate Deputy Chief, National Forest System.

[FR Doc. 2020–19067 Filed 8–28–20; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Revision of a Currently Approved Information Collection

AGENCY: Rural Housing Service, USDA.

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this Notice announces the Rural Housing Service's (RHS) intention to request a revision for a currently approved information collection in support of the program for the Guaranteed Rural Rental Housing Program.

DATES: Comments on this Notice must be received by October 30, 2020 to be assured consideration.

FOR FURTHER INFORMATION CONTACT: Lauren Cusick, Management Analyst, Regulations Management Division, Rural Development, USDA, STOP 0741, 1400 Independence Avenue SW, Washington, DC 20250, telephone: (202) 720–1414, email *Lauren.Cusick@usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Guaranteed Rural Rental Housing Program.

OMB Control Number: 0575–0174.

Expiration Date of Approval: February 28, 2021.

Type of Request: Revision of a Currently Approved Information Collection.

Abstract: On March 28, 1996, President Clinton signed the ''Housing Opportunity Program Extension Act of 1996.'' One of the provisions of the Act was the authorization of the Section 538 Guaranteed Rural Rental Housing Loan Program, adding the program to the Housing Act of 1949. The program has been designed to increase the supply of affordable Multi-Family Housing (MFH) through partnerships between RHS and major lending sources, as well as State and local housing finance agencies and bond issuers. Qualified lenders will be authorized to originate, underwrite, and close loans for MFH projects. To be considered, these projects must be either new construction or acquisition with rehabilitation with at least $6,500 per unit.

The housing must be available for occupancy only to low- or moderate-income families or persons, whose incomes at the time of initial occupancy do not exceed 115 percent of the median income of the area. After initial occupancy, the tenant's income may exceed these limits; however, rents, including utilities, are restricted to no more than 30 percent of the 115 percent of area median income for the term of the loan.

The Secretary is authorized under Section 510 (k) of the Housing Act of 1949 to prescribe regulations to ensure that these Federally-funded loans are made to eligible applicants for authorized purposes. The lender must evaluate the eligibility, cost, benefits, feasibility, and financial performance of the proposed project. The Agency collects this information from the lender to determine if funds are being used to meet the goals and mission of Rural Development. The information submitted by the lender to the Agency is used by the Agency to manage, plan, evaluate, and account for Government resources.

Estimate of Burden: Public reporting burden for this collection of information is estimated to be 2,079 man hours.

Respondents: Non-profit and for-profit lending corporations and public bodies.

Estimated Number of Respondents: 160.

Estimated Number of Responses per Respondent: 18.3.

Estimated Number of Responses: 2,934.

Estimated Total Annual Burden on Respondents: 2,079 hours.

Copies of this information collection can be obtained from Lauren Cusick, Regulations Management Division, at (202) 720–1414. Email: *Lauren.Cusick@usda.gov.*

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) 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) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent by the Federal eRulemaking Portal: Go to *http://www.regulations.gov* and, in the lower ''Search Regulations and Federal Actions'' box, select ''RHS'' from the agency drop-down menu, then click on ''Submit.'' In the Docket ID column, select 0575–0174 to submit or view public comments and to view supporting and related materials available electronically. Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link.

Elizabeth Green,

Administrator, Rural Housing Service.

[FR Doc. 2020–19075 Filed 8–28–20; 8:45 am]

BILLING CODE 3410–XV–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Ohio Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Ohio Advisory Committee (Committee) will hold a series of meetings via teleconference on to review and discuss health disparities and COVID–19 in Ohio.

DATES: The meetings will be held on:

- Thursday, October 22, 2020 at 12:00 p.m. Eastern Time
- Thursday, October 22, 2020 at 12:00 p.m. Eastern Time
- Thursday, November 12, 2020 at 10:00 a.m. Eastern Time

Public Call Information: Dial: 800–353–6461, Confirmation Code: 5797797.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or 202- 618–4158

SUPPLEMENTARY INFORMATION: Members of the public may listen to the discussion. This meeting is available to the public through the above listed toll-free number. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and confirmation code.

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 emailed to Carolyn Allen at *callen@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit Office at 202–618–4158.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzkGAAQ* under the Commission on Civil Rights, Ohio Advisory Committee link. Persons interested in the work of this Committee are also directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit office at the above email or street address.

Agenda

Welcome and Roll Call
Discussion:
Public Comment
Adjournment

Dated: August 25, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–19074 Filed 8–28–20; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the California Advisory Committee

AGENCY: 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 (FACA) that a meeting of the California

Advisory Committee (Committee) to the Commission will be held from 1:00 p.m.–3:00 p.m. (Pacific) Wednesday, September 23, 2020. The purpose of the meeting will be to review their report on immigration enforcement and k–12 children.

DATES: The meeting will be held on Wednesday, September 23, 2020 from 1:00 p.m.–3:00 p.m. PT.

ADDRESSES:

Public Call Information: Dial: 800–353–6461; Conference ID: 1804781.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes, Designated Federal Officer (DFO) at *afortes@usccr.gov* or (202) 681–0857.

SUPPLEMENTARY INFORMATION: This meeting is available to the public through the following toll-free call-in number: 800–353–6461, conference ID number: 1804781. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012 or email Ana Victoria Fortes at *afortes@usccr.gov.*

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzkUAAQ.*

Please click on ''Committee Meetings'' tab. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome
II. Review Report
  a. Recommendations
  b. Introduction and Background
III. Public Comment
IV. Adjournment

Dated: August 26, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–19152 Filed 8–28–20; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the California Advisory Committee

AGENCY: 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 (FACA) that a meeting of the California Advisory Committee (Committee) to the Commission will be held from 1:00 p.m.–3:00 p.m. (Pacific) Wednesday, September 9, 2020. The purpose of the meeting is to review findings and recommendations in their report on immigration enforcement and k–12 children.

DATES: The meeting will be held on Wednesday, September 9, 2020 from 1:00 p.m.–3:00 p.m. PT.

ADDRESSES:

Public Call Information: Dial: 800–353–6461; Conference ID: 1804781.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes, Designated Federal Officer (DFO) at *afortes@usccr.gov* or (202) 681–0857.

SUPPLEMENTARY INFORMATION: This meeting is available to the public through the following toll-free call-in number: 800–353–6461, conference ID number: 1804781. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012 or email Ana Victoria Fortes at *afortes@usccr.gov.*

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzkUAAQ.*

Please click on ''Committee Meetings'' tab. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome
II. Review Report
  a. Findings and Recommendations
III. Public Comment
IV. Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102–3.150, the notice for this meeting is given less than 15 calendar days prior to the meeting because of the exceptional circumstances of the COVID crisis and DFO availability.

Dated: August 26, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–19153 Filed 8–28–20; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Maine Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Maine Advisory Committee (Committee) will hold a meeting on Thursday, September 17, 2020, at 12:00 p.m. (EDT) for the purpose of hearing

testimony about digital equity issues in Maine.

DATES: The meeting will be held on Thursday, September 17, 2020, at 12:00 p.m. EDT.

ADDRESSES: *Public Call Information:* Dial: 1–800–367–2403; conference ID: 1644409.

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor, at *ero@usccr.gov* or 202–921–2212.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the above listed toll-free number. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number: 1–800–367–2403; conference ID: 1644409.

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 emailed to Evelyn Bohor at *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at (202) 376–7533.

Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Maine Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Eastern Regional Office at the above email or phone number.

Agenda

Thursday, September 17, 2020 at 12:00 p.m. (EDT)

- Welcome/Opening
- Briefing on Digital Equity
- Next Steps
- Other Business
- Public Comment
- Adjournment

Dated: August 26, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–19098 Filed 8–28–20; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Office of the Under Secretary for Economic Affairs

RIN 0691–XC113

American Workforce Policy Advisory Board; Meeting

AGENCY: Office of the Under Secretary for Economic Affairs, Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Office of the Under Secretary for Economic Affairs announces the seventh meeting of the American Workforce Policy Advisory Board (Advisory Board). Discussions of the Advisory Board will include its progress toward achieving the goals set at its inaugural meeting on March 6, 2019, as well as other Advisory Board matters.

DATES: The Advisory Board will meet on September 23, 2020; the meeting will begin at 1:30 p.m. and end at approximately 3:30 p.m. (EDT).

ADDRESSES: The meeting will be held at the Eisenhower Executive Office Building, 1650 Pennsylvania Ave. NW, Washington, DC 20502. The meeting is open to the public via audio conference technology. Audio instructions will be prominently posted on the Advisory Board homepage at: *https://www.commerce.gov/americanworker/american-workforce-policy-advisory-board.* Please note: The Advisory Board website will maintain the most current information on the meeting agenda, schedule, and location. These items may be updated without further notice in the **Federal Register**.

The public may also submit statements or questions via the Advisory Board email address, *AmericanWorkforcePolicyAdvisoryBoard@doc.gov* (please use the subject line ''September 2020 Advisory Board Meeting Public Comment''), or by letter to Sabrina Montes, c/o Office of Under Secretary for Economic Affairs, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230. If you wish the Advisory Board to consider your statement or question during the meeting, we must receive your written statement or question no later than 5 p.m. (EDT) four business days prior to the meeting. We will provide all statements or questions received after the deadline to the members; however, they may not consider them during the meeting.

FOR FURTHER INFORMATION CONTACT: Sabrina Montes, c/o Office of Under Secretary for Economic Affairs, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, (301) 278–9268, or *sabrina.montes@bea.gov.*

SUPPLEMENTARY INFORMATION: The Secretary of Commerce and the Advisor to the President overseeing the Office of Economic Initiatives serve as the co-chairs of the Advisory Board. In addition to the co-chairs, the Advisory Board comprises 25 members that represent various sectors of the economy. The Board advises the National Council for the American Worker.

The September meeting will include updates on implementation of the Call to Action from the May 2020 meeting and recommendations from prior meetings, and discussions of new recommendations under the four main goals of the Advisory Board:

- Develop a Campaign to Promote Multiple Pathways to Career Success. Companies, workers, parents, and policymakers have traditionally assumed that a university degree is the best, or only, path to a middle-class career. Employers and job seekers should be aware of multiple career pathways and skill development opportunities outside of traditional 4-year degrees.
- Build the Technological Infrastructure Necessary for the Future of Work. In response to the ''Call to Action'' recommendations approved by the Advisory Board in May 2020, the Increase Data Transparency to Better Match American Workers with American Jobs Working Group expanded its scope and changed its name to the Build the Technological Infrastructure Necessary for the Future of Work Working Group. The working group's scope now includes digital infrastructure investment as described in the ''Digital Infrastructure Principles'' approved by the Advisory Board at the June 2020 meeting. Our nation cannot achieve a satisfactory economic recovery unless the technological infrastructure is in place to connect and empower all Americans to participate in the workforce. High-quality, transparent, and timely data can significantly improve the ability of employers, students, job seekers,

education providers, and policymakers to make informed choices about education and employment—especially for matching education and training programs to in-demand jobs and the skills needed to fill them.

• Modernize Candidate Recruitment and Training Practices. Employers often struggle to fill job vacancies, yet their hiring practices may actually reduce the pool of qualified job applicants. To acquire a talented workforce, employers must better identify the skills needed for specific jobs and communicate those needs to education providers, job seekers, and students.

• Measure and Encourage Employer-led Training Investments. The size, scope, and impacts of education and skills training investments are still not fully understood. There is a lack of consistent data on company balance sheets and in federal statistics. Business and policy makers need to know how much is spent on training, the types of workers receiving training, and the long-term value of the money and time spent in classroom and on-the-job training.

Sabrina L. Montes,

Designated Federal Official, American Workforce Policy Advisory Board, Bureau of Economic Analysis.

[FR Doc. 2020–19087 Filed 8–28–20; 8:45 am]

BILLING CODE 3510–MN–P

DEPARTMENT OF COMMERCE

International Trade Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Annual Report From Foreign-Trade Zones

AGENCY: International Trade Administration, 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 October 30, 2020.

ADDRESSES: Interested persons are invited to submit written comments by email to Christopher Kemp, Analyst, Office of Foreign-Trade Zones, *Christopher.Kemp@trade.gov* or *PRAcomments@doc.gov.* Please reference OMB Control Number 0625–0109 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 Christopher Kemp, Analyst, Office of Foreign-Trade Zones, (202) 482–0862, *Christopher.Kemp@trade.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Foreign-Trade Zone Annual Report is the vehicle by which Foreign-Trade Zone grantees report annually to the Foreign-Trade Zones Board, pursuant to the requirements of the Foreign-Trade Zones Act (19 U.S.C. 81(p)). The annual reports submitted by grantees are the only complete source of compiled information on FTZs. The data and information contained in the reports relates to international trade activity in FTZs. The reports are used by the Congress and the Department to determine the economic effect of the FTZ program. The reports are also used by the FTZ Board and other trade policy officials to determine whether zone activity is consistent with U.S. international trade policy, and whether it is in the public interest. The public uses the information regarding activities carried out in FTZs to evaluate their effect on industry sectors. The information contained in annual reports also helps zone grantees in their marketing efforts. This is a request for a renewal of a currently approved information collection.

II. Method of Collection

The Foreign-Trade Zone Annual Report is collected from zone grantees in a web-based, electronic format.

III. Data

OMB Control Number: 0625–0109.

Form Number(s): ITA 359P.

Type of Review: Regular submission, extension of a current information collection.

Affected Public: State, local, tribal governments, or not-for-profit institutions that have been granted foreign-trade zone authority.

Estimated Number of Respondents: 261.

Estimated Time per Response: 1 to 76 hours (depending on size and structure of Foreign-Trade Zone).

Estimated Total Annual Burden Hours: 5,979.

Estimated Total Annual Cost to Public: 0.

Respondent's Obligation: Mandatory.

Legal Authority: 19 U.S.C. 81(p).

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. 2020–19169 Filed 8–28–20; 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; Atlantic Highly Migratory Species Individual Bluefin Tuna Quota (IBQ) Tracking and Appeals

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 October 30, 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 0648–0677 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

This request is for extension of a currently approved information collection.

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 undertakes internationally regarding tuna management through the Atlantic Tunas Convention Act (ATCA, 16 U.S.C. 971 *et seq.*).

Amendment 7 to the 2006 Consolidated HMS Fishery Management Plan (79 FR 71510, December 2, 2014) implemented individual bluefin tuna quota (IBQ) shares and allocations for vessels permitted in the Atlantic Tunas Longline category, and also implemented distribution of Atlantic Tunas Purse Seine category quota through the IBQ online system. IBQs are intended to fairly and effectively allocate limited quota for incidental capture of Atlantic bluefin tuna among vessels in the Longline category, while minimizing dead discards and discouraging interactions with bluefin tuna, and better utilizing the Purse Seine category quota. An online system developed by NMFS tracks allocations and allocation leases, and reconciles allocation with bluefin tuna catches for quota monitoring. This collection of information accounts for the reporting burden associated with allocation and lease tracking.

First-time vessel permit holders in the affected categories must obtain and set up an IBQ account in the online ''Catch Shares Online System'' in order to be issued IBQ shares and resultant allocation, to lease IBQ, and to resolve quota debt. To use the electronic IBQ System, first-time participants will need to request an account and set their account up with background information. The information collected during account issuance and set-up will be used by NMFS to verify the identity of the individual/business and whether they qualify for IBQ allocation leasing.

The lease monitoring information collected by the online system will be used by each permit holder to keep track of their individual IBQ allocation, and document allocation leases with other IBQ participants. NMFS will use these data to ensure proper accounting of allocations among participants, and to track use of quota allocations and reconcile allocation usage with bluefin tuna catch and landings.

II. Method of Collection

The method of submission is electronic.

III. Data

OMB Control Number: 0648–0677.

Form Number(s): None.

Type of Review: Regular submission [request for extension of a currently approved information collection].

Affected Public: Business or other for-profit organization.

Estimated Number of Respondents: 220.

Estimated Time per Response: 10 minutes for initial application for IBQ account; 15 minutes per IBQ allocation lease.

Estimated Total Annual Burden Hours: 54.

Estimated Total Annual Cost to Public: $ 1,100.

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. 2020–19078 Filed 8–28–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA442]

Marine Mammals; File No. 21476

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

ACTION: Notice; receipt of application for permit amendment.

SUMMARY: Notice is hereby given that Lars Bejder, Ph.D., University of Hawaii at Manoa, 46–007 Lilipuna Road, Kaneohe, HI 96744, has applied for an amendment to Scientific Research Permit No. 21476.

DATES: Written, telefaxed, or email comments must be received on or before September 30, 2020.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 21476 from the list of available applications. These documents are also available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 21476 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Shasta McClenahan or Carrie Hubard, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 21476 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 21476, issued on August 27, 2019 (84 FR 48600; September 16, 2019), authorizes the permit holder to conduct research on 32 species of marine mammals including the following ESA-listed species: blue (*Balaenoptera musculus*), bowhead (*Balaena mysticetus*), fin (*B. physalus*), Hawaiian insular false killer (*Pseudorca crassidens*), humpback (*Megaptera novaeangliae*), sei (*B. borealis*), sperm (*Physeter macrocephalus*), and Western North Pacific gray (*Eschrichtius robustus*) whales. Authorized research activities include unmanned aerial surveys and vessel surveys in U.S. and international waters of the Pacific Ocean near Hawaii, Alaska, and U.S. territories. Permitted research activities include photography and video recording (above water and underwater), photogrammetry, counts, passive acoustic recording, biological sampling (skin and blubber biopsy, sloughed skin, exhaled air, and feces), and suction-cup tagging.

The permit holder is requesting the permit be amended to: (1) Increase the permitted takes from 2,000 to 4,000 annually for Level B harassment activities for spinner dolphins (*Stenella longirostris*) in Hawaii; and (2) increase the number of suction-cup tagging takes from 10 to 20 annually for humpback whale calves in Hawaii from the non-ESA-listed Hawaii distinct population segment. No changes to the permitted objectives, methods, or locations are proposed. The permit expires on August 31, 2024.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: August 25, 2020.

Julia Marie Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–19080 Filed 8–28–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

NTIA 2020 Spectrum Policy Symposium

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: The National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, will host a virtual, online symposium on September 22, 2020, focusing on national spectrum policy development and the evolution of new techniques and technologies for federal spectrum management including spectrum sharing.

DATES: The symposium will be held on September 22, 2020, from 8:30 a.m. to 12:00 p.m., Eastern Daylight Time (EDT).

ADDRESSES: The symposium will be held online and will be accessible from NTIA's public website, *https://www.ntia.gov/other-publication/2020/2020-spectrum-policy-symposium-webcast.*

FOR FURTHER INFORMATION CONTACT: John Alden, Telecommunications Specialist, Office of Spectrum Management, NTIA, at (202) 482–8046 or *spectrumsymposium@ntia.gov.* Please direct media inquiries to NTIA's Office of Public Affairs, (202) 482–7002; email: *press@ntia.gov.*

SUPPLEMENTARY INFORMATION: NTIA serves as the president's principal advisor on telecommunications policies pertaining to the nation's economic and technological advancement and establishes policies concerning use of the radio spectrum by federal agencies. See 47 U.S.C. 902(b)(2)(D). NTIA is hosting a symposium that will focus on developing, implementing and maintaining sustainable, national spectrum policies and spectrum management techniques that will enable the United States to strengthen its global leadership role in the introduction of wireless telecommunications technology, services, and innovation, while also supporting the expansion of existing technologies and the nation's homeland security, national defense, and other critical government missions.

Speakers are expected to include representatives of the Department of Commerce, the Executive Office of the President, the U.S. Congress, Executive Branch agencies, and private sector and other non-government organizations. Prior to the event, NTIA will post a detailed agenda on its website at: *https://www.ntia.gov/other-publication/2020/2020-spectrum-policy-symposium-webcast.*

The symposium is open to the public and members of the press. NTIA asks registrants to provide their first and last names, email addresses, and their organization (optional) for both

registration purposes and to receive updates on the symposium. Registration information, the agenda, and meeting updates, if any, and other relevant documents will be available on NTIA's website at: *https://www.ntia.gov/other-publication/2020/2020-spectrum-policy-symposium-webcast.*

Individuals requiring accommodations, such as sign language interpretation or other ancillary aids, should notify Mr. Alden at the contact information listed above at least ten (10) business days before the event.

Dated: August 20, 2020.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2020–18619 Filed 8–28–20; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Global Intellectual Property Academy (GIPA) Surveys

The United States Patent and Trademark Office (USPTO) 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. The USPTO invites comment on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on June 22, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: United States Patent and Trademark Office, Department of Commerce.

Title: Global Intellectual Property Academy (GIPA) Surveys.

OMB Control Number: 0651–0065.

Form Number: None.

Type of Review: Extension and revision of a currently approved information collection.

Number of Respondents: 750 respondents.

Average Hours per Response: The USPTO estimates 750 responses and that it will take the public approximately 15 minutes to complete this information collection, depending on the complexity of the submission. This includes the time to gather the necessary information, prepare the appropriate briefs, petition, and other papers, and submit the completed items to the USPTO.

Estimated Total Annual Respondent Burden Hours: 188 hours.

Estimated Total Annual Non-Hour Cost Burden: $0.

Needs and Uses: The USPTO surveys international and domestic participants of the USPTO's GIPA training programs to obtain feedback from the participants on the effectiveness of the various services provided to them in the training programs. GIPA was established in 2006 to offer training programs on the enforcement of intellectual property rights, patents, trademarks, and copyright.

The training programs offered by GIPA are designed to meet the specific needs of foreign government officials (including judges; prosecutors; police; customs officials; patent, trademark, and copyright officials; and policymakers) concerning various intellectual property topics, such as global intellectual property rights protection, enforcement, and strategies to handle the protection and enforcement issues in their respective countries.

This information collection contains three surveys directed to separate audiences: Overseas-program participants, post-program participants, and alumni. The Overseas-Program Survey is designed for international participants at the conclusion of the GIPA training program conducted overseas. This survey replaces the existing Pre-Program Survey and is a shortened version of the Post-Program Survey. The Post-Program Survey is used to analyze the overall effectiveness of the program and is conducted at the conclusion of training programs held at U.S. locations. The Alumni Survey is used to determine the benefit of the GIPA training program for the future job performance of the participant. The data obtained from these three surveys will be used to evaluate the percentage of foreign officials trained by GIPA who have increased their expertise in intellectual property, enhanced their professional abilities and future job performance, and developed their own nation's intellectual property program. All the surveys have updated questions and answer options.

Affected Public: Federal Government (Foreign Government).

Frequency: On occasion.

Respondent's Obligation: Voluntary.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this 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 information collection or the OMB Control Number 0651–0065.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0065 information request'' in the subject line of the message.
- *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2020–19151 Filed 8–28–20; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Renewal of the Agricultural Advisory Committee

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of renewal.

SUMMARY: The Commodity Futures Trading Commission (Commission) is publishing this notice to announce the renewal of the Agricultural Advisory Committee (AAC). The Commission has determined that the renewal of the AAC is necessary and in the public's interest, and the Commission has consulted with the General Services Administration's Committee Management Secretariat regarding the AAC's renewal.

FOR FURTHER INFORMATION CONTACT: Summer Mersinger, AAC Designated Federal Officer, at 202–418–6074 or *smersinger@cftc.gov.*

SUPPLEMENTARY INFORMATION: The AAC's objectives and scope of activities are to assist the Commission in assessing issues affecting agricultural producers, processors, lenders and others interested in or affected by the agricultural commodity derivatives

markets through public meetings, and Committee reports and recommendations. The AAC will operate for two years from the date of renewal unless the Commission directs that the AAC terminate on an earlier date. A copy of the AAC renewal charter has been filed with the Commission; the Senate Committee on Agriculture, Nutrition and Forestry; the House Committee on Agriculture; the Library of Congress; and the General Services Administration's Committee Management Secretariat. A copy of the renewal charter will be posted on the Commission's website at *www.cftc.gov.*

Dated: August 26, 2020.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2020–19077 Filed 8–28–20; 8:45 am]

BILLING CODE 6351–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Credit Union Advisory Council Meeting

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice of public meeting.

SUMMARY: Under the Federal Advisory Committee Act (FACA), this notice sets forth the announcement of a public meeting of the Credit Union Advisory Council (CUAC or Council) of the Bureau of Consumer Financial Protection (Bureau). The notice also describes the functions of the Council.

DATES: The meeting date is Tuesday, September 15, 2020, from approximately 2:30 p.m. to 4:30 p.m. eastern daylight time. This meeting will be held via conference call and is open to the general public. Members of the public will receive the agenda and dial-in information when they RSVP.

FOR FURTHER INFORMATION CONTACT: Kim George, Outreach and Engagement Associate, Consumer Advisory Board and Councils Section, Office of Stakeholder Management, at 202–450–8617, *CFPB_CABandCouncilsEvents@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section two of the CUAC Charter provides that pursuant to the executive and administrative powers conferred on the Bureau by section 1012 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Director established the Credit Union Advisory Council under agency authority.

Section three of the CUAC Charter states: ''The purpose of the Advisory Council is to advise the Bureau in the exercise of its functions under the Federal consumer financial laws as they pertain to credit unions with total assets of $10 billion or less.''

II. Agenda

The CUAC will meet with the Bureau's Taskforce on Federal Consumer Financial Law to share recommendations on improvements to the current state of the Federal financial consumer protection laws, regulations, and practices. The meeting is part of the Taskforce's ongoing public outreach effort to solicit feedback to inform its work.

Persons who need a reasonable accommodation to participate should contact *CFPB_504Request@cfpb.gov,* 202–435–9EEO, 1–855–233–0362, or 202–435–9742 (TTY) at least ten (10) business days prior to the meeting or event to request assistance. The request must identify the date, time, location, and title of the meeting or event, the nature of the assistance requested, and contact information for the requester. The Bureau will strive to provide but cannot guarantee that accommodation will be provided for late requests.

Written comments will be accepted from interested members of the public and should be sent to *CFPB_CABandCouncilsEvents@cfpb.gov,* a minimum of seven (7) days in advance of the meeting. The comments will be provided to the CUAC members for consideration. Individuals who wish to join the CUAC must RSVP via this link *https://surveys.consumerfinance.gov/jfe/form/SV_6JPcwWEvxHMkXOJ* by noon, September 14, 2020. Members of the public must RSVP by the due date.

III. Availability

The Council's agenda will be made available to the public on Monday, September 14, 2020, via *consumerfinance.gov.* Individuals should express in their RSVP if they require a paper copy of the agenda.

A recording and summary of this meeting will be available after the meeting on the Bureau's website *consumerfinance.gov.*

Kirsten Sutton,

Chief of Staff, Bureau of Consumer Financial Protection.

[FR Doc. 2020–19089 Filed 8–28–20; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Community Bank Advisory Council Meeting

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice of public meeting.

SUMMARY: Under the Federal Advisory Committee Act (FACA), this notice sets forth the announcement of a public meeting of the Community Bank Advisory Council (CBAC or Council) of the Bureau of Consumer Financial Protection (Bureau). The notice also describes the functions of the Council.

DATES: The meeting date is Tuesday, September 15, 2020, from approximately 2:30 p.m. to 4:30 p.m. eastern daylight time. This meeting will take place via conference call and is open to the general public. Members of the public will receive the agenda and dial-in information when they RSVP.

FOR FURTHER INFORMATION CONTACT: Kim George, Outreach and Engagement Associate, Consumer Advisory Board and Councils Section, Office of Stakeholder Management, at 202–450–8617, *CFPB_CABandCouncilsEvents@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section two of the CBAC Charter provides that pursuant to the executive and administrative powers conferred on the Bureau by section 1012 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Director established the Community Bank Advisory Council under agency authority.

Section three of the CBAC Charter states: ''The purpose of the Advisory Council is to advise the Bureau in the exercise of its functions under the Federal consumer financial laws as they pertain to community banks with total assets of $10 billion or less.''

II. Agenda

The CBAC will meet with the Bureau's Taskforce on Federal Consumer Financial Law to share recommendations on improvements to the current state of federal consumer protection laws, regulations, and practices. This meeting is part of the Taskforce's ongoing public outreach effort to solicit feedback to inform its work.

Persons who need a reasonable accommodation to participate should contact *CFPB_504Request@cfpb.gov,*

202–435–9EEO, 1–855–233–0362, or 202–435–9742 (TTY) at least ten (10) business days prior to the meeting or event to request assistance. The request must identify the date, time, location, and title of the meeting or event, the nature of the assistance requested, and contact information for the requester. The Bureau will strive to provide but cannot guarantee that accommodation will be provided for late requests.

Written comments will be accepted from interested members of the public and should be sent to *CFPB_CABandCouncilsEvents@cfpb.gov,* a minimum of seven (7) days in advance of the meeting. The comments will be provided to the CBAC members for consideration. Individuals who wish to join the Council must RSVP via this link *https://surveys.consumerfinance.gov/jfe/form/SV_6JPcwWEvxHMkXOJ* by noon, September 14, 2020. Members of the public must RSVP by the due date.

III. Availability

The Council's agenda will be made available to the public on Monday, September 14, 2020, via *consumerfinance.gov.* Individuals should express in their RSVP if they require a paper copy of the agenda.

A recording and summary of this meeting will be available after the meeting on the Bureau's website *consumerfinance.gov.*

Kirsten Sutton,

Chief of Staff, Bureau of Consumer Financial Protection.

[FR Doc. 2020–19088 Filed 8–28–20; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Consumer Advisory Board Meeting

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice of public meeting.

SUMMARY: Under the Federal Advisory Committee Act (FACA), this notice sets forth the announcement of a public meeting of the Consumer Advisory Board (CAB or Board) of the Bureau of Consumer Financial Protection (Bureau). The notice also describes the functions of the Board.

DATES: The meeting date is Tuesday, September 15, 2020, from approximately 2:30 p.m. to 4:30 p.m. eastern daylight time. This meeting will take place via conference call and is open to the general public. Members of the public will receive the agenda and dial-in information when they RSVP.

FOR FURTHER INFORMATION CONTACT: Kim George, Outreach and Engagement Associate, Advisory Board and Councils Section, Office of Stakeholder Management, at 202–450–8617, or email: *CFPB_CABandCouncilsEvents@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 3 of the Charter of the Board states that: The purpose of the Board is outlined in section 1014(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which states that the Board shall ''advise and consult with the Bureau in the exercise of its functions under the Federal consumer financial laws'' and ''provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information.''

To carry out the Board's purpose, the scope of its activities shall include providing information, analysis, and recommendations to the Bureau. The Board will generally serve as a vehicle for market intelligence and expertise for the Bureau. Its objectives will include identifying and assessing the impact on consumers and other market participants of new, emerging, and changing products, practices, or services.

II. Agenda

The CAB will meet with the Bureau's Taskforce on Federal Consumer Financial Law to share recommendations on improvements to the current state of Federal financial consumer protection laws, regulations, and practices. This meeting is part of the Taskforce's ongoing public outreach effort to solicit feedback to inform its work.

Persons who need a reasonable accommodation to participate should contact *CFPB_504Request@cfpb.gov,* 202–435–9EEO, 1–855–233–0362, or 202–435–9742 (TTY) at least ten (10) business days prior to the meeting or event to request assistance. The request must identify the date, time, location, and title of the meeting or event, the nature of the assistance requested, and contact information for the requester. The Bureau will strive to provide, but cannot guarantee that accommodation will be provided for late requests.

Written comments will be accepted from interested members of the public and should be sent to *CFPB_CABandCouncilsEvents@cfpb.gov,* a minimum of seven (7) days in advance of the meeting. The comments will be provided to the CAB members for consideration. Individuals who wish to join the Board must RSVP via this link *https://surveys.consumerfinance.gov/jfe/form/SV_6JPcwWEvxHMkXOJ* by noon, September 14, 2020. Members of the public must RSVP by the due date.

III. Availability

The Board's agenda will be made available to the public on Monday, September 14, 2020, via *consumerfinance.gov.* Individuals should express in their RSVP if they require a paper copy of the agenda.

A recording and summary of this meeting will be available after the meeting on the Bureau's website *consumerfinance.gov.*

Kirsten Sutton,

Chief of Staff, Bureau of Consumer Financial Protection.

[FR Doc. 2020–19086 Filed 8–28–20; 8:45 am]

BILLING CODE 4810–AM–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2020–0021]

Agency Information Collection Activities; Proposed Collection; Comment Request; Child Strength Study

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission (CPSC or Commission) is announcing an opportunity for public comment on a new proposed collection of information by the agency. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** for each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on a study that will assess the strength capabilities of children. The Commission will consider all comments received in response to this notice before submitting this collection of information to the Office of Management and Budget (OMB) for approval.

DATES: Submit written or electronic comments on the collection of information by October 30, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2020–2021, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *https://www.regulations.gov.* Follow the instructions for submitting comments. CPSC does not accept comments submitted by electronic mail (email), except through *https://www.regulations.gov.* CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Mail/hand delivery/courier Written Submissions: Submit comments by mail/hand delivery/courier to: Division of the Secretariat, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504–7479; email: *AMills@cpsc.gov.*

Instructions: All submissions must include the agency name and docket number for this notice. CPSC may post all comments received without change, including any personal identifiers, contact information, or other personal information provided, to: *https://www.regulations.gov.* Do not submit electronically: confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If you wish to submit such information, please submit it according to the instructions for written submissions.

Docket: For access to the docket to read background documents or comments received, go to: *https://www.regulations.gov,* insert Docket No. CPSC–2020–2021 into the ''Search'' box, and follow the prompts. A copy of the proposed study is available at *http://www.regulations.gov* under Docket No. CPSC–2020–2021, Supporting and Related Material.

FOR FURTHER INFORMATION CONTACT: Kristen Talcott, Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; (301) 987–2311; or by email to: *KTalcott@cpsc.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency data collection studies. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. Accordingly, CPSC is publishing notice of the proposed collection of information set forth in this document.

A. Proposed Child Strength Study

The Commission is authorized under section 5(a) of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2054(a), to conduct studies and investigations relating to the causes and prevention of deaths, accidents, injuries, illnesses, other health impairments, and economic losses associated with consumer products. Section 5(b) of the CPSA, 15 U.S.C. 2054(b), further provides that the Commission may conduct research, studies, and investigations on the safety of consumer products or test consumer products and develop product safety test methods and testing devices.

CPSC uses data on human strength capabilities to develop product safety standards and inform other CPSC staff activities. CPSC's product safety work includes developing mandatory standards, enforcing existing safety requirements, and working with voluntary standards organizations to improve the safety of consumer products, including children's products. Products that are intended for children, and products that are not intended for children, can pose a hazard to a child (*e.g.,* if the product or a component of it breaks, collapses, or liberates a small part). Information about children's strength capabilities is essential to improve product safety because it can inform the development of performance requirements that consider children's interactions with product components. Manufacturers can also use this information when designing products.

In the 1970s, CPSC sponsored studies to conduct research on human size and strength; specifically, Snyder et al. (1975 [1] and 1977 [2]), studied child anthropometry and Owings et al. (1975 [3] and 1977 [4]), studied child strength. The research results were instrumental for many years in developing product safety standards; however, because the strength studies occurred more than 40 years ago, the information needs to be updated. Moreover, more recent studies lack information on younger children and additional strength measures, and they have collected data from a very small number of children. CPSC expects that the proposed information collection activity would provide CPSC staff with information that reflects more accurately the strength capabilities of children today, as well as data that is not available in literature currently, including data on younger children and additional strength measures.

The proposed study would collect data from a sample of up to approximately 800 children between the ages of 3 months and 5 years to assess children's strength capabilities. The proposed study would collect data on bite strength for children ages 3 months through 5 years, and strength data for children ages 6 months through 5 years. The information collected from the proposed study would provide CPSC staff with updated child strength measures, including upper and lower extremities and bite strength for expanded age ranges. With this information, CPSC would have more accurate and current data for developing voluntary and mandatory safety standards. This information will also help staff to analyze injuries and deaths of children interacting with consumer products and determine whether a product presents a safety hazard.

CPSC has contracted with the University of Michigan to conduct the proposed study and collect the data. A team of researchers at the University of Michigan Transportation Research Institute (UMTRI) will lead the study, and the study will be conducted at UMTRI Laboratories in Ann Arbor, MI. The contractor will recruit children to participate through their caregivers, using the University of Michigan Engage site, Craigslist, and flyers placed at UMTRI. The contractor will create a customized tool for data collection and feedback. The contractor will assign participants a random identification number that is not linked to any personal identifying information and will de-identify photos and videos of participants, taken to document their exertion postures, by blurring the faces. Participation will be voluntary and information collected from participants will be kept confidential and only used for research purposes. Following data collection, the contractor will provide CPSC staff with raw strength and position data (with identifying

[1] Snyder, R.G., Spencer, M.L., Owings, C.L., and Schneider, L.W. (1975). The Physical Characteristics of Children as Related to Death and Injury for Consumer Product Design and Use (Report No. UM–HSRI–BI–75–5). Prepared for the U.S. Consumer Product Safety Commission. Ann Arbor, MI: The Highway Safety Research Institute, University of Michigan.

[2] Snyder, R.G., Schneider, L.W., Owings, C.L., Reynolds, H.M., Golomb, D.H., and Schork, M.A. (1977). Anthropometry of Infants, Children, and Youths to Age 18 for Product Safety Design. Final Report UM–HSRI–77–17. University of Michigan Transportation Research Institute, Ann Arbor, MI. Prepared for the U.S. Consumer Product Safety Commission, Washington, DC 014926–F.

[3] Owings, C.L., Chaffin, D.B., Snyder, R.G., and Norcutt, R.H. (1975). Strength Characteristics of U.S. Children for Product Safety Design. U.S. Consumer Product Safety Commission, Bethesda, MD.

[4] Owings, C.L., Norcutt, R.H., Snyder, R.G., Golomb, D.H., and Lloyd, K.Y. (1977). Gripping Strength Measurements of Children for Product Safety Design (Contract No. CPSC–C–76–0119).

information removed), as well as a final report. After CPSC staff has reviewed and approved the final report, CPSC will release the report on the agency's website and through presentations at meetings and conferences related to the subject matter, in accordance with applicable laws and Commission policy.

B. Burden Hours

We estimate that the study will involve 3,050 respondents and take a total of 1,813 hours over the duration of the study. The monetized hourly cost is $37.73, as defined by the average total hourly cost to employers for employee compensation for all civilian employees across all occupations as of March 2020, reported by the Bureau of Labor Statistics, Employer Costs for Employee Compensation. Accordingly, we estimate the total cost burden to be $68,404 (1,813 hours × $37.73 = $68,404). The estimated cost to the federal government for the contract to design and conduct the study issued to the University of Michigan under contract number 61320618D0004 is $1,134,502. The total estimated cost to the federal government is $1,134,502 for the contract, plus $170,356 in government labor costs, for a total of $1,304,858.

C. Request for Comments

CPSC invites comments on these topics:

- Whether the proposed collection of information is necessary for the proper performance of CPSC's functions, including whether the information will have practical utility;
- The accuracy of CPSC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, utility, and clarity of the information to be collected;
- Ways to minimize the burden of the collection of information on participants, including through the use of automated collection techniques, when appropriate, and other forms of information technology; and
- Additional measures of children's strength capabilities, other than those already included in this proposed collection of information, which would be informative for developing consumer safety standards.

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2020–19142 Filed 8–28–20; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Charter Establishment of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense (DoD).

ACTION: Establishment of Federal Advisory Committee.

SUMMARY: The DoD is publishing this notice to announce that it is establishing the charter for the Defense Advisory Committee on Diversity and Inclusion (''the Committee'').

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: The Committee's charter is being established in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C., Appendix) and 41 CFR 102–3.50(d). The charter and contact information for the Committee's Designated Federal Officer (DFO) are found at *https://www.facadatabase.gov/FACA/apex/FACAPublicAgencyNavigation.*

The Committee shall conduct studies, make findings, and provide recommendations to the Secretary of Defense and the Deputy Secretary of Defense, through the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), on matters and policies relating to improving racial/ethnic diversity, inclusion, and equal opportunity within the DoD. The Committee shall be composed of no more than 20 members, including prominent individuals from academia and the public and private sectors, with experience in one or more of the following disciplines: Defense or national security, organizational or human resources management, constitutional or employment law, and diversity and inclusion.

Committee members who are not full-time or permanent part-time Federal civilian officers, employees, or active duty members of the Uniformed Services, shall be appointed as experts or consultants, pursuant to 5 U.S.C. 3109, to serve as special government employee members. Committee members who are full-time or permanent part-time Federal civilian officers, employees, or active duty members of the Uniformed Services will be appointed pursuant to 41 CFR 102–3.130(a), to serve as regular government employee members.

Committee members are appointed to exercise their own best judgement on behalf of the DoD, without representing any particular point of view, and to discuss and deliberate in a manner that is free from conflicts of interest. Except for reimbursement of official Committee-related travel and per diem, members serve without compensation.

The public or interested organizations may submit written statements to the Committee membership about the Committee's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Committee. All written statements shall be submitted to the DFO for the Committee, and this individual will ensure that the written statements are provided to the membership for their consideration.

Dated: August 25, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2020–19038 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Public Posting Requirement of Grant Information for Higher Education Emergency Relief Fund (HEERF) Grantees

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The U.S. Department of Education (Department) publishes a revised Information for Financial Aid Professionals (IFAP) Electronic Announcement (EA), originally posted May 6, 2020, that describes the public reporting requirements for Emergency Financial Aid Grants to Students.

FOR FURTHER INFORMATION CONTACT: Jack Cox, U.S. Department of Education, Office of Postsecondary Education, 400 Maryland Ave. SW, Room 270–60, Washington, DC 20202. Telephone: (202) 251–9672. Email: *Jack.Cox@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Department publishes a revised EA, originally dated May 6, 2020, that describes the public reporting requirements for Emergency Financial Aid Grants to Students. This revised EA, in conjunction with approved information collection under OMB control number 1801–0005, requires grantees receiving awards under Section

18004(a)(1) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116–136, 134 Stat. 281 (March 27, 2020), to publicly post certain grant information on the institution's primary website as part of the reporting requirements under Section 18004(e) of the CARES Act. This revised EA maintains the same seven reporting elements, but it adds a clarifying footnote for reporting item four and decreases the frequency of reporting after the initial 30-day period from every 45 days thereafter to every calendar quarter. The revised EA is in the Appendix of this notice.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Program Authority: Section 18004(e) of the CARES Act.

Robert L. King,

Assistant Secretary for the Office of Postsecondary Education.

Appendix—Revised May 06, 2020 IFAP Electronic Announcement

Originally Posted: May 06, 2020
Author: Office of Postsecondary Education
Subject: Higher Education Emergency Relief Fund Reporting—Emergency Financial Aid Grants to Students

Section 18004(e) of the Coronavirus Aid, Relief, and Economic Security Act (''CARES Act'' or the ''Act''), Public Law 116–136, 134 Stat. 281 (March 27, 2020), directs institutions receiving funds under Section 18004 of the Act to submit (in a time and manner required by the Secretary) a report to the Secretary describing the use of funds distributed from the Higher Education Emergency Relief Fund (''HEERF''). Section 18004(c) of the CARES Act requires institutions to use no less than 50 percent of the funds received from Section 18004(a)(1) of the Act to provide Emergency Financial Aid Grants to Students for expenses related to the disruption of campus operations due to coronavirus (including eligible expenses under a student's cost of attendance such as food, housing, course materials, technology, health care, and child care).

On April 9, 2020, the Department of Education (''Department'') published documents related to the Emergency Financial Aid Grants, including a letter from Secretary Betsy DeVos, a form Certification and Agreement for institutions to sign and return to access the funds, and a list of institutional allocations under Section 18004(a)(1)of the CARES Act. The Certification and Agreement directs each institution applying for HEERF funds to comply with Section 18004(e) of the CARES Act and submit an initial report to the Secretary thirty (30) days from the date of the institution's Certification and Agreement to the Department. Each HEERF participating institution must post the information listed below on the institution's primary website, as an initial report under Section 18004(e) of the CARES Act. This report is associated with approved information collection under OMB control number 1801–0005.

The Department encourages institutions to report as soon as possible, but no later than 30 days after the publication of this notice or 30 days after the date the Department obligated funds to the institution for Emergency Financial Aid Grants to Students, whichever comes later.

The following information must appear in a format and location that is easily accessible to the public. This information must also be updated no later than 10 days after the end of each calendar quarter (September 30, and December 31, March 31, June 30) thereafter, unless the Secretary specifies an alternative method of reporting:

(1) An acknowledgement that the institution signed and returned to the Department the Certification and Agreement and the assurance that the institution has used, or intends to use, no less than 50 percent of the funds received under Section 18004(a)(1) of the CARES Act to provide Emergency Financial Aid Grants to Students.

(2) The total amount of funds that the institution will receive or has received from the Department pursuant to the institution's Certification and Agreement for Emergency Financial Aid Grants to Students.

(3) The total amount of Emergency Financial Aid Grants distributed to students under Section 18004(a)(1) of the CARES Act as of the date of submission (*i.e.,* as of the initial report and every calendar quarter thereafter).

(4) The estimated total number of students at the institution eligible to participate in programs under Section 484 in Title IV of the Higher Education Act of 1965 and thus eligible to receive Emergency Financial Aid Grants to Students under Section 18004(a)(1) of the CARES Act.[1]

(5) The total number of students who have received an Emergency Financial Aid Grant to students under Section 18004(a)(1) of the CARES Act.

(6) The method(s) used by the institution to determine which students receive Emergency Financial Aid Grants and how much they would receive under Section 18004(a)(1) of the CARES Act.

(7) Any instructions, directions, or guidance provided by the institution to students concerning the Emergency Financial Aid Grants.

* *Note:* For the initial report and each report thereafter, institutions should use data suppression and other methodologies to protect the personally identifiable information from student education records consistent with the Family Educational Rights and Privacy Act (20 U.S.C. 1232g; 34 CFR part 99). This means that if the total number of eligible students or the total number of students who received Emergency Financial Aid Grants is less than 10, but not 0, then the institution must display the total number of students eligible and/or the total number of students who received Emergency Financial Aid Grants as less than 10 (''< 10'') on the publicly available websites controlled by the institution.

Institutions that accurately report the information listed above will meet the initial reporting requirements under Section 18004(e) of the CARES Act. Institutions that the Department determines have not met the reporting requirement as described in this notice may, consistent with the Department's authority to monitor grantee compliance, be subject to appropriate enforcement actions, up to and including being determined to be ineligible for certain other CARES Act program funding. For other subsequent reports for this program and other related HEERF programs, the Department will notify participating institutions of the Department's preferred reporting method. The Department may choose to collect additional information from institutions in accordance with the reporting requirement in Section 18004(e) of the CARES Act and the Certification and Agreement.

For more information on the HEERF, please visit the Department's CARES Act: Higher Education Emergency Relief Fund page at: *http://www2.ed.gov/about/offices/list/ope/caresact.html.*

Contact Information

If you have questions about the information in this announcement, contact *HEERF@ed.gov.*

Paperwork Burden Statement

According to the Paperwork Reduction Act of 1995 (PRA), no persons are required to respond to a collection of information unless

[1] For the purposes of this report, institutions may determine the number of eligible students based on the number of students for whom the institution has received an Institutional Student Information Record (ISIR) plus the number of students who completed an alternative application form developed by the institution for this purpose. The institution may then apply this number to its own methodological framework for disbursal of funds to produce a final total of eligible students at the institution. The institution is not asked to make assumptions about the potential eligibility of students for whom the institution has not received an ISIR or an alternative application.

such collection displays a valid OMB control number. The valid OMB control number for this information collection is 1801–0005. Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Under the PRA, participants are required to respond to this collection to obtain or retain benefit. If you have any comments concerning the accuracy of the time estimate or suggestions for improving this individual collection, or if you have comments or concerns regarding the status of your individual form, application, or survey, please contact: Jack Cox, U.S. Department of Education, 400 Maryland Avenue SW, Washington, DC 20202.

[FR Doc. 2020–19041 Filed 8–28–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0134]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application for Grants Under the Talent Search Program

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a reinstatement without change of a previously approved information collection.

DATES: Interested persons are invited to submit comments on or before September 30, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Antoinette Edwards, 202–453–7121.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Application for Grants under the Talent Search Program.

OMB Control Number: 1840–0818.

Type of Review: Reinstatement without change of a previously approved information collection.

Respondents/Affected Public: State, Local and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 1,230.

Total Estimated Number of Annual Burden Hours: 43,260.

Abstract: The application is needed to conduct a national competition under the Talent Search Program for FY 2021. The TS Program provides grants to institutions of higher education, public and private agencies and organizations, community-based organizations with experience in serving disadvantaged youth, combinations of such institutions, agencies and organizations, and secondary schools to operate projects that serve qualified individuals from disadvantaged backgrounds.

This collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1894–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection request.

Dated: August 26, 2020.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–19163 Filed 8–28–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL20–62–000]

Fern Solar LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On August 25, 2020, the Commission issued an order in Docket No. EL20–62–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2018), instituting an investigation into whether Fern Solar's proposed Rate Schedule may be unjust and unreasonable. *Fern Solar LLC,* 172 FERC 61,160 (2020).

The refund effective date in Docket No. EL20–62–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL20–62–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2019), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests

and interventions in lieu of paper using the eFile link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: August 25, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19107 Filed 8–28–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF20–5–000]

Southeastern Power Administration; Notice of Filing

Take notice that on August 21, 2020, Southeastern Power Administration submitted tariff filing per: 300.10: Kerr-Philpott 2020 Rate Adjustment to be effective 10/1/2020.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically 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.

Comment Date: 5:00 p.m. Eastern Time on September 21, 2020.

Dated: August 25, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19104 Filed 8–28–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–2695–000]

Mohave County Wind Farm 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 Mohave County Wind Farm LLC's Pioneer Solar (CO), 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 September 14, 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: August 25, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19103 Filed 8–28–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–2726–000]

Grand Energy, 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 Grand Energy, 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 September 14, 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.

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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: August 25, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19106 Filed 8–28–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–2722–000]

CO Buffalo Flats, 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 CO Buffalo Flats, 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 September 14, 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.

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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: August 25, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19111 Filed 8–28–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–2715–000]

Stored Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Stored Solar, 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 September 14, 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: August 25, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19108 Filed 8–28–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–459–000]

Golden Pass LNG Terminal LLC; Notice of Schedule for Environmental Review of The Golden Pass Amendment Project

On May 21, 2020, Golden Pass LNG Terminal LLC (Golden Pass LNG) filed an application in Docket No. CP20–459–000 requesting a limited amendment to its December 21, 2016 Order under Docket No. CP14–517–000 that granted Golden Pass LNG authority to site, construct, and operate facilities for the exportation of liquefied natural gas (LNG). Golden Pass LNG proposes to increase the total LNG production capacity of the Golden Pass Export Project in Jefferson County, Texas. The proposed project is known as the Golden Pass Amendment Project (Project).

On May 28, 2020, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA—November 6, 2020
90-day Federal Authorization Decision Deadline—February 4, 2021

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

The Project would increase the authorized LNG production capacity of Golden Pass LNG's facilities currently under construction from 15.6 million metric tons per annum (MTPA) to 18.1 MTPA. The Project LNG capacity increasewould not require any additional facility construction. Golden Pass LNG states the increase is based on a recalculation of the maximum design LNG production capability of the facilities. Golden Pass LNG would coordinate with the U.S. Coast Guard regarding any potential increases in marine traffic due to the capacity increase.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC website (*www.ferc.gov*). Using the eLibrary link, select General Search from the eLibrary menu, enter the selected date range and Docket Number excluding the last three digits (*i.e.,* CP20–459), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: August 25, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19102 Filed 8–28–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–467–006.

Applicants: New York Independent System Operator, Inc.

Description: Compliance filing: Compliance: ESRs Subject to TSC, NTAC to be effective 8/26/2020.

Filed Date: 8/25/20.

Accession Number: 20200825–5136.

Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–838–004.

Applicants: Duke Energy Ohio, Inc.

Description: Tariff Amendment: DEO–AEP Request for Extention SA 1491 to be effective 12/21/2019.

Filed Date: 8/25/20.

Accession Number: 20200825–5074.

Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–2284–001.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: 2900R13 Kansas Municipal Energy Agency NITSA NOA Motion for Deferral to be effective 12/31/9998.

Filed Date: 8/24/20.

Accession Number: 20200824–5215.

Comments Due: 5 p.m. ET 9/14/20.

Docket Numbers: ER20–2720–000.

Applicants: Crossover Wind LLC, Crossover Wind 2 LLC.

Description: Request for Limited Waiver of Tariff Provisions, et al. of Crossover Wind LLC, et al.

Filed Date: 8/21/20.
Accession Number: 20200821–5237.
Comments Due: 5 p.m. ET 8/31/20.

Docket Numbers: ER20–2723–000.
Applicants: Idaho Power Company.
Description: § 205(d) Rate Filing: Revised Section 4.2—Order 676–I to be effective 11/2/2020.
Filed Date: 8/24/20.
Accession Number: 20200824–5207.
Comments Due: 5 p.m. ET 9/14/20.

Docket Numbers: ER20–2724–000.
Applicants: NSTAR Electric Company.
Description: Initial rate filing: H.Q. Energy Services Tsfr of Use Rights Phase I/II HVDC Transmission Facilities to be effective 11/1/2020.
Filed Date: 8/24/20.
Accession Number: 20200824–5219.
Comments Due: 5 p.m. ET 9/14/20.

Docket Numbers: ER20–2725–000.
Applicants: Idaho Power Company.
Description: § 205(d) Rate Filing: Reinstated Language—Attachment O, Section 8 to be effective 5/26/2020.
Filed Date: 8/24/20.
Accession Number: 20200824–5235.
Comments Due: 5 p.m. ET 9/14/20.

Docket Numbers: ER20–2726–000.
Applicants: Grand Energy, LLC.
Description: Baseline eTariff Filing: Application For Market Based Rate Authority to be effective 9/1/2020.
Filed Date: 8/24/20.
Accession Number: 20200824–5245.
Comments Due: 5 p.m. ET 9/14/20

Docket Numbers: ER20–2728–000
Applicants: Americhoice Energy IL, LLC
Description: Tariff Cancellation: Cancellation of MBR Tariff to be effective 8/31/2020.
Filed Date: 8/24/20
Accession Number: 20200824–5246
Comments Due: 5 p.m. ET 9/14/20
Docket Numbers: ER20–2729–000
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3660 Solaer USA NM ACR, LLC GIA Cancellation to be effective 7/26/2020.
Filed Date: 8/25/20
Accession Number: 20200825–5022
Comments Due: 5 p.m. ET 9/15/20
Docket Numbers: ER20–2730–000
Applicants: Americhoice Energy OH, LLC
Description: Tariff Cancellation: Cancellation of MBR Tariff to be effective 8/31/2020.
Filed Date: 8/25/20.
Accession Number: 20200825–5052.
Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–2731–000.
Applicants: Americhoice Energy PA, LLC.
Description: Tariff Cancellation: Cancellation of MBR Tariff to be effective 8/31/2020.
Filed Date: 8/25/20.
Accession Number: 20200825–5054.
Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–2732–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Cancellation: Notice of Cancellation of WMPA, Service Agreement No. 5609; Queue No. AE1–219 to be effective 8/17/2020.
Filed Date: 8/25/20.
Accession Number: 20200825–5063.
Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–2733–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: Tariff Cancellation: Notice of Cancellation of Service Agreement No. 833 to be effective 7/3/2020.
Filed Date: 8/25/20.
Accession Number: 20200825–5086.
Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–2734–000.
Applicants: Alabama Power Company.
Description: Initial rate filing: Southern-FPL-Gulf Settlement Agreement Filing to be effective 7/3/2020.
Filed Date: 8/25/20.
Accession Number: 20200825–5104.
Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–2735–000.
Applicants: Georgia Power Company.
Description: Initial rate filing: Southern-FPL-Gulf Settlement Agreement Filing to be effective 7/3/2020.
Filed Date: 8/25/20.
Accession Number: 20200825–5108.
Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–2736–000.
Applicants: Mississippi Power Company.
Description: Initial rate filing: Southern-FPL-Gulf Settlement Agreement Filing to be effective 7/3/2020.
Filed Date: 8/25/20.
Accession Number: 20200825–5113.
Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–2737–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA 5728; Queue AF1–264; Cancel WMPA, SA 3318; Queue X3–075 to be effective 7/31/2020.
Filed Date: 8/25/20.
Accession Number: 20200825–5118.
Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–2738–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA 5727; Queue AF1–261; Cancel WMPA, SA 3147; Queue W4–103 to be effective 7/31/2020.
Filed Date: 8/25/20.
Accession Number: 20200825–5119.
Comments Due: 5 p.m. ET 9/15/20.

Docket Numbers: ER20–2739–000.
Applicants: Peetz Table Wind, LLC.
Description: Baseline eTariff Filing: Peetz Table Wind, LLC CFA with Logan Wind, NorCol Wind I & NorCol Wind II to be effective 9/16/2020.
Filed Date: 8/25/20.
Accession Number: 20200825–5135.
Comments Due: 5 p.m. ET 9/15/20.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RR20–6–000.
Applicants: North American Electric Reliability Corporation.
Description: Request of North American Electric Reliability Corporation for Acceptance of its 2021 Business Plan and Budget and the 2021 Business Plans and Budgets of Regional Entities and for Approval of Proposed Assessments to Fund Budgets.
Filed Date: 8/24/20.
Accession Number: 20200824–5278.
Comments Due: 5 p.m. ET 9/14/20.

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: August 25, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19113 Filed 8–28–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

August 25, 2020.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP20–1115–000.

Applicants: Alliance Pipeline L.P.

Description: § 4(d) Rate Filing: Addition of Stevens County MN18 Receipt Point to be effective 10/1/2020.

Filed Date: 8/24/20.

Accession Number: 20200824–5113.

Comments Due: 5 p.m. ET 9/8/20.

Docket Numbers: RP20–1117–000.

Applicants: Rockies Express Pipeline LLC.

Description: § 4(d) Rate Filing: REX 2020–08–21 Negotiated Rate Agreement to be effective 8/22/2020.

Filed Date: 8/24/20.

Accession Number: 20200824–5128.

Comments Due: 5 p.m. ET 9/8/20.

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 date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 25, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19110 Filed 8–28–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–2717–000]

Crossing Trails Wind Power 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 proceeding of Crossing Trails Wind Power 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 September 14, 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: August 25, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19114 Filed 8–28–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Boulder Canyon Project

AGENCY: Western Area Power Administration, Energy (DOE).

ACTION: Notice concerning fiscal year 2021 Boulder Canyon Project base charge and rates for electric service.

SUMMARY: The Assistant Secretary for Electricity confirms, approves, and places into effect on a final basis the Boulder Canyon Project (BCP) base charge and rates for fiscal year (FY) 2021 under Rate Schedule BCP–F10. The base charge decreased 1.5 percent from $66.4 million in FY 2020 to $65.4 million in FY 2021. The reduction is primarily the result of an increase in prior year carryover funds.

DATES: The FY 2021 base charge and rates will be effective October 1, 2020 and will remain in effect through September 30, 2021.

FOR FURTHER INFORMATION CONTACT: Tracey A. LeBeau, Regional Manager, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457, (602) 605–2525, or *dswpwrmrk@wapa.gov;* or Tina Ramsey, Rates Manager, Desert Southwest Region, Western Area Power Administration, (602) 605–2565, or *ramsey@wapa.gov.*

SUPPLEMENTARY INFORMATION: On June 6, 2018, the Federal Energy Regulatory Commission (FERC) confirmed and approved Rate Schedule BCP–F10 under Rate Order No. WAPA–178 on a final

basis through September 30, 2022.[1] The rate-setting methodology for BCP calculates an annual base charge rather than a unit rate for Hoover Dam hydropower. The base charge recovers an annual revenue requirement that includes Western Area Power Administration (WAPA) and Bureau of Reclamation (Reclamation) projected costs of investment repayment, interest, operations and maintenance (O&M), replacements, payments to States, and Hoover Dam visitor services. Non-power revenue projections such as water sales, Hoover Dam visitor center revenue, ancillary services, and late fees help offset these projected costs. Customers are billed a percentage of the base charge in proportion to their Hoover power allocation. Rates are calculated for comparative purposes but are not used to determine the charges for service.

Rate Schedule BCP–F10 and the BCP Electric Service Contract require WAPA to determine the annual base charge and rates for the next FY before October 1 of each year. The FY 2020 BCP base charge and rates expire on September 30, 2020.

COMPARISON OF BASE CHARGE AND RATES

	FY 2020	FY 2021	Amount change	Percent change
Base Charge ($)	$66,419,402	$65,443,462	−$975,940	−1.5
Composite Rate (mills/kWh)	18.08	18.10	0.02	0.1
Energy Rate (mills/kWh)	9.04	9.05	0.01	0.1
Capacity Rate ($/kW-Mo)	1.75	1.69	−0.06	−3.4

A $3 million increase in prior year carryover funds significantly contributed to the FY 2021 base charge reduction of 1.5 percent from the FY 2020 base charge. In addition, Reclamation's FY 2021 budget increased by $470,000 to $76.2 million, a 0.6 percent increase from FY 2020. The difference between Reclamation's $3.2 million decrease in O&M expenses and a $3.4 million increase in replacement costs accounts for most of the budget increase. WAPA's FY 2021 budget decreased by $370,000 to $8.4 million, a 4.2 percent decline from FY 2020. A reduction in O&M expenses and the elimination of WAPA's contingency funds resulted in the budget decrease.

Although there is a 1.5 percent reduction to the FY 2021 base charge, the composite and energy rates are both slightly increasing from FY 2020 due to a forecasted decrease in energy from the long-term drought in the Lower Colorado River Basin. The capacity rate, which represents a 3.4 percent reduction from the FY 2020 rate, is decreasing due to changes in capacity projections and the FY 2021 base charge.

Public Notice and Comment

The notice of the proposed FY 2021 base charge and rates for electric service was published consistent with procedures set forth in 10 CFR part 903 and 10 CFR part 904. WAPA took the following steps to involve customers and interested parties in the rate process:

1. On April 6, 2020, a **Federal Register** notice (85 FR 19144) announced the proposed base charge and rates and initiated the 90-day public consultation and comment period.

2. On May 6, 2020, WAPA held a public information forum by web conference. WAPA and Reclamation representatives explained the proposed base charge and rates, answered questions, and posted the presentation materials to WAPA's website.

3. On June 5, 2020, WAPA held a public comment forum by web conference to provide customers and interested parties an opportunity to comment for the record. WAPA received no comments during this forum.

4. On July 6, 2020, the public consultation and comment period ended with WAPA receiving two comment letters. The comments appear below, paraphrased where appropriate without compromising their meaning.

Comment: Both commenters thanked WAPA and Reclamation for their efforts to decrease the BCP base charge and electric service rates for FY 2021 amid the COVID–19 pandemic. They applauded efforts by Reclamation to mitigate revenue losses due to the pandemic's effects on tourism.

Response: WAPA and Reclamation acknowledge the comments. Non-power revenue projections decreased by $4 million since publication of the proposed base charge and rates due to the closing of the Hoover Dam visitor center as a result of the pandemic. Reclamation reduced FY 2021 O&M and replacement costs by $4 million to maintain the proposed decrease to the FY 2021 base charge.

Comment: A commenter had concerns about future costs for the landfill mitigation, post-retirement benefit costs, and the potential for a continued decrease in Hoover Dam visitor center tourism revenue.

Response: WAPA and Reclamation will continue to work with the BCP contractors on moderating future costs.

Comment: A commenter requested that future maintenance schedules be adjusted to minimize capacity downtime in the summer.

Response: Reclamation plans to continue to limit routine maintenance from May through October to provide maximum available capacity to the BCP contractors.

Certification of Rates

WAPA's Administrator certified that the FY 2021 base charge and rates under Rate Schedule BCP–F10 are the lowest possible rates consistent with sound business principles. The base charge and rates were developed following administrative policies and applicable laws.

Availability of Information

Information about the rate process to establish the FY 2021 base charge and rates was made available on WAPA's website at *https://www.wapa.gov/regions/DSW/Rates/Pages/boulder-canyon-rates.aspx.*

Legal Authority

10 CFR 904.7(e) requires annual review of the BCP base charge and an adjustment, either upward or downward, when necessary and administratively feasible to assure sufficient revenues to effect payment of all costs and financial obligations associated with the project. WAPA's Administrator provided all BCP contractors an opportunity to comment

[1] Order Confirming and Approving Rate Schedule on a Final Basis, FERC Docket No. EF18–1–000, 163 FERC ¶ 62,154 (2018).

on the proposed base charge adjustment consistent with the procedures for public participation in rate adjustments as required under 10 CFR 904.7(e) and the BCP Electric Service Contract. The BCP Electric Service Contract goes on to state that in years other than the first and fifth years of a rate schedule approved by the Deputy Secretary on a provisional basis and by FERC on a final basis, adjustments to the base charge ''shall be effective upon approval by the Deputy Secretary of Energy.'' Under the Department of Energy Organization Act, the Secretary of Energy holds plenary authority over Department of Energy affairs with respect to the Power Marketing Administrations, and the Secretary of Energy may therefore exercise the Deputy Secretary's contractual authority in this context. By Delegation Order No. 00–002.00S, effective January 15, 2020, the Secretary of Energy delegated to the Under Secretary of Energy the authority vested in the Secretary with respect to WAPA. By Redelegation Order No. 00–002.10E, effective February 14, 2020, the Under Secretary of Energy delegated to the Assistant Secretary for Electricity the same authority with respect to WAPA. By Redelegation Order No. 00–002.10–5, effective July 8, 2020, the Assistant Secretary for Electricity delegated to WAPA's Administrator the same authority with respect to WAPA. However, based upon the governing terms of existing BCP Electric Service Contract, the Assistant Secretary for Electricity is approving the FY 2021 base charge and rates for BCP electric service. This rate action is issued under the Redelegation Orders and Department of Energy (DOE) procedures for public participation in rate adjustments set forth at 10 CFR part 903 and 10 CFR part 904.[3]

Following DOE's review of WAPA's proposal, and as authorized by applicable provisions of the BCP Electric Service Contract, I hereby confirm, approve, and place the FY 2021 base charge and rates for BCP electric service, under Rate Schedule BCP–F10, into effect on a final basis through September 30, 2021.

Ratemaking Procedure Requirements

Environmental Compliance

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), WAPA has determined that this action is categorically excluded from preparing an environmental assessment or an environmental impact statement.

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 August 24, 2020, by Bruce J. Walker, 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 August 26, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–19116 Filed 8–28–20; 8:45 am]

BILLING CODE 6450–01–P

[3] 50 FR 37835 (Sept. 18, 1985); 85 FR 19144 (Apr. 6, 2020).

ENVIRONMENTAL PROTECTION AGENCY

[CERCLA–10–2020–0105; FRL–10013–76-Region 10]

Proposed CERCLA Administrative Cashout Settlement; S.C. Breen Construction Company

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act., as amended (''CERCLA''), notice is hereby given of a proposed administrative settlement for recovery of past and projected future response costs concerning the Hamilton/Labree Roads Groundwater Contamination Site in Chehalis, Washington, with the following settling party: S.C. Breen Construction Company. The settlement requires the settling party to pay $3,250,000 to the Hazardous Substance Superfund. The settlement includes a covenant not to sue the settling party. For thirty (30) days following the date of publication of this document, the Agency will receive written comments relating to the settlement. The Agency will consider all comments and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available electronically for public inspection at *https://www.regulations.gov.*

DATES: Comments must be submitted on or before September 30, 2020.

ADDRESSES: The proposed settlement is available electronically for public inspection at *https://www.regulations.gov.* Submit your comments, identified by EPA Docket No. CERCLA–10–2020–0105, by one of the following methods:

- *https://www.regulations.gov.* Follow on-line instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. 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, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*
- *Email:* Andrea Lindsay, Community Involvement Coordinator, at *lindsay.andrea@epa.gov.*
- Written comments submitted by mail are temporarily suspended, and no hand deliveries will be accepted. We encourage the public to submit comments via *https://www.regulations.gov.*

Instructions: Direct your comments to EPA Docket No. CERCLA–10–2020–

0105. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov* or email. The *https://www.regulations.gov* website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *https://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *https://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available electronically in *https://www.regulations.gov.*

EPA is temporarily suspending its Docket Center and Regional Records Centers for public visitors to reduce the risk of transmitting COVID–19. In addition, many site information repositories are closed, and information in these repositories, including the deletion docket, has not been updated with hardcopy or electronic media. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID.

FOR FURTHER INFORMATION CONTACT: Robert Tan, Remedial Project Manager, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 155, 12–D12–1, Seattle, WA 98101, (206) 553–2580, email: *Tan.Robert@epa.gov; and/or* Nick Vidargas, Attorney Advisor, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 155, 11–09, Seattle, WA 98101, (206) 553–1460, email: *Vidargas.Nick@epa.gov.*

SUPPLEMENTARY INFORMATION: This settlement is entered into pursuant to the authority under section 122(h)(1) of CERCLA, 42 U.S.C. 9622(h)(1), to settle claims under section 107 of CERCLA, 42 U.S.C. 9607, with the prior written approval of the Attorney General. The settlement agreement provides for payment of $3,250,000 from the settling party to the Site's Hazardous Substance Superfund special account, to be used towards remedial actions at the Site. The settlement also includes a covenant not to sue the settling party pursuant to sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a).

Authority: 42 U.S.C. 9601–9657.

Dated: August 25, 2020.

Calvin Terada,

Division Director, Superfund and Emergency Management Division, Region 10.

[FR Doc. 2020–19081 Filed 8–28–20; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: EIB–2020–0006]

Application for Final Commitment for a Long-Term Loan or Financial Guarantee in Excess of $100 million: AP089365XX and AP089366XX

AGENCY: Export-Import Bank.

ACTION: Notice.

SUMMARY: This Notice is to inform the public the Export-Import Bank of the United States (''EXIM'') has received two applications for final commitment for aggregated long-term loans or financial guarantees in excess of $100 million. Comments received within the comment period specified below will be presented to the EXIM Board of Directors prior to final action on these Transactions.

DATES: Comments must be received on or before September 25, 2020 to be assured of consideration before final consideration of the transactions by the Board of Directors of EXIM.

ADDRESSES: Comments may be submitted through *Regulations.gov* at *www.regulations.gov.* To submit a comment, enter EIB–2020–0006 under the heading ''Enter Keyword or ID'' and select Search. Follow the instructions provided at the Submit a Comment screen. Please include your name, company name (if any) and EIB–2020–0006 on any attached document.

SUPPLEMENTARY INFORMATION:

Reference: AP089365XX and AP089366XX.

Purpose and Use:

Brief description of the purpose of the transactions: Oil and gas field development and production.

Brief non-proprietary description of the anticipated use of the items being exported: Assortment of goods and services used in oil and gas exploration and production.

To the extent that EXIM is reasonably aware, the item(s) being exported are not expected to produce exports or provide services in competition with the exportation of goods or provision of services by a United States industry.

Parties:

Principal Supplier: Various—approximately 83 different exporters.

Obligor: Petroleos Mexicanos (Pemex).

Guarantor(s): Pemex Exploration and Production, Pemex Logistica and Pemex Transformaction Industrial.

Description of Items Being Exported: Goods and services used in oil and gas exploration and production.

Information on Decision: Information on the final decision for these transactions will be available in the ''Summary Minutes of Meetings of Board of Directors'' on *http://exim.gov/newsandevents/boardmeetings/board/.*

Confidential Information: Please note that this notice does not include confidential or proprietary business information; information which, if disclosed, would violate the Trade Secrets Act; or information which would jeopardize jobs in the United States by supplying information that competitors could use to compete with companies in the United States.

Authority: Section 3(c)(10) of the Export-Import Bank Act of 1945, as amended (12 U.S.C. 635a(c)(10)).

Joyce B. Stone,

Assistant Corporate Secretary.

[FR Doc. 2020–19154 Filed 8–28–20; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 20–930; FRS 17031]

Next Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission released a public notice announcing the meeting of the North American Numbering Council (NANC), which will be held via conference call and available to the public via live internet feed.

DATES: Thursday, September 24, 2020. The meeting will come to order at 9:30 a.m.

ADDRESSES: The meeting will be conducted via conference call and available to the public via the internet at *http://www.fcc.gov/live.*

FOR FURTHER INFORMATION CONTACT: Marilyn Jones, Designated Federal Officer (DFO) of the NANC, at *marilyn.jones@fcc.gov* or 202–418–2357 and Jordan Reth, Deputy DFO, at *jordan.reth@fcc.gov* or 202–418–1418. More information about the NANC is available at *https://www.fcc.gov/about-fcc/advisory-committees/general/north-american-numbering-council.*

SUPPLEMENTARY INFORMATION: The NANC meeting is open to the public on the internet via live feed from the FCC's web page at *http://www.fcc.gov/live.* Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). Such requests should include a detailed description of the accommodation needed. In addition, please include a way for the FCC to contact the requester if more information is needed to fill the request. Please allow at least five days' advance notice for accommodation requests; last minute requests will be accepted but may not be possible to accommodate. Members of the public may submit comments to the NANC in the FCC's Electronic Comment Filing System, ECFS, at *www.fcc.gov/ecfs.* Comments to the NANC should be filed in CC Docket No. 92–237. This is a summary of the Commission's document in CC Docket No. 92–237, DA 20–930 released August 24, 2020.

Proposed Agenda: At the September 24 meeting, the NANC will consider and vote on recommendations from the Call Authentication Trust Anchor Working Group on best practices that providers of voice service may use as part of the implementation of effective call authentication frameworks to ensure the calling party is accurately identified. These recommendations will facilitate the Commission's implementation of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act). The NANC will also discuss the status of its working groups. This agenda may be modified at the discretion of the NANC Chair and the Designated Federal Officer (DFO).

Federal Communications Commission.

Daniel Kahn,

Associate Bureau Chief, Wireline Competition Bureau.

[FR Doc. 2020–19059 Filed 8–28–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MEDIATION AND CONCILIATION SERVICE

Senior Executive Service Performance Review Board

AGENCY: Office of the Director (OD), Federal Mediation and Conciliation Service (FMCS).

ACTION: Notice.

SUMMARY: Notice is hereby given of the names of the members of the Agency's SES Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Sarah Cudahy, General Counsel 202–606–8090, *scudahy@fmcs.gov,* 250 E St. SW, Washington, DC 20427.

SUPPLEMENTARY INFORMATION: Sec. 4314(c)(1) through (5) of title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more performance review boards. The board shall review and evaluate the initial appraisal of a senior executive's performance by the supervisor, along with any recommendations to the appointing authority relative to the performance of the senior executive.

Dated: August 26, 2020.

Sarah Cudahy,

General Counsel.

The Members of the Performance Review Board Are:

1. Marla Hendriksson, Deputy Director for the Office of Partnership and Operational Policy, Office of Regulatory Affairs, Food and Drug Administration, Department of Health and Human Services
2. Priscilla Clark, Deputy Chief Human Capital Officer, Office of the Chief Human Capital Officer, Housing and Urban Development
3. Gregory Goldstein, Chief Operating Officer, Federal Mediation and Conciliation Service
4. Angie Titcombe, Director of Human Resources, Federal Mediation and Conciliation Services

[FR Doc. 2020–19097 Filed 8–28–20; 8:45 am]

BILLING CODE 6732–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than September 14, 2020.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President), 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Dorothy Stine Revocable Trust, Gregory D. Stine, as trustee, both of Omaha, Nebraska;* to become a member of the Stine Family Group and to retain voting shares of Premier Bancshares, Inc., and thereby indirectly retain voting shares of Premier Bank, both of Omaha, Nebraska.

Board of Governors of the Federal Reserve System, August 25, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–19042 Filed 8–28–20; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank(s) indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than September 15, 2020.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Senior Vice President) 33 Liberty Street, New York, New York 10045–0001. Comments can also be sent electronically to *Comments.applications@ny.frb.org:*

1. *CRB Group, Inc., Fort Lee, New Jersey;* to acquire Synthetic P2P Holdings Corporation, d/b/a PeerIQ, New York, New York, and thereby engage in data processing activities pursuant to section 225.28(b)(14) of Regulation Y.

Board of Governors of the Federal Reserve System, August 26, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–19158 Filed 8–28–20; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than September 15, 2020.

A. Federal Reserve Bank of St. Louis (David L. Hubbard, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Susan and Kent Wunderlich Family Trust, Philip S. Wunderlich and Gary Wunderlich, Jr., as co-trustees, and a trust established for a minor child, Gary Wunderlich, Jr., as trustee, all of Memphis, Tennessee;* to become members of the Wunderlich Family Group, a group acting in concert, and to acquire voting shares of Financial FedCorp, Inc., and thereby indirectly acquire voting shares of Financial Federal Bank, both of Memphis, Tennessee.

In addition, The Gary K. Wunderlich III Trust, The Madison Graves Wunderlich Trust, Gary Wunderlich, Jr., as trustee for both trusts, The Philip S. Wunderlich, Jr. Trust, The Elizabeth T. Wunderlich Trust, and a trust established for a minor child, Philip Wunderlich, as trustee for all three trusts, and all of Memphis, Tennessee; as members of the Wunderlich Family Group, a group acting in concert, to retain voting shares of Financial FedCorp, Inc., and thereby indirectly retain voting shares of Financial Federal Bank.

Board of Governors of the Federal Reserve System, August 26, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–19157 Filed 8–28–20; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 201–0041]

Arko Holdings Ltd. and Empire Petroleum Partners, LLC; Analysis of Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before September 30, 2020.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: ''Arko Holdings Ltd. and Empire Petroleum Partners, LLC; File No. 201 0041'' on your comment, and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th

Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Steven Couper (202–326–3349), Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Orders to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website (for August 25, 2020), at this web address: *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before September 30, 2020. Write ''Arko Holdings Ltd. and Empire Petroleum Partners, LLC; File No. 201 0041'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to the public health emergency in response to the COVID–19 outbreak and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Arko Holdings Ltd. and Empire Petroleum Partners, LLC; File No. 201 0041'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing this matter. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before September 30, 2020. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Consent Orders To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from Arko Holdings Ltd. (''Arko''), GPM Southeast, LLC, and GPM Petroleum, LLC (collectively with Arko, ''GPM'') and Empire Petroleum Partners, LLC (''Empire,'' and collectively ''Respondents''). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from GPM's proposed acquisition of retail fuel assets from Empire.

Under the terms of the proposed Consent Agreement, Respondents must divest certain retail fuel assets in seven local markets in Indiana, Michigan, Maryland, and Texas. Respondents must complete the divestiture within 20 days after the closing of the acquisition. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture outlet in the normal course of business through the date the up-front buyers acquire the divested assets.

The Commission has placed the proposed Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

II. The Respondents

Respondent Arko is a publicly traded company headquartered in Tel Aviv, Israel. Arko, through its subsidiaries GPM Southeast, LLC, and GPM Petroleum, LLC, supplies wholesale fuel to or operates approximately 1,400 retail fuel and convenience stores in twenty-two states across the South, Mid-Atlantic, and Midwest. In 2019, GPM ranked as the sixth largest operator of retail fuel and convenience stores in the United States.

Respondent Empire is a privately held Delaware limited liability company headquartered in Dallas, Texas. Empire also distributes fuel on a wholesale basis and operates retail fuel and convenience stores in 30 states and Washington, DC With respect to

wholesale fuel distribution, Empire is a ''super jobber,'' a company that supplies over one billion gallons of fuel each year. Empire has supply relationships with all major oil companies, and distributes both branded and unbranded fuel. Empire supplies fuel to 1,555 retail sites, and operates 76 retail fuel and convenience stores itself.

III. The Proposed Acquisition

On December 17, 2019, GPM entered into an agreement to acquire certain retail and wholesale fuel assets from Empire and related entities (the ''Acquisition''). With the Complaint, the Commission alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and that the Acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by substantially lessening competition for the retail sale of gasoline in seven local markets in Indiana, Michigan, Maryland, and Texas, and by substantially lessening competition for the retail sale of diesel fuel in three local markets in Indiana, Michigan, and Texas.

IV. The Retail Sale of Gasoline and Diesel Fuel

The Commission alleges that the relevant product markets in which to analyze the Acquisition are the retail sale of gasoline and the retail sale of diesel fuel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel fuel for their diesel-powered vehicles and can purchase diesel fuel only at retail fuel outlets. The retail sale of gasoline and the retail sale of diesel fuel constitute separate relevant markets because the two are not interchangeable. Vehicles that run on gasoline cannot run on diesel fuel, and vehicles that run on diesel fuel cannot run on gasoline.

The Commission alleges that the relevant geographic markets in which to assess the competitive effects of the Acquisition with respect to the retail sale of gasoline are seven local markets in and around the following cities: Knox, Indiana; Kokomo, Indiana; South Bend, Indiana; Stevensville, Maryland; Edmore, Michigan; Hastings, Michigan; and Arlington, Texas. The relevant geographic markets in which to assess the competitive effects of the Acquisition with respect to the retail sale of diesel fuel are three local markets in and around the following cities: South Bend, Indiana; Edmore, Michigan; and Arlington, Texas.

The geographic markets for retail gasoline and retail diesel fuel are highly localized, depending on the unique circumstances of each area. Each relevant market is distinct and fact-dependent, reflecting many considerations, including commuting patterns, traffic flows, and outlet characteristics. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes. The geographic markets for the retail sale of diesel fuel are similar to the corresponding geographic markets for retail gasoline, as many diesel fuel consumers exhibit preferences and behaviors similar to those of gasoline consumers.

The Acquisition would substantially lessen competition in each of these local markets, resulting in seven highly concentrated markets for the retail sale of gasoline and three highly concentrated markets for the retail sale of diesel fuel. Retail fuel outlets compete on price, store format, product offerings, and location, and pay close attention to competitors in close proximity, on similar traffic flows, and with similar store characteristics. In each of the local gasoline and diesel fuel retail markets, the Acquisition would reduce the number of competitively constraining independent market participants to three or fewer. The combined entity would be able to raise prices unilaterally in markets where GPM and Empire are close competitors. Absent the Acquisition, GPM and Empire would continue to compete head to head in these local markets.

Moreover, the Acquisition would enhance the incentives for interdependent behavior in local markets where only two or three competitively constraining independent market participants would remain. Two aspects of the retail fuel industry make it vulnerable to such coordination. First, retail fuel outlets post their fuel prices on price signs that are visible from the street, allowing competitors to observe each other's fuel prices without difficulty. Second, retail fuel outlets regularly track their competitors' fuel prices and change their own prices in response. These repeated interactions give retail fuel outlets familiarity with how their competitors price and how changing prices affect fuel sales.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

V. The Proposed Consent Agreement

The proposed Consent Agreement would remedy the Acquisition's likely anticompetitive effects by requiring Respondents to divest certain retail fuel assets to an independent competitor in each local market. Each buyer of divestiture assets is an experienced operator or supplier of retail fuel sites, and will be a new entrant into the local market.

The proposed Consent Agreement requires that the divestiture be completed no later than 20 days after Respondents consummate the Acquisition. The proposed Consent Agreement further requires Respondents to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the divestiture is complete. For up to 15 months following the divestiture, Respondents must provide transitional services, as needed, to assist the buyers with the divestiture assets.

In addition to requiring outlet divestitures, the proposed Consent Agreement requires Respondents to provide the Commission notice before acquiring retail fuel assets within a fixed distance of any GPM outlet in a market involving a divestiture for ten years. The prior notice provision is necessary because an acquisition in close proximity to divested assets likely would raise the same competitive concerns as the Acquisition, and may fall below the Hart-Scott-Rodino Act premerger notification thresholds.

The proposed Consent Agreement contains additional provisions designed to ensure the effectiveness of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will issue at the time the proposed Consent Agreement is accepted for public comment. The Order to Maintain Assets requires Respondents to operate and maintain each divestiture outlet in the normal course of business, through the date Respondents complete the divestiture. The Commission may appoint an independent third party as a Monitor to oversee Respondents' compliance with the requirements of the proposed Consent Agreement.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

By direction of the Commission, Commissioner Slaughter and Commissioner Wilson not participating.

April J. Tabor,

Acting Secretary.

[FR Doc. 2020–19140 Filed 8–28–20; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project ''Identifying and Testing Strategies for Management of Opioid Use and Misuse in Older Adults in Primary Care Practices.'' This proposed information collection was previously published in the **Federal Register** on June 8, 202020 and allowed 60 days for public comment. No comments were received by AHRQ. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments on this notice must be received by 30 days after date of publication of this notice.

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: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *doris.lefkowitz@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

Identifying and Testing Strategies for Management of Opioid Use and Misuse in Older Adults in Primary Care Practices

The goals of this project are to assess and describe the current prevalence, awareness, and management of opioid use, misuse, and abuse in older adults, and identify gaps and areas of needed research. Additionally, this project will support primary care practices (PCP) in developing and testing innovative strategies, approaches, and/or tools for opioid management within the context of facilitated learning collaboratives, culminating in a Compendium of Strategies for opioid management in older adults in primary care settings. Through this project, AHRQ is addressing the gaps in knowledge around opioid use in older adults in primary care settings. To accomplish this we are synthesizing what is known about the development and testing of innovative strategies, approaches, and/or tools for opioid management of older adults with pain on opioid medication, and/or opioid use disorder.

This study is being conducted by AHRQ through its contractor, Abt Associates Inc., pursuant to AHRQ's statutory authority to conduct and support research on healthcare and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of healthcare services and with respect to quality measurement and improvement. 42 U.S.C. 299a(a)(1) and (2).

Method of Collection

To achieve the goals of this project the following data collections will be implemented:

1. We will conduct a web-based survey of primary care clinicians who care for older adults. The purpose of the survey is to assess primary care clinician experiences caring for older adult patients with chronic pain on opioids. The survey will be sent to 5,000 randomly selected primary care clinicians.

2. Participating learning collaborative practices will be asked to implement strategies related to each of the key areas on the continuum: prevention, management and treatment of opioid use, misuse and OUD in older adults. We will collect primary data via observations, interviews, and a survey, and secondary data including practice and learning collaborative documents. The following primary data collection activities are proposed:

a. PCP Clinical Staff Survey. A brief web-based survey will be emailed to all clinical staff participating in the learning collaborative at baseline before starting implementation and approximately 15 months later. We assumed 20 clinical staff per clinic site, and 24 clinics for a total of 480 staff.

b. Interviews. In-depth interviews will occur with up to three staff at each health care organization participating in the learning collaborative, for a total of up to 72 individuals. The evaluation team will conduct these interviews with:

c. Quality Improvement (QI) champion for the initiative in the clinics at baseline, mid-point and post-implementation

d. Two additional staff (*e.g.* clinician, information technology analyst, behavioral health specialist) per organization (mid-point and post-implementation).

3. Self-Assessment. The QI champion will complete a self-assessment tool at baseline. A similar tool is used in the Six Building Blocks program and the Centers for Disease Control (CDC) Opioid QI Collaborative. This tool is for clinics or health systems to assess the status of their QI efforts to improve opioid prescribing, and the extent to which care is consistent with the CDC Opioid Prescribing Guidelines.

4. Quality Improvement Measures. Each clinic will report quarterly on the QI measures. The QI measures include both process and outcome measures. Process measures are reflective of recommended clinical strategies or tools being implemented, and outcome measures examine intermediate outcomes. A data analyst at each organization will provide aggregate reports of the specified QI measures to the evaluation team on a quarterly basis over the course of a 15-month period. The QI measures are measures of opioid prescribing that are critical for understanding the potential improvements in opioid prescribing in implementing the strategies.

Estimated Annual Respondent Burden

Exhibit 1 presents estimates of the reporting burden hours for the data collection efforts. Time estimates are based on prior experiences and what can reasonably be requested of participating providers (survey) and PCPs. The number of respondents listed in column A, Exhibit 1 reflects a projected response rate for data collection efforts.

1. *Provider web-based survey.* A survey will be sent to 5,000 randomly selected primary care clinicians. The survey will include no more than 30 items and is expected to take approximately 15 minutes to complete. We anticipate a 30% response rate, resulting in 1,500 completed surveys.

2. *PCP Learning Collaboratives Primary Data Collection.*

a. *PCP Learning Collaborative Clinical Staff Survey.* A brief survey will be emailed to all clinicians at baseline before starting implementation and approximately 15 months later. We

assume 20 clinical staff per clinic site, and 24 clinics for a total of 480 staff. We assume 360 clinical staff will complete the survey based on a 75% response rate. It is expected to take up to 20 minutes to complete.

b. *Interviews.* In-depth interviews will occur with up to 3 staff at each health care organization, for a total of up to 72 individuals. The evaluation team will conduct these interviews, each lasting up to 30 minutes with:

i. QI champion for the initiative in the clinics at baseline, mid-point and post-implementation.

ii. Two additional staff (*e.g.,* clinician, information technology analyst, behavioral health specialist) per PCP at mid-point and post-implementation.

c. *Self-Assessment.* A self-assessment tool used in the Six Building Blocks program, and CDC Opioid QI Collaborative for clinics or health systems will be provided to practices to assess where they are in their QI efforts to improve opioid prescribing, and the extent to which care is consistent with the CDC Opioid Prescribing Guideline. The QI champion or lead for the effort in each of the 24 participating PCPs will respond to the self-assessment which will take approximately 15 minutes to complete.

d. *QI Measures.* Aggregate reports of the specified quality measures will be provided on a quarterly basis over the course of a 15-month period by a data analyst at each PCP. This activity will involve 12 individuals at each learning collaborative for a total of 24. We assume 40 hours total for each data analyst to collect and provide these data: twenty hours to develop a system for pulling these measures and five hours to pull and submit these reports each quarter. The QI measures are measures of opioid prescribing that are critical for understanding the potential improvements in opioid prescribing in implementing strategies and tools for management of opioid use, misuse, and abuse. Each health care organization is asked to report quarterly on the QI measures. Clinics may obtain these measures from electronic health record (EHR) data, or they may not have the sophistication or capacity to do that and may track these measures using Excel files or other methods.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Data collection method or project activity	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
	(A.)	(B.)	(C.)	(D.)
1. Web-Based Provider Survey [1]	1500	1	15/60	375
2a. Learning Collaborative Clinical Staff Survey [2]	360	2	20/60	240
2bi. Learning Collaborative QI Champion Interview	24	3	30/60	36
2bii. Learning Collaborative Staff Interview	48	2	30/60	48
2c. Learning Collaborative Self-Assessment	24	1	15/60	6
2di. Learning Collaborative QI Measures—develop system	24	1	20	480
2dii. Learning Collaborative QI Measures—pull and submit	24	4	5	480
Total	2028	n/a	n/a	1665

[1] Number of respondents reflects a 30% response rate.
[2] Number of respondents reflects a sample size assuming a 75% response rate.

Exhibit 2, below, presents the estimated annualized cost burden associated with the respondents' time to participate in this research. The total cost burden is estimated to be about $72,145.62.

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Data collection method or project activity	Number of respondents	Total burden hours	Average hourly wage rate *	Total cost burden
1. Web-Based Provider Survey [1]	1500	375	$101.82	$38,182.50
2a. Learning Collaborative Clinical Staff Survey [2]	360	240	39.42	9,460.80
2bi. Learning Collaborative QI Champion Interview [3]	24	36	54.68	1,968.48
2bii. Learning Collaborative Staff Interview [4]	48	48	39.42	1,892.16
2c. Learning Collaborative Self-Assessment [5]	24	6	54.68	328.08
2di. Learning Collaborative QI Measures—develop system [6]	24	480	21.16	10,156.80
2dii. Learning Collaborative QI Measures—pull and submit [7]	24	480	21.16	10,156.80
Total	2028	1917	n/a	72,145.62

Mean hourly wage rates for these groups of occupations were obtained from the Bureau of Labor & Statistics on ''Occupational Employment and Wages, May 2018'' found at the following URL: *http://www.bls.gov/oes/current/oes_nat.htm#b29-0000.htm.*

[1] The average hourly rate of $101.82 for the provider survey was calculated based on the 2018 mean hourly wage rate for family and general practitioners, (occupation code 29–1062).

[2] The average hourly rate of $39.42 for the learning collaborative clinical staff survey was calculated based on the 2018 mean hourly wage rate for medical and health services managers (occupation code 29–0000).

[3] The average hourly rate of $54.68 for QI champion interviews was calculated based on the 2018 mean hourly wage rate for medical and health services managers (occupation code 11–9111).

[4] The average hourly rate of $39.42 for staff interviews was calculated based on the 2018 mean hourly wage rate for medical and health services managers (occupation code 29–0000).

[5] The average hourly rate of 54.68 for the Learning Collaborative QI champion to complete the self-assessment was calculated based on the 2018 mean hourly wage rate for medical and health services managers (occupation code 11–9111).

[6] The average hourly rate of $21.16 to develop the Learning Collaborative QI measures was calculated

Request for Comments

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3520, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ's health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: August 26, 2020.

Virginia L. Mackay-Smith,

Associate Director.

[FR Doc. 2020–19093 Filed 8–28–20; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Temporary Assistance for Needy Families (TANF) Data Reporting for Work Participation (OMB #0970–0338)

AGENCY: Office of Family Assistance, Administration for Children and Families, Health and Human Services (HHS).

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) is requesting a 3-year extension of the Temporary Assistance for Needy Families (TANF) Data Reporting for Work Participation (formerly titled the Deficit Reduction Act of 2005 TANF Final Rule; OMB #0970–0338). Information collections include the TANF data verification procedures, the TANF Data Report, the Separate State Program (SSP)—Maintenance of Effort (MOE) Data Report, the Caseload Reduction Documentation Process, and the Reasonable Cause/Corrective Compliance Documentation Process. We are proposing to continue these information collections without change.

DATES: *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION:

Description: ACF is requesting a 3-year extension of the following information collections: TANF data verification procedures, the TANF Data Report, the SSP–MOE Data Report, the Caseload Reduction Documentation Process, and the Reasonable Cause/Corrective Compliance Documentation Process (OMB #0970–0338). The data and information from these reports and processes are used for program analysis and oversight, including the calculation and administration of the work participation rate and associated penalties. Congress provides Federal funds to operate TANF programs in the states, the District of Columbia, Guam, Puerto Rico, the U.S. Virgin Islands, and for approved federally recognized tribes and Alaskan Native Villages. We are proposing to continue these information collections without change.

Respondents: The 50 states of the United States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Annual number of responses per respondent	Average burden hours per response	Total annual burden hours
Preparation and Submission of Data Verification Procedures §§ 261.60—261.63	54	1	640	34,560
Caseload Reduction Documentation Process, ACF–202 §§ 261.41 & 261.44	54	1	120	6,480
Reasonable Cause/Corrective Compliance Documentation Process §§ 262.4, 262.6, & 262.7; § 261.51	54	2	240	25,920
TANF Data Report Part 265	54	4	2,201	475,416
SSP–MOE Data Report—Part 265	29	4	714	82,824
TANF Sampling and Statistical Methods Manual § 265.5	30	4	48	5,760

based on the 2018 mean hourly wage rate for medical records and health information technicians (occupation code 29–2071).

[7] The average hourly rate of $21.16 to pull and submit the Learning Collaborative QI measures was calculated based on the 2018 mean hourly wage rate for medical records and health information technicians (occupation code 29–2071).

Estimated Total Annual Burden Hours: 630,960.

Authority: 42 U.S.C. 601, 607, 609, 611, 613, and 1302.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–19304 Filed 8–28–20; 8:45 am]

BILLING CODE 4184–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Cost Study of Trauma-Specific Evidence-Based Programs Used in the Regional Partnership Grants Program (New Collection)

AGENCY: Children's Bureau, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Children's Bureau (CB), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing to collect data for a new descriptive study—the Cost Study of Trauma-Specific Evidence-Based Programs used in the Regional Partnership Grants (RPG) Program.

DATES: *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION:

Description: Since 2006, CB has awarded multiple rounds of competitive grants to state and local agencies and service providers under the RPG Program. Grants are awarded to organizations such as child welfare agencies, substance abuse treatment providers, or family court systems to develop interagency collaborations and provide services designed to increase well-being, improve permanency, and enhance the safety of children who are in or are at risk of being placed in out-of-home care as a result of a parent's or caretaker's substance abuse. Thirty-five grantees are participating in the ongoing RPG national cross-site evaluation, which examines implementation, partnerships, outcomes, and impacts. All grantees collect data on a uniform set of performance measures and report them to CB on a semi-annual basis through a web-based system. These ongoing data collection activities are approved under OMB #0970–0527. All grantees are also required to use a portion of their funding to conduct their own ''local'' program impact evaluation.

This proposed cost study adds a new and unique contribution to CB's portfolio of evaluation activities. Although the RPG cross-site evaluation will provide evidence for the effectiveness of some interventions to address the emotional effects of trauma, more information is needed about the cost of implementing these Evidence-Based Programs (EBPs).

The cost study has the key objective to determine the cost of implementing three select Trauma-Specific EBPs: Parent-Child Interaction Therapy, Seeking Safety, and Trauma-Focused Cognitive Behavioral Therapy. To carry out this objective, the study team will collect detailed cost information from nine RPG round four and five grantees who are implementing these selected EBPs. For each grantee, the study team will administer two data collection instruments: (1) A Cost Workbook used to collect comprehensive information on the cost of implementing each select program (Instrument #1), and (2) a Staff Survey and Time Log used to collect information on how program staff allocate their time (Instrument #2).

Respondents: Grantee staff.

Annual Burden Estimates: Data collection will take place within a one year period.

Instrument	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total/annual burden hours
Cost Workbook	9	1	8	72
Staff Survey and Time Log	90	1	3.6	330

Estimated Total Annual Burden Hours: 402.

Authority: The Child and Family Services Improvement and Innovation Act (Pub. L. 112–34).

Emily Ball Jabbour,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–19066 Filed 8–28–20; 8:45 am]

BILLING CODE 4184–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–1564]

Principles for Selecting, Developing, Modifying, and Adapting Patient-Reported Outcome Instruments for Use in Medical Device Evaluation; Draft Guidance for Industry, Food and Drug Administration Staff, and Other Stakeholders; Availability

AGENCY: Food and Drug Administration, Health and Human Services (HHS).

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of the draft guidance entitled ''Principles for Selecting, Developing, Modifying, and Adapting Patient-Reported Outcome Instruments for Use in Medical Device Evaluation.'' The FDA encourages the collection, analysis, and integration of patient perspectives in the development, evaluation, and surveillance of medical devices, including digital health technologies. Patient-reported outcome (PRO) instruments facilitate the systematic collection of patient perspectives as scientific evidence to support the regulatory and healthcare decision-making process. This draft guidance describes principles that should be considered when using PRO

instruments in the evaluation of medical devices and provides recommendations about the importance of ensuring the measures are ''fit-for-purpose.'' This draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by October 30, 2020 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2020–D–1564 for ''Principles for Selecting, Developing, Modifying, and Adapting Patient-Reported Outcome Instruments for Use in Medical Device Evaluation.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled ''Principles for Selecting, Developing, Modifying, and Adapting Patient-Reported Outcome Instruments for Use in Medical Device Evaluation'' to the Office of Policy, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Michelle Tarver, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5608, Silver Spring, MD 20993–0002, 301–796–6884 or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

A PRO instrument can be used in a clinical investigation to measure the effects of a medical intervention or changes in the health status of a patient. PRO instruments allow for collection of certain data as evidence of safety and effectiveness which is complementary to other clinical outcomes and/or biomarkers. Information from well-defined and reliable PRO instruments can provide valuable evidence for benefit-risk assessments and can be used in medical device labeling to communicate the effect of a treatment on patient symptoms, functioning, or quality of life when the labeling is consistent with the PRO instrument's documented measurement capability. PRO instruments may be used to inform a patient's eligibility for inclusion within a study, to capture safety or effectiveness outcomes, and may be aligned as primary or secondary endpoints or used as a stand-alone outcome assessment or component of a composite endpoint. FDA determines the validity evidence needed to support use of a PRO instrument for a particular regulatory purpose informed by the way it is used in the clinical investigation. FDA uses the term ''fit-for-purpose'' to describe this flexible approach. In addition to providing evidence to assess the safety and effectiveness of medical devices, PRO instruments can measure the impact of medical devices on patient well-being and other concepts that may influence payers, healthcare providers, and patients when making decisions about potential treatments or management options.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115).

The draft guidance, when finalized, will represent the current thinking of FDA on ''Principles for Selecting, Developing, Modifying, and Adapting Patient-Reported Outcome Instruments for Use in Medical Device Evaluation.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* This guidance document is also available at *https://www.regulations.gov* or *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances.* Persons unable to download an electronic copy of ''Principles for Selecting, Developing, Modifying, and Adapting Patient-Reported Outcome Instruments for Use in Medical Device Evaluation'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 18042 to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in the following FDA regulations and guidance have been approved by OMB as listed in the following table:

21 CFR part or guidance	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120
814, subparts A through E	Premarket approval	0910–0231
814, subpart H	Humanitarian Device Exemption	0910–0332
812	Investigational Device Exemption	0910–0078
''De Novo Classification Process (Evaluation of Automatic Class III Designation)''.	De Novo classification process	0910–0844
''Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff''.	Q-submissions	0910–0756
800, 801, and 809	Medical Device Labeling Regulations	0910–0485

Dated: August 21, 2020.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2020–19094 Filed 8–28–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2019–N–3657; FDA–2019–N–6085; FDA–2017–N–6381; FDA–2017–N–0084; FDA–2013–N–0731; FDA–2019–N–5971; FDA–2014–N–1021; and FDA–2019–N–3018]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approvals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of information collections that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The following is a list of FDA information collections recently approved by OMB under section 3507 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The OMB control number and expiration date of OMB approval for each information collection are shown in table 1. Copies of the supporting statements for the information collections are available on the internet at *https://www.reginfo.gov/public/do/PRAMain.* 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.

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB

Title of collection	OMB control number	Date approval expires
Accreditation Scheme for Conformity Assessment Pilot Program	0910–0889	6/30/2023
General Administrative Practice and Procedures	0910–0191	7/31/2023
Records and Reports Concerning Experience With Approved New Animal Drugs	0910–0284	7/31/2023
Adverse Event Program for Medical Devices (Medical Product Safety Network	0910–0471	7/31/2023
Human Cells, Tissues, and Cellular and Tissue-Based Products: Establishment Registration and Listing; Eligibility Determination for Donors; and Current Good Tissue Practice	0910–0543	7/31/2023
Recommendations to Reduce the Risk of Transfusion-Transmitted of Infection in Whole Blood and Blood Components; Agency Guidance	0910–0681	7/31/2023
Food Labeling; Gluten-Free Labeling of Fermented or Hydrolyzed Foods	0910–0817	8/31/2023

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB—Continued

Title of collection	OMB control number	Date approval expires
Healthcare Provider Perception of Boxed Warning Information Survey	0910–0890	8/31/2023

Dated: August 24, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–19092 Filed 8–28–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2019–E–2091 and FDA–2019–E–2092]

Determination of Regulatory Review Period for Purposes of Patent Extension; POTELIGEO

AGENCY: Food and Drug Administration, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for POTELIGEO and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by October 30, 2020. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by March 1, 2021. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

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 October 30, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of October 30, 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 Nos. FDA–2019–E–2091 and FDA–2019–E–2092 For ''Determination of Regulatory Review Period for Purposes of Patent Extension; POTELIGEO.'' 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 § 10.20 (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: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological product becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product POTELIGEO (mogamulizumab-kpkc). POTELIGEO is indicated for the treatment of adult patients with relapsed or refractory mycosis fungoides or Sézary syndrome after at least one prior systemic therapy. Subsequent to this approval, the USPTO received patent term restoration applications for POTELIGEO (U.S. Patent Nos. 6,989,145 and 7,504,104) from Kyowa Hakko Kirin, and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated June 21, 2019, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of POTELIGEO represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for POTELIGEO is 3,536 days. Of this time, 3,227 days occurred during the testing phase of the regulatory review period, while 309 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* December 4, 2008. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on December 4, 2008.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* October 4, 2017. FDA has verified the applicant's claim that the biologics license application (BLA) for POTELIGEO (BLA 761051) was initially submitted on October 4, 2017.

3. *The date the application was approved:* August 8, 2018. FDA has verified the applicant's claim that BLA 761051 was approved on August 8, 2018.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,826 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see DATES). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see DATES), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: August 24, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–19036 Filed 8–28–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2019–E–3166 and FDA–2019–E–3174]

Determination of Regulatory Review Period for Purposes of Patent Extension; ELZONRIS

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for ELZONRIS and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by October 30, 2020. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by March 1, 2021. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

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 October 30, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of October 30, 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 Nos. FDA–2019–E–3166 and FDA–2019–E–3174 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; ELZONRIS.'' 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 and 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 § 10.20 (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: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological product becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product ELZONRIS (tagraxofusp-erzs). ELZONRIS is indicated for the treatment of blastic plasmacytoid dendritic cell neoplasm in adults and in pediatric patients 2 years and older. Subsequent to this approval, the USPTO received patent term restoration applications for ELZONRIS (U.S. Patent Nos. 9,181,317 and 9,631,006) from Scott & White Memorial Hospital, and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated February 24, 2020, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of ELZONRIS represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for ELZONRIS is 5,541 days. Of this time, 5,357 days occurred during the testing phase of the regulatory review period, while 184 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* October 22, 2003. FDA has verified the applicant's claims that the date the investigational new drug

application became effective was on October 22, 2003.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* June 21, 2018. FDA has verified the applicant's claims that the biologics license application (BLA) for ELZONRIS (BLA 761116) was initially submitted on June 21, 2018.

3. *The date the application was approved:* December 21, 2018. FDA has verified the applicant's claims that BLA 761116 was approved on December 21, 2018.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 660 days or 394 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket Nos. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: August 24, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–19085 Filed 8–28–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–D–0369]

Product-Specific Guidances; Draft and Revised Draft Guidances for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of additional draft and revised draft product-specific guidances. The guidances provide product-specific recommendations on, among other things, the design of bioequivalence (BE) studies to support abbreviated new drug applications (ANDAs). In the **Federal Register** of June 11, 2010, FDA announced the availability of a guidance for industry entitled ''Bioequivalence Recommendations for Specific Products'' that explained the process that would be used to make product-specific guidances available to the public on FDA's website. The guidances identified in this notice were developed using the process described in that guidance.

DATES: Submit either electronic or written comments on the draft guidance by October 30, 2020 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2007–D–0369 for ''Product-Specific Guidances; Draft and Revised Draft Guidances for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidances to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance documents.

FOR FURTHER INFORMATION CONTACT: Mara Miller, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4709C, Silver Spring, MD 20993–0002, 301–796–0683.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of June 11, 2010 (75 FR 33311), FDA announced the availability of a guidance for industry entitled ''Bioequivalence Recommendations for Specific Products'' that explained the process that would be used to make product-specific guidances available to the public on FDA's website at *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm.*

As described in that guidance, FDA adopted this process as a means to develop and disseminate product-specific guidances and provide a meaningful opportunity for the public to consider and comment on those guidances. Under that process, draft guidances are posted on FDA's website and announced periodically in the **Federal Register**. The public is encouraged to submit comments on those recommendations within 60 days of their announcement in the **Federal Register**. FDA considers any comments received and either publishes final guidances or publishes revised draft guidances for comment. Guidances were last announced in the **Federal Register** on June 4, 2020. This notice announces draft product-specific guidances, either new or revised, that are posted on FDA's website.

II. Drug Products for Which New Draft Product-Specific Guidances are Available

FDA is announcing the availability of new draft product-specific guidances for industry for drug products containing the following active ingredients:

TABLE 1—NEW DRAFT PRODUCT-SPECIFIC GUIDANCES FOR DRUG PRODUCTS

Active Ingredient(s)
Alpelisib
Amlodipine benzoate
Amoxicillin; Clarithromycin; Omeprazole
Amoxicillin; Omeprazole magnesium; Rifabutin
Bortezomib
Darolutamide
Diroximel fumarate
Drospirenone
Empagliflozin; Linagliptin; Metformin hydrochloride
Erdafitinib
Esketamine hydrochloride
Gallium DOTATOC Ga–68
Glasdegib maleate
Lamivudine; Tenofovir disoproxil fumarate
Larotrectinib sulfate
Lefamulin acetate
Sumatriptan
Tafenoquine succinate
Talc

III. Drug Products for Which Revised Draft Product-Specific Guidances are Available

FDA is announcing the availability of revised draft product-specific guidances for industry for drug products containing the following active ingredients:

TABLE 2—REVISED DRAFT PRODUCT-SPECIFIC GUIDANCES FOR DRUG PRODUCTS

Active Ingredient(s)
Abacavir sulfate; Dolutegravir sodium; Lamivudine
Amphotericin B
Budesonide
Dolutegravir sodium
Dolutegravir sodium; Rilpivirine hydrochloride
Esomeprazole magnesium
Ketorolac tromethamine
Loteprednol etabonate; Tobramycin
Maraviroc
Metoprolol succinate
Mycophenolate mofetil (multiple referenced listed drugs)
Omega-3-acid ethyl esters
Rivaroxaban
Sodium polystyrene sulfonate
Theophylline (multiple referenced listed drugs)

For a complete history of previously published **Federal Register** notices related to product-specific guidances, go to *https://www.regulations.gov* and enter Docket No. FDA–2007–D–0369.

These draft guidances are being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). These draft guidances, when finalized, will represent the current thinking of FDA on, among other things, the product-specific design of BE studies to support ANDAs. They do not establish any rights for any person and are not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

IV. Electronic Access

Persons with access to the internet may obtain the draft guidances at either *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs* or *https://www.regulations.gov.*

Dated: August 26, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–19164 Filed 8–28–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Communication Disorders Review Committee, October 15, 2020, 08:00 a.m. to October 16, 2020, 05:00 p.m., Embassy Suites—Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC, 20015 which was published in the **Federal Register** on January 13, 2020, 85 FR 1816.

This notice is being amended to change the meeting location from in person to a virtual meeting. The meeting is closed to the public.

Dated: August 25, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–19072 Filed 8–28–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Community Influences on Health Behavior Study Section.

Date: September 23–25, 2020.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Tasmeen Weik, DRPH, MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3141, Bethesda, MD 20892, (301) 827–6480, *weikts@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Cardiovascular and Respiratory Sciences AREA/REAP Review.

Date: September 25, 2020.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Xiang-Ning Li, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5112, MSC 7854, Bethesda, MD 20892, (301) 435–1744, *lixiang@csr.nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Lung Cellular, Molecular, and Immunobiology Study Section.

Date: September 29–30, 2020.

Time: 9:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: George M Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435–0696, *barnasg@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel PAR Panel; Technology Development and Research for Coronavirus Disease 2019 (COVID–19).

Date: September 29–30, 2020.

Time: 9:30 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Kee Forbes, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7806, Bethesda, MD 20892, (301) 272–4865, *kee.forbes@nih.gov*.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group Pathophysiological Basis of Mental Disorders and Addictions Study Section

Date: September 30-October 1, 2020.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Boris P Sokolov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217A, MSC 7846, Bethesda, MD 20892, (301) 408–9115, *bsokolov@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: August 25, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–19071 Filed 8–28–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Time-Sensitive Obesity Prevention.

Date: September 16, 2020.

Time: 3:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7353, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: August 25, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–19073 Filed 8–28–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Clinical Research Center Application (P50) Review.

Date: September 24, 2020.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NSC, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Shiguang Yang, DVM, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Room 8349, Bethesda, MD 20892, (301) 496–8683, *yangshi@nidcd.nih.gov*.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel, NIDCD Clinical Trial Review.

Date: October 1, 2020.

Time: 12:00 p.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NSC Building, 6001 Executive Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Katherine Shim, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIH/NIDCD, 6001 Executive Blvd., Room 8351, Bethesda, MD 20892, (301) 496–8683, *katherine.shim@nih.gov*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel, Translational Grant Review.

Date: October 7, 2020.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NSC Building, 6001 Executive Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Sheo Singh, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, 6001 Executive Blvd., Room 8351, Bethesda, MD 20892, (301) 496–8683, *singhs@nidcd.nih.gov*.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Hearing and Balance Application Review.

Date: October 8–9, 2020.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NSC Building, 6001 Executive Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Eliane Lazar-Wesley, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, 6001 Executive Boulevard, Room 8339, MSC 9670, Bethesda, MD 20892–8401, (301) 496–8683, *el6r@nih.gov*.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Chemosensory Fellowship Review.

Date: October 14, 2020.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NSC, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Shiguang Yang, DVM, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Room 8349, Bethesda, MD 20892, (301) 496–8683, *yangshi@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Clinical Trials.

Date: October 29, 2020.

Time: 12:00 p.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NSC, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Eliane Lazar-Wesley, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, 6001 Executive Boulevard, Room 8339, MSC 9670, Bethesda, MD 20892–8401, (301) 496–8683, *el6r@nih.gov*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: August 25, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–19070 Filed 8–28–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Library of Medicine Board of Scientific Counselors.

The meeting will be open to the public as indicated below. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL LIBRARY OF MEDICINE, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Library of Medicine Board of Scientific Counselors.

Date: October 15–16, 2020.

Open: October 15, 2020, 11:00 a.m. to 12:15 p.m.

Agenda: Program Discussion and Senior Investigator Report.

Place: Virtual Meeting.

Closed: October 15, 2020, 12:15 p.m. to 12:30 p.m.

Agenda: To review and evaluate personal qualifications, performance, and competence of individual investigators.

Open: October 15, 2020, 12:30 p.m. to 1:15 p.m.

Agenda: Senior Investigator Report

Closed: October 15, 2020, 1:15 p.m. to 1:30 p.m.

Agenda: To review and evaluate personal qualifications, performance, and competence of individual investigators

Open: October 15, 2020, 1:45 p.m. to 2:30 p.m.

Agenda: Senior Investigator Report

Closed: October 15, 2020, 2:30 p.m. to 2:45 p.m.

Agenda: To review and evaluate personal qualifications, performance, and competence of individual investigators

Open: October 15, 2020, 3:00 p.m. to 4:00 p.m.

Agenda: Poster Session

Closed: October 15, 2020, 4:15 p.m. to 4:45 p.m.

Agenda: Reports and Discussion

Open: October 16, 2020, 11:00 a.m. to 11:45 a.m.

Agenda: Senior Investigator Report

Place: Virtual Meeting

Closed: October 16, 2020, 11:45 a.m. to 12:00 p.m.

Agenda: To review and evaluate personal qualifications, performance, and competence of individual investigators

Closed: October 16, 2020, 12:30 p.m. to 1:30 p.m.

Agenda: Reports and Discussion

Open: October 16, 2020, 1:30 p.m. to 3:15 p.m.

Agenda: Updates and Planning Session

Contact Person: David Landsman, Ph.D., Chief, Computational Biology Branch, National Center for Biotechnology Information, National Library of Medicine, NIH, Building 38A, Room 6N601, Bethesda, MD 20892, 301–435–5981, *landsman@ncbi.nlm.nih.gov.*

Any member of the public may submit written comments no later than 15 days after the meeting. Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Open sessions of this meeting will be broadcast to the public and available for viewing at *https://videocast.nih.gov* on October 15–16, 2020. Please direct any questions to the Contact Person listed on this notice.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: August 25, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–19100 Filed 8–28–20; 8:45 am]

BILLING CODE 4140–01–P

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Notice of Amendments to the Program Comment To Avoid Duplicative Reviews for the Wireless Communications Facilities Construction and Modification

AGENCY: Advisory Council on Historic Preservation

ACTION: Notice of Issuance of Amendments to the Program Comment to Avoid Duplicative Reviews for the Wireless Communications Facilities Construction and Modification.

SUMMARY: The Advisory Council on Historic Preservation (ACHP) has approved amendments to the Program Comment that sets forth the way in which various agencies comply with Section 106 of the National Historic Preservation Act for telecommunications project already subject to Section 106 review by the Federal Communications Commission. The amendments add the Office of Surface Mining Reclamation and Enforcement to the Program Comment and authorize the Chairman of the ACHP to amend the Program Comment to add new agencies to it or extend its duration.

DATES: The amendments went into effect on July 31, 2020.

ADDRESSES: Address any questions concerning the amendments to Jaime Loichinger, Office of Federal Agency Programs, Advisory Council on Historic Preservation, 401 F Street NW, Suite 308, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Jaime Loichinger, (202) 517–0219, *jloichinger@achp.gov.*

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108, requires federal agencies to consider the effects of projects they carry out, license, or assist (undertakings) on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued the regulations that set forth the process through which federal agencies comply with these duties at 36 CFR part 800 (Section 106 regulations).

Under Section 800.14(e) of those regulations, agencies can request the ACHP to provide a ''Program Comment'' on a particular category of undertakings in lieu of conducting individual reviews of each individual undertaking under such category, as set forth in 36 CFR 800.4 through 800.7. An agency can meet its Section 106 responsibilities regarding the effects of particular aspects of those undertakings by taking into account an applicable Program Comment and following the steps set forth in that comment.

I. Background on Amendments

On October 23, 2009, the ACHP issued the ''Program Comment for Streamlining Section 106 Review for Wireless Communications Facilities Construction and Modification Subject to Review Under the FCC Nationwide Programmatic Agreement and/or the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas'' (Broadband PC). The Broadband PC relieves various agencies from conducting duplicate reviews under Section 106 when those agencies assist a telecommunications project subject to Section 106 review by the Federal Communications Commission (FCC). For background on the original Broadband PC, please refer to 74 FR 60280–60281 (November 20, 2009).

Earlier this year, the Office of Surface Mining Reclamation and Enforcement (OSMRE) asked the ACHP to include them in the Broadband PC. OSMRE has made funding available for projects in the Abandoned Mine Land Reclamation Economic Development Pilot Program (AMLPP) as authorized by the Consolidated Appropriations Acts (Pub. L. 114–113 (2016); Pub. L. 115–31 (2017); Pub. L. 115–141 (2018), and Pub. L. 116–6 (2019)), and which may continue under annual appropriation cycles. OSMRE is providing financial assistance under the AMLPP to the West Virginia Department of Environmental Protection (DEP), issued to the Upshur County Development Authority (UCDA) as a sub-recipient, for the purposes of: (1) Increasing the availability of broadband to unserved and under-served communities in West Virginia by construction of an open-access transport network across West Virginia on Abandoned Mine Land sites; and (2) constructing a series of towers consisting of fiber connected towers as the network backbone with wireless transport to aggregation and last mile towers using a ''hub and spoke'' architecture.

During consultation for ways to handle Section 106 reviews for these projects, it became apparent that some of the proposed actions would be subject to FCC's existing Section 106 Nationwide Programmatic Agreement and collocation Programmatic Agreement, and that OSMRE would benefit from being added to the Broadband PC to avoid duplicative reviews. This would allow OSMRE to use the exemptions contained in those FCC agreements, and streamline review in the future. OSMRE would still need to have ways to comply with Section 106 to address the other components of their undertakings that do not include the construction of the cell towers, but adding them to the Broadband PC would move along a good portion of the projects consistent with how FCC handles tower construction.

ACHP staff also took the opportunity to propose authorizing the ACHP

Chairman to amend the Broadband PC without the need for a full ACHP membership vote, to add new agencies to the Broadband PC or extend its duration. The ACHP Chairman could do that after notifying the ACHP membership about such amendments and providing them an opportunity to object and thereby move the matter to full membership consideration.

The ACHP membership voted in favor of issuing the mentioned amendments on July 31, 2020.

II. Text of Broadband PC as Amended

What follows is the current text of the Broadband PC, incorporating the amendments adopted on August 31, 2020 and previously adopted amendments:

Program Comment for Streamlining Section 106 Review for Wireless Communications Facilities Construction and Modification Subject to Review Under the FCC Nationwide Programmatic Agreement and/or the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (as amended on September 24, 2015 and July 31, 2020).

I. Background

Due to their role in providing financial assistance and/or carrying out other responsibilities for undertakings that involve the construction of communications towers and collocation of communications equipment on existing facilities, the Rural Utilities Service (RUS), the National Telecommunications and Information Administration (NTIA), the Department of Homeland Security (DHS), the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA), the First Responder Network Authority (FirstNet), and the Office of Surface Mining Reclamation and Enforcement in the U.S. Department of the Interior (OSMRE) are required to comply with Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108, and its implementing regulations at 36 CFR part 800 (Section 106 review) for such undertakings. Some of those communications towers and antennas are also federal undertakings of the Federal Communications Commission (FCC), and therefore undergo, or are exempted from, Section 106 review under the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the FCC (FCC Nationwide PA) and the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, as amended (FCC Collocation PA). The FCC Nationwide PA was executed by the FCC, the Advisory Council on Historic Preservation (ACHP), and the National Conference of State Historic Preservation Officers (NCSHPO) on October 4, 2004. The FCC Collocation PA was executed by the FCC, ACHP, and NCSHPO on March 16, 2001, and was amended on August 29, 2016 and July 10, 2020. The undertakings addressed by the FCC Nationwide PA primarily include the construction and modification of communications towers. The undertakings addressed by the FCC Collocation PA include the collocation of communications equipment on existing structures and towers.

This Program Comment is intended to streamline Section 106 review of the construction and modification of communications towers and antennas for which FCC and RUS, NTIA, DHS, FRA, FTA, FirstNet, or OSMRE share Section 106 responsibility. Such streamlining is consistent with the broad purpose of the Presidential Memorandum: Unleashing the Wireless Broadband Revolution dated June 28, 2010, Executive Order 13616: Accelerating Broadband Infrastructure Deployment, dated June 14, 2012, and the Presidential Memorandum: Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training, dated March 23, 2015.

The term ''DHS,'' as used in this Program Comment, refers to all of that agency's operational and support components. For a list of such components, you may refer to: *http://www.dhs.gov/components-directorates-and-offices.*

Nothing in this Program Comment alters or modifies the FCC Nationwide PA or the FCC Collocation PA (collectively, the FCC NPAs), or imposes Section 106 responsibilities on the FCC for elements of a RUS, NTIA, DHS, FRA, FTA, FirstNet, or OSMRE undertaking that are unrelated to a communications facility within the FCC's jurisdiction or are beyond the scope of the FCC NPAs.

The Program Comment, as originally issued in October 23, 2009, only covered RUS, NTIA, and the Federal Emergency Management Agency (FEMA). Because of the successful implementation of this Program Comment, as originally issued, the DHS sought to expand its participation beyond FEMA to all of its components which provide federal assistance for the construction and modification of communications towers, and the collocation of communications equipment on existing structures and towers. Four additional agencies, the FRA, which supports railroading with funding that may be used to improve safety and rail infrastructure, the FTA, which provides financial assistance to eligible applicants to support public transportation, FirstNet, an independent authority within the NTIA that was created by Congress in 2012, and OSMRE, which supports reclamation and economic growth for abandoned mine lands, also wished to become part of Program Comment in order to benefit from the efficiencies in the timely delivery of their respective programs.

DHS, FRA, FTA, and OSMRE provide financial assistance to applicants for various undertakings, including the construction of communications towers and collocation of communications equipment on existing facilities. Conversely, FirstNet is the entity responsible for ensuring the building, deployment, and operation of the nationwide public safety broadband network, which will likely include the construction of communications towers and the collocation of equipment on existing facilities. DHS, FRA, FTA, FirstNet, and OSMRE must therefore comply with Section 106 for these undertakings. Some of the communications towers and collocated communications equipment assisted by DHS components, FRA, FTA, FirstNet, and OSMRE are also the FCC's undertakings, and therefore undergo Section 106 review governed by the FCC NPAs.

Accordingly, the ACHP amended this Program Comment on September 24, 2015, to add all DHS components, FRA, FTA and FirstNet to the list of agencies subject to the terms of the Program Comment along with RUS, NTIA, and FEMA, and to extend its period of applicability, which originally would have ended on September 30, 2015. The ACHP subsequently amended this Program Comment on July 31, 2020, to add OSMRE to the list of agencies subject to the terms of the Program Comment.

II. Establishment and Authority

This Program Comment was originally issued by the ACHP on October 23, 2009 pursuant to 36 CFR 800.14(e), and was subsequently amended, effective on September 24, 2015 and July 31, 2020, pursuant to its Stipulation VI.

III. Date of Effect

This Program Comment, as originally issued, went into effect on October 23, 2009. It was subsequently amended to its current version on September 24, 2015 and July 31, 2020, effective on those dates respectively.

IV. Use of This Program Comment To Comply With Section 106 for the Effects of Facilities Construction or Modification Reviewed Under the FCC Nationwide PA and/or the FCC Collocation PA

RUS, NTIA, DHS, FRA, FTA, FirstNet, and OSMRE will not need to comply with Section 106 with regard to the effects of communications facilities construction or modification that has either undergone or will undergo Section 106 review, or is exempt from Section 106 review, by the FCC under the FCC Nationwide PA and/or the FCC Collocation PA. For purposes of this program comment, review under the FCC Nationwide PA means the historic preservation review that is necessary to complete the FCC's Section 106 responsibility for an undertaking that is subject to the FCC Nationwide PA.

When an RUS, NTIA, DHS, FRA, FTA, FirstNet, or OSMRE undertaking includes both communications facilities construction or modification components that are covered by the FCC Nationwide PA or Collocation PA and components other than such communications facilities construction or modification, RUS, NTIA, DHS, FRA, FTA, FirstNet, or OSMRE, as applicable, will comply with Section 106 in accordance with the process set forth at 36 CFR 800.3 through 800.7, or 36 CFR 800.8(c), or another applicable alternate procedure under 36 CFR 800.14, for the components other than communications facilities construction or modification. However, RUS, NTIA, DHS, FRA, FTA, FirstNet, or OSMRE will not have to consider the effects of the communications facilities construction or modification component of the undertaking on historic properties.

Whenever RUS, NTIA, DHS, FRA, FTA, FirstNet, or OSMRE uses this Program Comment for such undertakings, RUS, NTIA, DHS, FRA, FTA, FirstNet, or OSMRE will apprise the relevant State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) of the use of this Program Comment for the relevant communications facilities construction or modification component.

V. Reporting

No later than March 1, 2016, the FCC, RUS, NTIA, DHS, FRA, FTA, and FirstNet, and in the case of OSMRE no later than February 1, 2021, will inform the ACHP as to the reporting system that they will utilize to collectively provide annual reports to the ACHP. The intent of the annual reports will be to enable the monitoring of the use of the Program Comment.

VI. Amendment

The terms of this Program Comment may be amended by the ACHP membership after the ACHP consults with FCC, RUS, NTIA, DHS, FRA, FTA, FirstNet, OSMRE, and other parties, as appropriate. Such amendments will then be published in the **Federal Register**.

However, terms of this Program Comment that solely affect its duration or add a Federal agency to it may be amended by the Chairman of the ACHP after notifying the rest of the ACHP membership in writing and not receiving a written objection therefrom within 10 calendar days, and consulting the FCC, RUS, NTIA, DHS, FRA, FTA, FirstNet, OSMRE and other parties as appropriate. Such amendments will then be published in the **Federal Register**. If the ACHP Chairman receives an ACHP member written objection within the 10-day period, the amendment shall not be issued by the ACHP Chairman alone but may be issued by the ACHP membership.

Any Federal agency that wishes to take advantage of this Program Comment may notify the ACHP to that effect. An amendment, as set forth above, is needed in order to add such an agency to this Program Comment.

VII. Sunset Clause

This Program Comment will terminate on September 30, 2025, unless it is amended to extend the period in which it is in effect.

The ACHP may extend the Program Comment for an additional five years beyond 2025 through an amendment per Stipulation VI of this Program Comment.

VIII. Termination

The ACHP may terminate this Program Comment, pursuant to 36 CFR 800.14(e)(6), by publication of a notice in the **Federal Register** thirty (30) days before the termination takes effect.

(END OF DOCUMENT)

Authority: 36 CFR 800.14(e).

Dated: August 6, 2020.

Javier Marqués,

General Counsel.

[FR Doc. 2020–19165 Filed 8–28–20; 8:45 am]

BILLING CODE 4310–K6–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4557–DR; Docket ID FEMA–2020–0001]

Iowa; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Iowa (FEMA–4557–DR), dated August 17, 2020, and related determinations.

DATES: This amendment was issued August 20, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Iowa is hereby amended to include Individual Assistance for the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 17, 2020.

Linn County for Individual Assistance (already designated for Public Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19133 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4553–DR; Docket ID FEMA–2020–0001]

North Dakota; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Dakota (FEMA–4553–DR), dated July 9, 2020, and related determinations.

DATES: This change occurred on August 11, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, James R. Stephenson, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Nancy M. Casper as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19131 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4470–DR; Docket ID FEMA–2020–0001]

Mississippi; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4470–DR), dated December 6, 2019, and related determinations.

DATES: This change occurred on August 24, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jose M. Girot as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19126 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3540–EM; Docket ID FEMA–2020–0001]

Texas; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Texas (FEMA–3540–EM), dated August 24, 2020, and related determinations.

DATES: This amendment was issued August 25, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of an emergency declaration for the State of Texas is hereby amended to include reimbursement for eligible emergency protective measures for the following areas determined to have been adversely affected by the event declared an emergency by the President in his declaration of August 24, 2020.

The counties of Aransas, Bexar, Brazoria, Calhoun, Cameron, Chambers, Galveston, Hardin, Harris, Jackson, Jasper, Jefferson, Kenedy, Kleberg, Liberty, Matagorda, Newton, Nueces, Orange, Refugio, San Patricio, Victoria, and Willacy for reimbursement for eligible emergency protective measures (already designated for emergency protective measures (Category B), limited to direct Federal assistance and reimbursement for mass care including evacuation and shelter support).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19121 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4551–DR; Docket ID FEMA–2020–0001]

Mississippi; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4551–DR), dated July 9, 2020, and related determinations.

DATES: This change occurred on August 24, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jose M. Girot as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19130 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4450–DR; Docket ID FEMA–2020–0001]

Mississippi; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4450–DR), dated June 20, 2019, and related determinations.

DATES: This change occurred on August 24, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jose M. Girot as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19125 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4429–DR;Docket ID FEMA–2020–0001]

Mississippi; Amendment No. 8 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4429–DR), dated April 23, 2019, and related determinations.

DATES: This change occurred on August 24, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jose M. Girot as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19124 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4538–DR;Docket ID FEMA–2020–0001]

Mississippi; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4538–DR), dated April 23, 2020, and related determinations.

DATES: This change occurred on August 24, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jose M. Girot as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19129 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0002; Internal Agency Docket No. FEMA–B–2050]

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 November 30, 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–2050, 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
Rio Blanco County, Colorado and Incorporated Areas Project: 15-08-0644S Preliminary Date: March 5, 2020	
Town of Meeker	Town Hall, 345 Market Street, Meeker, CO 81641.
Town of Rangely	Town Hall, 209 East Main Street, Rangely, CO 81648.
Unincorporated Areas of Rio Blanco County	Rio Blanco County Clerk and Recorder's Office, 555 Main Street, Meeker, CO 81641.

[FR Doc. 2020–19062 Filed 8–28–20; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Internal Agency Docket No. FEMA–4556–DR;

Docket ID FEMA–2020–0001]

Arkansas; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Arkansas (FEMA–4556–DR), dated July 10, 2020, and related determinations.

DATES: This amendment was issued August 21, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Arkansas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 10, 2020.

Monroe and Philips Counties for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19132 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3538–EM; Docket ID FEMA–2020–0001]

Louisiana; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Louisiana (FEMA–3538–EM), dated August 23, 2020, and related determinations.

DATES: This amendment was issued August 25, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of an emergency declaration for the State of Louisiana is hereby amended to include reimbursement for eligible emergency protective measures for the following areas among those areas determined to have been adversely affected by the event declared an emergency by the President in his declaration of August 23, 2020.

The parishes of Acadia, Allen, Ascension, Assumption, Beauregard, Calcasieu, Cameron, East Baton Rouge, East Feliciana, Evangeline, Iberia, Iberville, Jefferson, Jefferson Davis, Lafayette, Lafourche, Livingston, Orleans, Plaquemines, Pointe Coupee, St. Bernard, St. Charles, St. Helena, St. James, St. John the Baptist, St. Landry, St. Martin, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Vermilion, Washington, West Baton Rouge, and West Feliciana for reimbursement for eligible emergency protective measures (already designated for emergency protective measures (Category B), limited to direct Federal assistance and reimbursement for mass care including evacuation and shelter support).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora

Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19120 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4478–DR; Docket ID FEMA–2020–0001]

Mississippi; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4478–DR), dated March 12, 2020, and related determinations.

DATES: This change occurred on August 24, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jose M. Girot as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19127 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4536–DR;Docket ID FEMA–2020–0001]

Mississippi; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4536–DR), dated April 16, 2020, and related determinations.

DATES: This change occurred on August 24, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jose M. Girot as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19128 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4399–DR;Docket ID FEMA–2020–0001]

Florida; Amendment No. 13 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Florida (FEMA–4399–DR), dated October 11, 2018, and related determinations.

DATES: This change occurred on August 17, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Jeffrey L. Coleman, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Brett Howard as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19122 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4415–DR; Docket ID FEMA–2020–0001]

Mississippi; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4415–DR), dated February 14, 2019, and related determinations.

DATES: This change occurred on August 24, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jose M. Girot as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19123 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below. The FIRM and FIS report are the basis of the floodplain management measures that a 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 Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report are used by insurance agents and others to calculate appropriate flood insurance premium rates for buildings and the contents of those buildings.

DATES: The date of January 15, 2021 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *https://msc.fema.gov* by the date indicated above.

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 Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(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
Jefferson County, Colorado and Incorporated Areas Docket No.: FEMA–B–1946	
City of Arvada	Engineering Division, 8101 Ralston Road, Arvada, CO 80002.
Unincorporated Areas of Jefferson County	Jefferson County Planning and Zoning Division, 100 Jefferson County Parkway, Suite 3550, Golden, CO 80419.

Community	Community map repository address
Larimer County, Colorado and Incorporated Areas Docket No.: FEMA–B–1950	
Town of Berthoud	Town Hall, 807 Mountain Avenue, Berthoud, CO 80513.
Town of Johnstown	Town Hall, 450 South Parish Avenue, Johnstown, CO 80534.
Unincorporated Areas of Larimer County	Larimer County Courthouse Offices Building, 200 West Oak Street, Suite 3000, Fort Collins, CO 80521.
Citrus County, Florida and Incorporated Areas Docket No.: FEMA–B–1950	
City of Crystal River	Planning and Zoning Department, 123 Northwest Highway 19, Crystal River, FL 34428.
Unincorporated Areas of Citrus County	Citrus County Building Division, 3600 West Sovereign Path, Suite 111, Lecanto, FL 34461.
Hernando County, Florida and Incorporated Areas Docket No.: FEMA–B–1950	
Unincorporated Areas of Hernando County	Hernando County Zoning Division, 789 Providence Boulevard, Brooksville, FL 34601.
Story County, Iowa and Incorporated Areas Docket No.: FEMA–B–1940	
City of Ames	City Hall, 515 Clark Avenue, Ames, IA 50010.
City of Cambridge	City Hall, 225 Water Street, Cambridge, IA 50046.
City of Collins	City Hall, 212 Main Street, Collins, IA 50055.
City of Gilbert	City Hall, 105 Southeast 2nd Street, Gilbert, IA 50105.
City of Huxley	City Hall, 515 North Main Avenue, Huxley, IA 50124.
City of Maxwell	City Hall, 107 Main Street, Maxwell, IA 50161.
City of McCallsburg	City Hall, 425 Main Street, McCallsburg, IA 50154.
City of Nevada	City Hall, 1209 6th Street, Nevada, IA 50201.
City of Roland	City Hall, 208 North Main Street, Roland, IA 50236.
City of Slater	City Hall, 101 Story Street, Slater, IA 50244.
City of Story City	City Hall, 504 Broad Street, Story City, IA 50248.
City of Zearing	City Hall, 105 West Main Street, Zearing, IA 50278.
Unincorporated Areas of Story County	Story County Administration Building, 900 6th Street, Nevada, IA 50201.
Plaquemines Parish, Louisiana (All Jurisdictions) Docket No.: FEMA–B–1944	
Unincorporated Areas of Plaquemines Parish	Plaquemines Parish Permits, Planning and Zoning Department, 333 F. Edward Hebert Boulevard, Building 300, Belle Chasse, LA 70037.
Cleveland County, Oklahoma and Incorporated Areas Docket No.: FEMA–B–1921	
City of Norman	City Hall, Public Works Department, 201 West Gray Street, Building A, Norman, OK 73069.
City of Oklahoma City	Public Works Department, 420 West Main Street, Suite 700, Oklahoma City, OK 73102.
Union County, South Dakota and Incorporated Areas Docket No.: FEMA–B–1936	
City of Alcester	City Hall, 106 West 2nd Street, Alcester, SD 57001.
City of Beresford	City Hall, 101 North 3rd Street, Beresford, SD 57004.
City of Elk Point	City Hall, 106 West Pleasant Street, Elk Point, SD 57025.
City of North Sioux City	City Hall, 504 River Drive, North Sioux City, SD 57049.
Unincorporated Areas of Union County	Union County Courthouse, 209 East Main Street, Suite 100, Elk Point, SD 57025.
Dickson County, Tennessee and Incorporated Areas Docket No.: FEMA–B–1905	
Town of Charlotte	City Hall, 22 Court Square, Charlotte, TN 37036.
Town of Slayden	Mayor's Office, 701 Schmittou Street, Slayden, TN 37165.
Unincorporated Areas of Dickson County	Dickson County Courthouse, 4 Court Square, Charlotte, TN 37036.
Houston County, Tennessee and Incorporated Areas Docket No.: FEMA–B–1905	
City of Erin	City Hall, 15 Hill Street, Erin, TN 37061.

Community	Community map repository address
City of Tennessee Ridge	City Hall, 2300 South Main Street, Tennessee Ridge, TN 37178.
Unincorporated Areas of Houston County	Houston County Courthouse, 4725 East Main Street, Erin, TN 37061.
Montgomery County, Tennessee and Incorporated Areas Docket No.: FEMA–B–1905	
City of Clarksville	Regional Planning Commission, 329 Main Street, Clarksville, TN 37040.
Unincorporated Areas of Montgomery County	Montgomery County Building and Codes Department, 350 Pageant Lane, Suite 309, Clarksville, TN 37040.
Stewart County, Tennessee and Incorporated Areas Docket No.: FEMA–B–1905	
Town of Cumberland City	City Hall, 121 Main Street, Cumberland City, TN 37050.
Town of Dover	City Hall, 625 Donelson Parkway, Dover, TN 37058.
Unincorporated Areas of Stewart County	Stewart County Mayor's Office, 226 Lakeview Drive, Dover, TN 37058.
Matagorda County, Texas and Incorporated Areas Docket No.: FEMA–B–1311 and FEMA–B–1941	
City of Bay City	City Hall, 1901 5th Street, Bay City, TX 77414.
City of Palacios	City Hall, 311 Henderson Avenue, Palacios, TX 77465.
Unincorporated Areas of Matagorda County	Matagorda County Office Building, 2200 7th Street, 1st Floor, Bay City, TX 77414.

[FR Doc. 2020–19063 Filed 8–28–20; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4558–DR; Docket ID FEMA–2020–0001]

California; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of California (FEMA–4558–DR), dated August 22, 2020, and related determinations.

DATES: This amendment was issued August 24, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of California is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 22, 2020.

Monterey County for Individual Assistance and assistance for emergency protective measures (Category B), including direct federal assistance under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–19134 Filed 8–28–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R7–ES–2020–N045; FXES11140700000–201–FF07CAFB00]

Endangered and Threatened Wildlife and Plants; Initiation of 5-Year Status Review of the Spectacled Eider (Somateria fischeri)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service, are initiating a 5-year status review of the spectacled eider under the Endangered Species Act. A 5-year status review is based on the best scientific and commercial data available at the time of the review. We are requesting submission of any new information on this species that has become available since the last review of this species.

DATES: To ensure consideration, we must receive your comments and information by October 30, 2020. However, we will accept information about the species at any time.

ADDRESSES: Please submit your information by one of the following methods:

- *Email: kate_martin@fws.gov;* or
- *U.S. mail or hand delivery:* U.S. Fish and Wildlife Service, Attention: Kate Martin, Fisheries and Ecological Services, 1011 East Tudor Road, Anchorage, AK 99503.

For more about submitting information, see Request for Information in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Kate Martin, by telephone at 907–786–3459. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), are initiating a 5-year status review of the spectacled eider (*Somateria fischeri*)

under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). A 5-year status review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any new information on this species that has become available since the last 5-year review was conducted in 2010.

Why do we conduct 5-year reviews?

Under the ESA, we maintain Lists of Endangered and Threatened Wildlife and Plants (which we collectively refer to as the List) in the Code of Federal Regulations (CFR) at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the ESA requires us to review each listed species' status at least once every 5 years. Further, our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species under active review. For additional information about 5-year reviews, go to http://www.fws.gov/endangered/what-we-do/recovery-overview.html.

What information do we consider in our reviews?

In conducting these reviews, we consider the best scientific and commercial data that have become available since the listing determination or most recent status review, such as:

(1) The biology of the species, including but not limited to population trends, distribution, abundance, demographics, and genetics;

(2) Habitat conditions, including but not limited to amount, distribution, and suitability;

(3) Conservation measures that have been implemented that benefit the species;

(4) Threat status and trends in relation to the five listing factors (as defined in section 4(a)(1) of the ESA); and

(5) Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

Any new information will be considered during the 5-year review and will also be useful in evaluating the ongoing recovery programs for the species.

Species under review

Entity listed: Spectacled Eider (*Somateria fischeri*).

- *Where listed:* Wherever found.
- *Classification:* Threatened.
- *Date listed (publication date for final listing rule):* May 10, 1993.
- ***Federal Register*** *citation for final listing rule*: 58 FR 27474.

Request for Information

To ensure that a 5-year review is complete and based on the best available scientific and commercial information, we request new information from all sources. See what information do we consider in our review? for specific criteria. If you submit information, please support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comments, 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.

Completed and Active Reviews

A list of all completed and currently active 5-year status reviews addressing species for which the Alaska Region of the Service has the lead responsibility is available at *https://www.fws.gov/alaska/pages/endangered-species-program/recovery-endangered-species.*

Authority

This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Mary Colligan,

Assistant Regional Director, Alaska Region.

[FR Doc. 2020–19084 Filed 8–28–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2020–N117; FXES11130300000–201–FF03E00000]

Endangered and Threatened Species; Receipt of Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received applications for permits to conduct activities intended to enhance the propagation or survival of endangered or threatened species under the Endangered Species Act. We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before September 30, 2020.

ADDRESSES: *Document availability and comment submission:* Submit requests for copies of the applications and related documents, as well as any comments, by one of the following methods. All requests and comments should specify the applicant name(s) and application number(s) (*e.g.,* TEXXXXXX; see table in **SUPPLEMENTARY INFORMATION**):

- *Email: permitsR3ES@fws.gov.* Please refer to the respective application number (*e.g.,* Application No. TEXXXXXX) in the subject line of your email message.
- *U.S. Mail:* Regional Director, Attn: Nathan Rathbun, U.S. Fish and Wildlife Service, Ecological Services, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437–1458.

FOR FURTHER INFORMATION CONTACT: Nathan Rathbun, 612–713–5343 (phone); *permitsR3ES@fws.gov* (email). Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), prohibits certain activities with endangered and threatened species unless authorized by a Federal permit. The ESA and our implementing regulations in part 17 of title 50 of the Code of Federal Regulations (CFR) provide for the issuance of such permits and require that we invite public comment before issuing permits for activities involving endangered species.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened

wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

We invite local, State, and Federal agencies; Tribes; and the public to comment on the following applications:

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
TE194099	Michael A. Hoggarth, Galena, OH.	30 freshwater mussels ..	IN, KY, MI, NY, OH, PA, WY.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture, handle, transport, release, relocate.	Renew.
TE49715D	Jared I. Varner, Bridgeport, WV.	Indiana bat (*Myotis sodalis*), northern long-eared bat (*M. septentrionalis*).	Add new location—MI—to existing authorized locations in CT, ME, MA, NH, NY, OH, PA, SC.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture, handle, mist-net, band, radio-tag, release.	Amend.
TE81935D	Aaron M. Prewitt, Cincinnati, OH.	25 freshwater mussels ..	AL, AR, GA, IL, IN, IA, KS, KY, LA, MI, MN, MS, MO, NE, NY, NC, OH, OK, PA, TN, VA, WI, WV.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture, handle, release, collect dead shell vouchers.	New.
TE81936D	Jason P. Damm, Indianapolis, IN.	Gray bat (*Myotis grisescens*), Indiana bat (*M. sodalis*), northern long-eared bat (*M. septentrionalis*).	AL, AR, CT, DE, DC, GA, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NH, NJ, NY, NC, ND, OH, OK, PA, RI, SC, SD, TN, VT, VA, WV, WI, WY.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, evaluate impacts.	Capture, handle, mist-net, band, radio-tag, release.	New.

Public Availability of Comments

Written comments we receive become part of the administrative 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. Moreover, 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

If we decide to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Lori Nordstrom,

Assistant Regional Director, Ecological Services.

[FR Doc. 2020–19056 Filed 8–28–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2020–N025; FX3ES11130300000–201–FF03E00000]

Endangered and Threatened Wildlife and Plants; Initiation of 5-Year Status Reviews of 14 Listed Animal and Plant Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of initiation of reviews; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service, are initiating 5-year status reviews under the Endangered Species Act of 1973, as amended, for seven plant and seven animal species. A 5-year status review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information that has become available since the last review for the species.

DATES: To ensure consideration, please send your written information by October 30, 2020. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: For instructions on how to submit information for each species, see the table in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: To request information, contact the appropriate person in the table in the **SUPPLEMENTARY INFORMATION** section or, for general information, contact Laura Ragan; *laura_ragan@fws.gov* 612–713–5157. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We are initiating 5-year status reviews under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), for seven plant and seven animal species. A 5-year status review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information that has become available since the last review for the species.

Why do we conduct 5-year reviews?

Under the ESA, we maintain Lists of Endangered and Threatened Wildlife and Plants (which we collectively refer

to as the List) in the Code of Federal Regulations (CFR) at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the ESA requires us to review each listed species' status at least once every 5 years. Our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species under active review. For additional information about 5-year reviews, go to http://www.fws.gov/endangered/what-we-do/recovery-overview.html, scroll down to ''Learn More about 5-Year Reviews,'' and click on our factsheet.

What information do we consider in our review?

A 5-year review considers the best scientific and commercial data that have become available since the current listing determination or most recent status review of each species, such as:

(A) Species biology, including but not limited to population trends, distribution, abundance, demographics, and genetics;

(B) Habitat conditions, including but not limited to amount, distribution, and suitability;

(C) Conservation measures that have been implemented that benefit the species;

(D) Threat status and trends in relation to the five listing factors (as defined in section 4(a)(1) of the ESA); and

(E) Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

New information will be considered in the 5-year review and ongoing recovery programs for the species.

What species are under review?

This notice announces our active 5-year status reviews of the species in the following table.

Common name	Scientific name	Taxonomic group	Listing status	Where listed	Final listing rule (Federal Register citation and publication date)	Contact person, email, phone	Contact person's U.S. mail address
Eastern prairie fringed orchid.	*Platanthera leucophaea*.	Plant	T	IA, IL, IN, ME, MI, MO, OH, VA, WI.	54 FR 39857; September 28, 1989.	Cathy Pollack, *cathy_pollack@fws.gov*, 847–608–3101.	USFWS, 230 South Dearborn Street, Suite 2398, Chicago, IL 60604.
Lakeside daisy ...	*Hymenoxys herbacea* (*Tetraneuris herbacea*).	Plant	T	IL, MI, OH	53 FR 23742; June 23, 1988.	Jennifer Finfera, *Jennifer_finfera@fws.gov*, 614–416–8993.	USFWS, 4625 Morse Road, Suite 104, Columbus, OH 43230.
Leedy's roseroot	*Rhodiola integrifolia* ssp. *leedyi*.	Plant	T	MN, NY, SD	57 FR 14649; April 22, 1992.	Sarah Quamme, *sarah_quamme@fws.gov*, 952–252–0092.	USFWS, 4101 American Boulevard East, Bloomington, MN 55425.
Minnesota dwarf trout lily.	*Erythronium propullans*.	Plant	E	MN	51 FR 10521; March 26, 1986.	Sarah Quamme, *sarah_quamme@fws.gov*, 952–252–0092.	USFWS, 4101 American Boulevard East, Bloomington, MN 55425.
Northern wild monkshood.	*Aconitum noveboracense*.	Plant	T	IA, NY, OH, WI	43 FR 17910; April 26, 1978.	Sarah Quamme, *sarah_quamme@fws.gov*, 952–252–0092.	USFWS, 4101 American Boulevard East, Bloomington, MN 55425.
Prairie bush-clover.	*Lespedeza leptostachya*.	Plant	T	IL, IA, MN, WI ..	52 FR 781; January 9, 1987.	Sarah Quamme, *sarah_quamme@fws.gov*, 952–252–0092.	USFWS, 4101 American Boulevard East, Bloomington, MN 55425.
Western prairie fringed orchid.	*Platanthera praeclara*.	Plant	T	CO, IA, KS, MN, MO, NE, ND, SD, WY.	54 FR 39857; September 28, 1989.	Sarah Quamme, *sarah_quamme@fws.gov*, 952–252–0092.	USFWS, 4101 American Boulevard East, Bloomington, MN 55425.
Hungerford's crawling water beetle.	*Brychius hungerfordi*.	Insect	E	MI	59 FR 10580; March 7, 1994.	Carrie Tansy, *carrie_tansy@fws.gov*, 517–351–8375.	USFWS, 2651 Coolidge Road, Suite 101, East Lansing, MI 48823.
Mitchell's satyr butterfly.	*Neonympha mitchellii mitchellii*.	Insect	E	AL, IN, MI, MS, OH, VA.	57 FR 21564; May 20, 1992.	Carrie Tansy, *carrie_tansy@fws.gov*, 517–351–8375.	USFWS, 2651 Coolidge Road, Suite 101, East Lansing, MI 48823.

Common name	Scientific name	Taxonomic group	Listing status	Where listed	Final listing rule (Federal Register citation and publication date)	Contact person, email, phone	Contact person's U.S. mail address
Curtis pearlymussel.	*Epioblasma florentina curtisii.*	Clam	E	AR, MO	41 FR 24062; June 14, 1976.	Andy Roberts, *andy_roberts@fws.gov*, 573–234–2132.	USFWS, 101 Park DeVille Drive, Suite A, Columbia, MO 65203.
Scaleshell mussel	*Leptodea leptodon.*	Clam	E	AR, IL, MO, NE, OK, SD.	66 FR 51322; October 9, 2001.	Andy Roberts, *andy_roberts@fws.gov*, 573–234–2132.	USFWS, 101 Park DeVille Drive, Suite A, Columbia, MO 65203.
White cat's paw pearlymussel.	*Epioblasma obliquata perobliqua.*	Clam	E	IN, OH	41 FR 24062, June 14, 1976.	Angela Boyer, *angela_boyer@fws.gov*, 614–416–8993, ext. 22.	USFWS, 4625 Morse Road, Suite 104, Columbus, OH 43230.
Grotto sculpin	*Cottus specus* ..	Fish	E	MO	78 FR 58938, September 25, 2013.	Laurel Hill, *laurel_hill@fws.gov*, 573–234–2132.	USFWS, 101 Park DeVille Drive, Suite A, Columbia, MO 65203.
Eastern massasauga rattlesnake.	*Sistrurus catenatus.*	Reptile	T	IL, IN, IA, MI, NY, OH, PA.	81 FR 67193; September 30, 2016.	Mike Redmer, *mike_redmer@fws.gov*, 847–608–3105.	USFWS, 230 South Dearborn Street, Suite 2398, Chicago, IL 60604.

Request for Information

To ensure that a 5-year review is complete and based on the best available scientific and commercial information, we request new information from all sources. See ''What Information Do We Consider in Our Review?'' for specific criteria. If you submit information, please support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

How do I ask questions or provide information?

If you wish to provide information for any species listed above, please submit your comments and materials to the appropriate contact in the table above. You may also direct questions to those contacts. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8339 for TTY assistance.

Public Availability of Submissions

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comments and materials received will be available for public inspection, by appointment, during normal business hours at the offices where the comments are submitted.

Authority

We publish this notice under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Lori Nordstrom,

Assistant Regional Director, Ecological Services, Midwest Region.

[FR Doc. 2020–19083 Filed 8–28–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT921000–L51100000–GA0000–LVEME17CE500]

Notice of Lease Sale Coyote Creek Mining Company's Coal Lease-by-Application NDM 110277, Mercer County, ND

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of coal lease sale.

SUMMARY: Notice is hereby given that coal resources in lands in Mercer County, North Dakota, will be offered for competitive lease by sealed bid in accordance with the provisions of the Mineral Leasing Act of 1920, as amended.

DATES: The lease sale will be held at 10 a.m. Mountain Time on October 1, 2020. Sealed bids must be received by the Bureau of Land Management (BLM) Montana State Office Cashier on or before 9:30 a.m., September 17, 2020.

ADDRESSES: The lease sale will be held in the Main Conference Room of the BLM Montana State Office, 5001 Southgate Drive, Billings, Montana 59101–4669. Sealed bids must be submitted to the Cashier, BLM Montana State Office, at this same address. Social Distancing and limited seating will be applied during the sale due to Covid-19.

FOR FURTHER INFORMATION CONTACT: Joel Hartmann, by telephone at 406–200–3554, or by email at *jhartmann@blm.gov.* Persons who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact Mr. Hartmann during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This sale is being held in response to a lease-by-application filed by Coyote Creek Mining Company (CCMC). These tracts are located in Mercer County, North Dakota, southwest of Beulah, North Dakota. The Federal coal resources to be offered are located in the following described lands:

Fifth Principal Meridian, North Dakota

T. 143 N., R. 89 W.,
Sec. 24, SW1/4;
Sec. 26, SE1/4.

The areas described aggregate 320.00 acres.

The coal in the tracts has one minable coal bed, which is designated as the Upper Beulah coal seam. This seam on average is approximately 9.4 feet thick. The tracts are adjacent to CCMC's current mining operations and contain approximately 5.23 million tons of coal. The coal quality in the Upper Beulah coal seam is as follows:

British Thermal Unit (BTU) ...	6,879 BTU/lbs.
Moisture	36.94%
Sulfur Content	7.33%
Ash Content	1.0%

The tracts will be leased to the qualified bidder of the highest cash amount, provided that the high bid meets or exceeds the BLM's estimate of the fair market value (FMV) of the tract. The minimum bid for the tract is $100 per acre or fraction thereof. The minimum bid is not intended to represent FMV. The authorized officer will determine if the bids meet FMV after the sale.

The sealed bids should be sent by certified mail, return receipt requested, or be hand delivered to the Public Room, BLM Montana State Office (see **ADDRESSES**), and clearly marked ''Sealed Bid for NDM–110277 Coal Sale—Not to be opened before 10 a.m. on October 1, 2020.'' The Public Room representative will issue a receipt for each hand-delivered bid. Bids received after 9:30 a.m. will not be considered. If identical high bids are received, the tying high bidders will be requested to submit follow-up sealed bids until a high bid is received. All tie-breaking sealed bids must be submitted within 15 minutes following the sale official's announcement at the sale that identical high bids have been received.

Prior to lease issuance, the high bidder, if other than the applicant, must pay the BLM the cost recovery fee in the amount of $133,600.57, in addition to all processing costs incurred by the BLM after the date of this sale notice (43 CFR 3473.2(f)).

A lease issued as a result of this offering will require payment of an annual rental of $3 per acre, or fraction thereof, and a royalty payable to the United States of 12.5 percent of the value of coal mined by surface methods.

Bidding instructions for the tracts offered and the terms and conditions of the proposed coal lease are included in the Detailed Statement of Lease Sale, with copies available at the BLM Montana State Office (see **ADDRESSES**). Documents for case file NDM–110277 are available for public inspection at the BLM Montana State Office Public Room.

(Authority: 43 CFR 3422.3–2)

John J. Mehlhoff,

Montana State Director.

[FR Doc. 2020–19105 Filed 8–28–20; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–BSAD–CONC–NPS0030497; PPWOBSADC6, PPMVSCS1Y.Y00000, (200) P103601; OMB Control Number 1024–0233]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; National Park Service Leasing Program

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 September 30, 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 1024–0233 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Gordy Kito, Leasing Program Manager, Commercial Services Division by email at *gordy_kito@nps.gov;* or by telephone at 202–354–2096. 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 public comment period soliciting comments on this collection of information was published on March 18, 2020 (85 FR 15496). No public comments were received in response to this notice.

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 NPS Leasing Program allows any person or government entity to lease buildings and associated property administered by the Secretary of the Interior as part of the National

Park System, under the authority of the Director of the NPS. A lease may not authorize an activity that could be authorized by a concessions contract or commercial use authorization. All leases must provide for the payment of fair market value rent. The Director may retain rental payments for park infrastructure needs and, in some cases, to provide administrative support of the leasing program.

The authority to collect information for the Leasing Program is derived from 54 U.S.C. 102101 *et seq.,* 54 U.S.C. 306121, and 36 CFR part 18. For competitive leasing opportunities, the regulations require the submission of proposals or bids by parties interested in applying for a lease. The regulations also require that the Director approve lease amendments, construction or demolition of structures, and encumbrances on leasehold interests.

We collect information from anyone who wishes to submit a bid or proposal to lease a property. The Director may issue a request for bids if the amount of rent is the only criterion for award of a lease. The Director issues a request for proposals when the award of a lease is based on selection criteria other than the rental rate. A request for proposals may be preceded by a request for qualifications to select a ''short list'' of potential offerors that meet minimum management, financial, and other qualifications necessary for submission of a proposal.

We use the information collected to evaluate offers, proposed subleases or assignments, proposed construction or demolition, the merits of proposed lease amendments, and proposed encumbrances. The completion times for each information collection requirement vary substantially depending on the complexity of the leasing opportunity.

The forms were revised from our previous submission to allow for simpler forms to be used for businesses that are owned by an Individual or Sole Proprietor and to accommodate bids for smaller leases that require less financial detail. The proposed revisions are detailed below:

Revision #1:

- Previous Form Name: 10–352 Identification and Credit Information
- Revised Form Name: 10–352 Business History Information
- Revised Forms: 10–353 Business Organization Information: Corporation, Limited Liability Company, Partnership, or Joint Venture; and 10–354 Individual or Sole Proprietorship

Rationale for change: Based upon comments received from previous users of the forms, the program determined that the level of detail required for the offeror's business history is not the same for small business and large corporations. Therefore, Form 10–352 was revised to provide a simplified application process for small businesses responding to requests for bids on smaller leasing opportunities. Forms 10–353 and 10–354 were also revised from our previous submission to allow for simpler forms to be used for businesses that are owned by an Individual or Sole Proprietor and for smaller leases that require less financial detail.

Revision #2

- Previous Form: 10–355 Financial Information for Revenue Producing Uses
- Revised Forms: 10–355A Offeror Financial Statements and Projections—(Small Leases); and 10–355B Offeror Financial Statements and Projections—(Large Leases)

Rationale for change: The change in the form is in response to comments received from applicants not understanding the financial information required. The revised forms allow for a more thorough description of larger more complex leases that include substantial investments in capital improvements.

Title of Collection: National Park Service Leasing Program, 36 CFR part 18.

OMB Control Number: 1024–0233.

Form Number: NPS Forms 10–352, 10–353, 10–354, 10–355A and 10–355B.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Individuals and businesses seeking to submit a bid or proposal to lease NPS property.

Total Estimated Number of Annual Responses: 250.

Estimated Completion Time per Response: Varies from 4 hours to 45 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 1,649.

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. 2020–19143 Filed 8–28–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[18XR0680A1–RX312800080000002]

Notice of Intent To Accept Proposals, Select Preliminary Lessee, and Contract for Hydroelectric Power Development on Lake Roosevelt Reservoir, Grand Coulee, Washington

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of intent to accept proposals, select lessee, and contract for pumped-storage hydroelectric power on Lake Roosevelt.

SUMMARY: Current Federal policy allows non-Federal entities to develop electrical power resources on Federal water resource projects. This Notice seeks proposals to develop pumped-storage hydroelectric power utilizing Lake Roosevelt, located in Washington. This Notice provides background information, proposal content guidelines, and information concerning the selection of a non-Federal entity as a preliminary lessee. The Bureau of Reclamation (Reclamation) is considering such hydroelectric power development under its lease of power privilege (LOPP) process. Interested entities are invited to submit proposals on this project. This Notice of Intent to accept proposals does not obligate Reclamation to select a preliminary-lessee; the decision to select a preliminary-lessee will ultimately be made based on the qualifications of submitted proposals.

DATES: A written proposal with seven copies and an electronic version of the proposal must be submitted on or before 4 p.m. (Mountain Standard Time) on January 28, 2021. A proposal will be considered timely only if it is received in the office of the Regional Power Manager on or before 4 p.m. on the above-designated date. Interested entities are cautioned that delayed delivery to the Regional Power Manager's office due to failures or misunderstandings of the entity and/or of mail, overnight, or courier services will not excuse lateness, and accordingly, are advised to provide

sufficient time for delivery. Late proposals will not be considered.

ADDRESSES: Send written proposal with seven copies and an electronic version of the proposal to Mr. Joseph Summers, Regional Power Manager, Bureau of Reclamation, 1150 North Curtis Road, Suite 100, Boise, ID 83706; telephone (208) 378–5290.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding proposal requirements or technical data available for reservoirs included in this project to Mr. Benjamin Miller, Bureau of Reclamation, 1150 North Curtis Road, Suite 100, Boise, ID 83706; telephone (208) 378–5196; email *bjmiller@usbr.gov.* Upon receipt of written request, Mr. Miller will arrange an informational meeting and/or site visit with interested entities as needed. Reclamation reserves the right to schedule a single meeting and/or visit to address the questions of all entities that have submitted questions or requested site visits. Specific information related to operation and maintenance of Reclamation facilities utilizing Banks Lake and/or Lake Roosevelt may also be obtained from Mr. Miller at the above contact information.

SUPPLEMENTARY INFORMATION: Ensuring energy and economic security for America through hydropower is a top priority in the Department of the Interior's 2018 Strategic Plan. This priority is achieved in part via new energy generation from hydropower. The Department, acting through Reclamation, will consider proposals for non-Federal development of pumped-storage hydroelectric power utilizing Lake Roosevelt for a pumped-storage project.

This project is subject to the dual jurisdiction of Reclamation and the Federal Energy Regulatory Commission (FERC). Reclamation has jurisdiction over the parts of the project within the boundaries of Lake Roosevelt and will consider these parts of the project under its LOPP process. FERC jurisdiction applies to all elements of a proposed pumped-storage hydroelectric power project at Lake Roosevelt that are outside of Reclamation authorizations. In this case, FERC jurisdiction will include Banks Lake (the upper reservoir), a large part of the penstock connecting the upper reservoir with the lower reservoir (Lake Roosevelt), underground tunnel(s) and powerhouse, and other facilities (such as power transmission lines and access roads that are outside of Reclamation jurisdiction).

General Overview

Congress authorized the Columbia Basin Project, located in Central Washington, in 1943. The Columbia Basin Project includes Grand Coulee Dam and its three powerplants, John Keys Pump Generating Plant, North Dam, Dry Falls Dam, Lake Roosevelt and Banks Lake reservoirs. Grand Coulee Dam is a multiple purpose structure that supports irrigation, power, and flood control. Grand Coulee Dam has the ability to generate 6,809 MW of electrical power. John Keys Pump Generating Plant has six pumps and six pump-generators that combined, are able to produce 314 megawatts of electrical power. Lake Roosevelt Reservoir has a water storage capacity of 9.5 million acre-feet. Banks Lake Reservoir has a water storage capacity of 1.275 million acre-feet.

Reclamation is considering allowing a non-Federal pumped-storage hydroelectric power development utilizing Lake Roosevelt under a LOPP. A congressionally authorized alternative to Federal hydroelectric power development, a LOPP is an authorization issued to a non-federal entity to utilize a Reclamation asset for electric power generation consistent with Reclamation project purposes. LOPPs have terms not to exceed 40 years. The general authority for LOPP under Reclamation law includes, among others, the Town Sites and Power Development Act of 1906 (43 U.S.C. 522), the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)) (1939 Act), and the Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act of 2013 (Act of August 9, 2013, 127 Stat. 498). For guidance regarding LOPP refer to Reclamation Manual Directive and Standard, *Lease of Power Privilege (LOPP) Processes, Responsibilities, Timelines, and Charges* (FAC 04–08) (*https://www.usbr.gov/recman/DandS.html*).

Reclamation and FERC are responsible for ensuring any project selected for consideration pursuant to this Notice of Intent complies with the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), Endangered Species Act (ESA), and other related environmental regulations for all elements of the proposed project. Reclamation and FERC will also lead necessary consultation with American Indian Tribal Governments. A LOPP may be denied, or withdrawn if already issued, due to inadequate compliance studies or unsatisfactory environmental impacts. All Reclamation costs associated with project planning and regulatory compliance requirements will be borne by the selected applicant.

Fundamental Considerations and Requirements

As indicated above, Reclamation can only issue an LOPP for the lower reservoir (Lake Roosevelt) in a pumped-storage system and any other area where Reclamation has jurisdiction. Parallel approvals from FERC will be necessary for project elements where FERC has jurisdiction. These elements will include part of the penstock, the upper reservoir and potential appurtenant facilities such as transmission lines, access roads, etc. Reclamation and FERC will determine the appropriate relationship between the two agencies in coordinating the study and decision-making process.

Any LOPP utilizing Lake Roosevelt must not interfere with existing contractual commitments related to operation and maintenance of facilities and systems supporting the Columbia Basin Project. The lessee (*i.e.,* successful proposing entity) will be required to enter into a contract with Reclamation. This contract will (1) address requirements related to coordination of operation and maintenance with Columbia Basin Project stakeholders, and (2) stipulate that the LOPP lessee will be responsible for any increase in operation or maintenance costs that are attributable to the hydroelectric power development.

No LOPP facilities will be permitted within the Reclamation zone surrounding Grand Coulee Dam and support structures, including inlet/outlet works, hydropower facilities, access tunnels, and appurtenant facilities. The one exception to this constraint may be power transmission lines.

The lessee would be responsible for securing transfer and marketing of the power generated by the proposed project. Bonneville Power Administration (BPA) will have the first opportunity to purchase and/or market the power that is generated by this project under a LOPP. In the event BPA elects to not purchase and/or market the power generated by the hydropower development or such a decision cannot be made prior to execution of the LOPP, the lessee will have the right to market the power generated by the project to others.

All costs incurred by the United States related to a proposed LOPP project will be at the expense of the lessee. Such costs include management and coordination of necessary Reclamation activities, provision of information, conduct or assistance with

regulatory compliance (including NEPA), consultation during design development related to operation and maintenance under a LOPP, development of the LOPP, necessary contracts with outside consultants, or any other cost for which the government would be reimbursed by an applicant or the general public.

Under the LOPP, the lessee will be required to make annual payments to the United States for the use of a government facility in the amount of at least 2–3 mills per kilowatt-hour of gross energy produced by the facility, measured at the generator(s). Provisions will be included for the mill rate to increase each year commensurate with inflation. Such annual payments shall be deposited in the Reclamation fund as a credit to the project and are applied against the total outstanding reimbursable repayment obligation for reimbursable project construction costs of the Federal project on which the LOPP is issued pursuant to the existing construction cost allocation.

The proposed LOPP must not impair efficiency of Reclamation-generated power or water deliveries, jeopardize public safety, nor negatively affect any other Reclamation project purpose.

Proposal Content Guidelines

Interested parties should submit proposals specifically addressing the following qualifications, capabilities, and approach factors. Proposals submitted will be evaluated and ranked directly based on these factors. Additional information may be provided at the discretion of those submitting proposals.

Qualifications of Proposing Entity: Provide relevant information describing/documenting the qualifications of the proposing entity to plan, design, and implement such a project, including, but not limited to:

(1) Type of organization;

(2) Business history, including length of time in business, experience in funding, and design and construction of similar projects;

(3) Industry rating(s) that indicate financial soundness and/or technical and managerial capability;

(4) Experience of key management personnel;

(5) History of any reorganizations or mergers with other companies (if applicable);

(6) Information pertaining to qualification as a preference entity (as applied to a LOPP, the term ''preference entity'' means an entity qualifying for preference under Section 9(c) of the 1939 Reclamation Project Act as a municipality, public corporation or agency, or cooperative or other nonprofit organization financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936, as amended). If proposing as a group of entities or as a subdivision of an entity, explain whether and why the group or subdivision qualifies as preference entities; and

(7) Any other information not already requested above or in the following evaluation categories that demonstrates the interested entity's organizational, technical, and financial ability to perform all aspects of the work.

Proposed Project Plan: Describe and provide mapping and drawings of proposed facilities and equipment comprising the LOPP project. Include locations and descriptions of all structures, pumps/turbines, penstocks, upper and lower reservoirs, transmission lines, access roads, and other appurtenant facilities.

Describe proposed capacities and general operation of the pumped-storage hydroelectric project(s). Include generation capacity, power source, and power consumption; configuration, turbine generating capacity, distribution transmission line size, and route; and other relevant aspects of the project.

Describe the ability of generation to provide ancillary services, such as regulation, spinning reserves, and volt-ampere reactive support; and information on the reliability of the generation, potential maintenance outage schedule, and duration.

Also describe diurnal, seasonal and/or annual patterns (as relevant) of energy generation and consumption. Include descriptions and estimates of any influence on power generation capacity and/or consumption attributable to type of water year (*i.e.,* each month of average, dry, or wet water years, as relevant). If capacity and energy can be delivered to another location, either by the proposing entity or by potential wheeling agents, specify where capacity and energy can be delivered. Include concepts for power sales and contractual arrangements, involved parties, and the proposed approach to wheeling, as relevant.

Proposed Approach to Acquisition of Necessary Property Rights: Specify plans for acquiring title to or the right to occupy and use all lands necessary for the proposed development, including such additional lands as may be required during construction. Address lands necessary for electrical distribution lines, access roads, and all aspects of project development and operation and maintenance.

Proposed Plan for Acquisition/Perfection of Water Rights: Necessary water rights or purchases must be arranged by the project proponent(s). Quantify water necessary for operation of the proposed development(s). Identify the source of water rights acquired or to be acquired to meet these water needs, including the current holder of such rights, and how these rights would be used, acquired, or perfected.

Impact on Columbia Basin Project Water Rights and Operations: Describe any potential changes in seasonal or annual fulfillment of existing water rights or storage contracts that may occur as a result of the proposed pumped-storage hydroelectric power project. Also provide full hydrologic analysis and related studies exploring potential impact of the project on current operations and projected operations of Grand Coulee Dam, John Keys Pump Generating Plant, Lake Roosevelt Reservoir, Banks Lake Reservoir, and/or the Columbia Basin Project as a whole.

This analysis should include estimates of daily fluctuations in reservoir elevation attributable to proposed project operations, including schedule (nighttime filling, daytime generation) and other details pertinent to reservoir fluctuations.

Long-Term Operation and Maintenance: Provide a description (with relevant references) of the project proponent's experience in operation and maintenance of hydroelectric or similar facilities once they are operational and over the long-term (*i.e.,* the 40-year lease contemplated for the proposed project). Identify the organizational structure and plan for the long-term operation and maintenance of the proposed project. Define how the proposed project would operate in harmony with Lake Roosevelt and Banks Lake reservoirs, and the Columbia Basin Project as a whole, specifically related to existing contracts for operation and maintenance of Columbia Basin Project features.

Contractual Arrangements: Describe any anticipated contractual arrangements with project stakeholders of the Columbia Basin Project, including contractual arrangements to utilize Lake Roosevelt and Banks Lake water rights. Define how the LOPP project would operate in harmony with the Reclamation project and existing applicable contracts.

Management Plan: Provide a management plan to accomplish such activities as planning; NEPA, NHPA, ESA compliance, and other necessary studies; LOPP project development, design, construction, safety plan, facility testing, start-up of hydropower production; and preparation of an

Emergency Action Plan. Prepare schedules of these activities as applicable. Describe what studies are necessary to accomplish the hydroelectric power development and how the studies would be implemented.

Environmental Impact: Discuss potentially significant adverse impacts from the proposed project on biophysical or sociocultural resource parameters on the Columbia Basin Project as a whole. Of concern are potential impacts on land use adjacent to proposed facilities, recreation at the surrounding areas, cultural resources, and Indian Trust assets, and impacts on any protected aquatic or terrestrial wildlife species or associated protected habitat.

Discuss potential adverse impacts based on available information. Provide information on the types and severity of expected impacts and proposed methods of resolving or mitigating these impacts. Describe also any potentially beneficial environmental effects that may be expected from the proposed project, including such perspectives as energy conservation or using available water resources in the public interest. As necessary, describe studies required to adequately define the extent, potential severity, and potential approaches to mitigation of impacts that may be associated with the proposed development.

Other Study and/or Permit Requirements: Describe planned response to other applicable regulatory requirements, including the NHPA, Clean Water Act, ESA, and state and local laws and licensing requirements. Also describe any known potential for impact on lands or resources of American Indian tribes, including trust resources.

Project Development Costs and Economic Analysis: Estimate the costs of development, including the cost of studies to determine feasibility, environmental compliance, project design, construction, financing, and the amortized annual cost of the investment. Estimate annual operation and maintenance, replacement expenses, annual payments to the United States, and those potentially associated with the Columbia Basin Project. Estimate costs associated with any anticipated additional transmission or wheeling services. Identify proposed methods of financing the project. The anticipated return on investment should be estimated and an economic analysis should be presented that compares the present worth of all benefits and the costs of the project.

Performance Guarantee and Assumption of Liability: Describe plans for (1) providing the government with performance bonds or irrevocable letter of credit covering completion of the proposed project; (2) assuming liability for damage to the structural integrity of North Dam or any other Reclamation asset physically altered as part of proposed project; (3) assuming liability for damage to the operational integrity of John Keys Pump Generating Plant, Grand Coulee Dam, Lake Roosevelt and Banks Lake reservoirs, or other aspects of the Columbia Basin Project caused by construction, operation and/or maintenance of the hydropower development; and (4) obtaining general liability insurance.

Other Information: This final paragraph is provided for the applicant to include additional information considered relevant to Reclamation's selection process in this matter.

Selection of Lessee

Reclamation will evaluate proposals received in response to this published Notice. Proposals will be ranked according to response to the factors described in Fundamental Requirements and Considerations and Proposal Content Guidelines sections provided in this Notice. In general, Reclamation will give more favorable consideration to proposals that (1) are well adapted to developing, conserving, and utilizing the water resource and protecting natural resources; (2) clearly demonstrate that the offeror is qualified to develop the hydropower facility and provide for long-term operation and maintenance; and (3) best share the economic benefits of the hydropower development among parties to the LOPP. A proposal will be deemed unacceptable if it is inconsistent with Columbia Basin Project purposes, as determined by Reclamation.

Reclamation will give preference to those entities that qualify as preference entities, as defined under Proposal Content Guidelines of this Notice, provided that the preference entity is well qualified and their proposal is at least as well adapted to developing, conserving, and utilizing the water and natural resources as other submitted proposals. Preference entities will be allowed 30 days from notification to improve their proposals, if necessary, to be made at least equal to a proposal(s) that may have been submitted by a non-preference entity.

The Notice of Intent to accept proposals does not obligate Reclamation to ultimately select a lessee.

Notice and Time Period To Enter Into LOPP

Reclamation will notify, in writing, all entities submitting proposals of Reclamation's decision regarding selection of the potential lessee. Time period requirements to sign the preliminary lease, sign the LOPP contract, design completion, and construction will be administered in accordance with Reclamation Manual Directive and Standard, *Lease of Power Privilege (LOPP) Processes, Responsibilities, Timelines, and Charges* (FAC 04–08).

Lorri J. Gray,

Regional Director, Interior Region 9: Columbia-Pacific-Northwest, Bureau of Reclamation.

[FR Doc. 2020–19155 Filed 8–28–20; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed First Modification of The Consent Decree Under The Clean Air Act

On August 25, 2020, the Department of Justice lodged a proposed First Modification of the Consent Decree (First Modification) with the United States District Court of the Virgin Islands Division of St. Croix in the lawsuit entitled *United States of America and the United States Virgin Islands* v. *HOVENSA L.L.C.,* Civil Action Nos. 1:11-cv-00006. The proposed First Modification modifies the Consent Decree approved by the Court on June 7, 2011 (June 2011 Consent Decree) resolving claims by the United States and the United States Virgin Islands against HOVENSA L.L.C. for alleged violations of Section 113(b) of the Clean Air Act, 42 U.S.C. 7413(b) and territorial law. Under the original Consent Decree, HOVENSA L.L.C. agreed to substantially reduce emissions of nitrogen oxides (NO_X), sulfur dioxide (SO_2), volatile organic compounds, and benzene from the refinery.

On September 15, 2015, HOVENSA L.L.C. filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code in District Court of the U.S. Virgin Islands, Bankruptcy Division—St. Croix, Virgin Islands. See, bankruptcy proceeding entitled *In re HOVENSA L.L.C..,* No. 1–15–10003–MFW. As part of the bankruptcy proceeding, Limetree Bay Terminals, LLC purchased certain assets from HOVENSA L.L.C. that are subject to the June 2011 Consent Decree. As part of the bankruptcy, an Environmental Response Trust was established and assumed some of

HOVENSA L.L.C.'s 2011 Consent Decree obligations. Subsequent to that purchase, Limetree Bay Terminals, LLC transferred certain assets to Limetree Bay Refining, LLC.

Paragraph 7 of the 2011 Consent Decree requires HOVENSA L.L.C. to condition any transfer of ownership or operation of the refinery ''upon the execution by the transferee of a modification to this Consent Decree, which makes the terms and conditions of this Consent Decree applicable to the transferee.'' Under the proposed First Modification, Limetree Bay Terminals, LLC, Limetree Bay Refining, LLC and the Environmental Response Trust are being added as parties to the Consent Decree. The proposed First Modification also makes changes to some of the deadlines and injunctive relief obligations required by the 2011 Consent Decree.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the First Modification. Comments should be addressed to the Assistant Attorney General for the Environmental and Natural Resources Division, and should refer to *United States, et al.* v. *HOVENSA L.L.C.,* Civil Action No. 1:11-cv-00006, D. J. Ref. No. 90–5–2–1–08229/1. All comments must be submitted no later than thirty days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, D.C. 20044–7611.

During the public comment period, the First Modification may be examined and downloaded at this Department of Justice website: *http://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the First Modification upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check in the amount of $39.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Susan M. Akers,

Assistant Section Chief, Environmental Enforcement Section, Environment & Natural Resources Division.

[FR Doc. 2020–19160 Filed 8–28–20; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Wage and Hour Division

Establishing a Minimum Wage for Contractors, Notice of Rate Change in Effect as of January 1, 2021

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice.

SUMMARY: The Wage and Hour Division (WHD) of the U.S. Department of Labor (the Department) is issuing this notice to announce the applicable minimum wage rate for workers performing work on or in connection with federal contracts covered by Executive Order 13658, Establishing a Minimum Wage for Contractors (the Executive Order or the Order), beginning January 1, 2021. Beginning on that date, the Executive Order minimum wage rate that generally must be paid to workers performing work on or in connection with covered contracts will increase to $10.95 per hour, while the required minimum cash wage that generally must be paid to tipped employees performing work on or in connection with covered contracts will increase to $7.65 per hour.

DATES: These new rates shall take effect on January 1, 2021.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this notice may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. Executive Order 13658 Background and Requirements for Determining Annual Increases to the Minimum Wage Rate

The Executive Order was signed on February 12, 2014, and raised the hourly minimum wage for workers performing work on or in connection with covered federal contracts to $10.10 per hour, beginning January 1, 2015, with annual adjustments thereafter in an amount determined by the Secretary pursuant to the Order. *See* 79 FR 9851. The Executive Order directed the Secretary to issue regulations to implement the Order's requirements. *See* 79 FR 9852. Accordingly, after engaging in notice-and-comment rulemaking, the Department published a Final Rule on October 7, 2014 to implement the Executive Order. *See* 79 FR 60634. The final regulations, set forth at 29 CFR part 10, established standards and procedures for implementing and enforcing the minimum wage protections of the Order.

The Executive Order and its implementing regulations require the Secretary to determine the applicable minimum wage rate for workers performing work on or in connection with covered contracts on an annual basis, beginning January 1, 2016. *See* 79 FR 9851; 29 CFR 10.1(a)(2), 10.5(a)(2), 10.12(a). Sections 2(a) and (b) of the Order establish the methodology that the Secretary must use to determine the annual inflation-based increases to the minimum wage rate. *See* 79 FR 9851. These provisions, which are implemented in 29 CFR 10.5(b)(2), explain that the applicable minimum wage determined by the Secretary for each calendar year shall be:

- Not less than the amount in effect on the date of such determination;
- Increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics (BLS); and
- Rounded to the nearest multiple of $0.05.

Section 2(b) of the Executive Order further provides that, in calculating the annual percentage increase in the CPI–W for purposes of determining the new minimum wage rate, the Secretary shall compare such CPI–W for the most recent month, quarter, or year available (as selected by the Secretary prior to the first year for which a minimum wage is in effect) with the CPI–W for the same month in the preceding year, the same quarter in the preceding year, or the preceding year, respectively. *See* 79 FR 9851. To calculate the annual percentage increase in the CPI–W, the Department elected in its final rule implementing the Executive Order to compare such CPI–W for the most recent year available with the CPI–W for

the preceding year. *See* 29 CFR 10.5(b)(2)(iii). In its final rule, the Department explained that it decided to compare the CPI–W for the most recent year available (instead of using the most recent month or quarter, as allowed by the Order) with the CPI–W for the preceding year, ''to minimize the impact of seasonal fluctuations on the Executive Order minimum wage rate.'' 79 FR 60666.

Once a determination has been made with respect to the new minimum wage rate, the Executive Order and its implementing regulations require the Secretary to notify the public of the applicable minimum wage rate on an annual basis at least 90 days before any new minimum wage takes effect. *See* 79 FR 9851; 29 CFR 10.5(a)(2), 10.12(c)(1). The regulations explain that the Administrator of the Department's Wage and Hour Division (the Administrator) will publish an annual notice in the **Federal Register** stating the applicable minimum wage rate at least 90 days before any new minimum wage takes effect. *See* 29 CFR 10.12(c)(2)(i). Additionally, the regulations state that the Administrator will provide notice of the Executive Order minimum wage rate on Wage Determinations OnLine (WDOL), *http://www.wdol.gov,* or any successor site;[1] on all wage determinations issued under the Davis-Bacon Act (DBA), 40 U.S.C. 3141 *et seq.,* and the Service Contract Act (SCA), 41 U.S.C. 6701 *et seq.;* and by other means the Administrator deems appropriate. *See* 29 CFR 10.12(c)(2)(ii)-(iv).

Section 3 of the Executive Order requires contractors to pay tipped employees covered by the Order performing on or in connection with covered contracts an hourly cash wage of at least $4.90, beginning on January 1, 2015, provided the employees receive sufficient tips to equal the Executive Order minimum wage rate under section 2 of the Order when combined with the cash wage. *See* 79 FR 9851–52; 29 CFR 10.28(a). The Order further provides that, in each succeeding year, beginning January 1, 2016, the required cash wage must increase by $0.95 (or a lesser amount if necessary) until it reaches 70 percent of the Executive Order minimum wage. *Id.* For subsequent years, the cash wage for tipped employees will be 70 percent of the Executive Order minimum wage rounded to the nearest $0.05. *Id.* At all times, the amount of tips received by the employee must equal at least the difference between the cash wage paid and the Executive Order minimum wage; if the employee does not receive sufficient tips, the contractor must increase the cash wage paid so that the cash wage in combination with the tips received equals the Executive Order minimum wage. *Id.*

The Executive Order minimum wage and the cash wage required for tipped employees are currently $10.80 and $7.55 per hour, respectively. The Department announced these rates on September 19, 2019, 84 FR 49345, and the rates took effect on January 1, 2020.

II. The 2021 Executive Order Minimum Wage Rate

Using the methodology set forth in the Executive Order and summarized above, the Department must first determine the annual percentage increase in the CPI–W (United States city average, all items, not seasonally adjusted), as published by BLS, to determine the new Executive Order minimum wage rate. In calculating the annual percentage increase in the CPI–W, the Department must compare the CPI–W for the most recent year available with the CPI–W for the preceding year. The Department therefore compares the percentage change in the CPI–W between the most recent year (*i.e.,* the most recent four quarters) and the prior year (*i.e.,* the four quarters preceding the most recent year). The Department then increases the current Executive Order minimum wage rate by the resulting annual percentage change and rounds to the nearest multiple of $0.05.

In order to determine the Executive Order minimum wage rate beginning January 1, 2021, the Department therefore calculated the CPI–W for the most recent year by averaging the CPI–W for the four most recent quarters, which consist of the first two quarters of 2020 and the last two quarters of 2019 (*i.e.,* July 2019 through June 2020). The Department then compared that data to the average CPI–W for the preceding year, which consists of the first two quarters of 2019 and the last two quarters of 2018 (*i.e.,* July 2018 through June 2019). Based on this methodology, the Department determined that the annual percentage increase in the CPI–W (United States city average, all items, not seasonally adjusted) was 1.432 percent. The Department then applied that annual percentage increase of 1.432 percent to the current Executive Order hourly minimum wage rate of $10.80, which resulted in a wage rate of $10.955 (($10.80 × 0.01432) + $10.80); however, pursuant to the Executive Order, that rate must be rounded to the nearest multiple of $0.05.

The new Executive Order minimum wage rate that must generally be paid to workers performing on or in connection with covered contracts beginning January 1, 2021 is therefore $10.95 per hour.

III. The 2021 Executive Order Minimum Cash Wage for Tipped Employees

As noted above, section 3 of the Executive Order provides a methodology to determine the amount of the minimum hourly cash wage that must be paid to tipped employees performing on or in connection with covered contracts. Because the cash wage for tipped employees reached 70 percent of the Executive Order minimum wage beginning on January 1, 2018 (*i.e.,* $7.25 per hour compared to $10.35 per hour), future updates to the cash wage for tipped employees must continue to set the rate at 70 percent of the full Executive Order minimum wage. Seventy percent of the new Executive Order minimum wage rate of $10.95 is $7.67. Because the Executive Order provides that the rate must be rounded to the nearest $0.05, the new minimum hourly cash wage for tipped workers performing on or in connection with covered contracts beginning January 1, 2021 is therefore $7.65 per hour.

IV. Appendices

Appendix A to this notice provides a comprehensive chart of the CPI–W data published by BLS that the Department used to calculate the new Executive Order minimum wage rate based on the methodology explained herein. Appendix B to this notice sets forth an updated version of the Executive Order poster that the Department published with its Final Rule, reflecting the updated wage rates that will be in effect beginning January 1, 2021. *See* 79 FR 60732–33. Pursuant to 29 CFR 10.29, contractors are required to notify all workers performing on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. Contractors with employees covered by the Fair Labor Standards Act who are performing on or in connection with a covered contract may satisfy the notice requirement by displaying the poster set forth in Appendix B in a prominent or accessible place at the worksite.

[1] In 2019, WDOL.gov moved to *beta.SAM.gov* and is now known as Wage Determinations. The *beta.SAM.gov* website is the authoritative and single location for obtaining appropriate Service Contract Act and Davis-Bacon Act wage determinations for each official contract action.

Dated: August 25, 2020.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

Appendix A: Data Used To Determine Executive Order 13658 Minimum Wage Rate Effective January 1, 2021.

Data Source: Consumer Price Index for Urban wage Earners and Clerical Workers (CPI–W)

(United States city average, all items, not seasonally adjusted)

	Quarter 3			Quarter 4			Quarter 1			Quarter 2			Annual Average
2018Q3 to 2019Q2	246.155	246.336	246.565	247.038	245.933	244.786	245.133	246.218	247.768	249.332	249.871	249.747	247.0735
2019Q3 to 2020Q2	250.236	250.112	250.251	250.894	250.644	250.452	251.361	251.935	251.375	249.515	249.521	251.054	250.6125
Annual Percentage Increase													1.432%

Appendix B: Updated Version of the Executive Order 13658 Poster

BILLING CODE 4510–27–P

WORKER RIGHTS
UNDER EXECUTIVE ORDER 13658

FEDERAL MINIMUM WAGE FOR CONTRACTORS

$10.95 PER HOUR

EFFECTIVE JANUARY 1, 2021 – DECEMBER 31, 2021

The law requires certain employers to display this poster where employees can readily see it.

MINIMUM WAGE Executive Order 13658 (EO) requires that federal contractors pay workers performing work on or in connection with covered contracts at least (1) $10.10 per hour beginning January 1, 2015, and (2) beginning January 1, 2016, and every year thereafter, an inflation-adjusted amount determined by the Secretary of Labor in accordance with the EO and appropriate regulations. The EO hourly minimum wage in effect from January 1, 2021 through December 31, 2021 is $10.95.

TIPS Covered tipped employees must be paid a cash wage of at least $7.65 per hour effective January 1, 2021 through December 31, 2021. If a worker's tips combined with the required cash wage of at least $7.65 per hour paid by the contractor do not equal the EO hourly minimum wage for contractors, the contractor must increase the cash wage paid to make up the difference. Certain other conditions must also be met.

EXCLUSIONS

- Some workers who provide support "in connection with" covered contracts for less than 20 percent of their hours worked in a week may not be entitled to the EO minimum wage.
- Certain full-time students, learners, and apprentices who are employed under subminimum wage certificates are not entitled to the EO minimum wage.
- Workers employed on contracts for seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands, except when the workers are performing associated lodging and food services, are not entitled to the EO minimum wage.
- Certain other occupations and workers are also exempt from the EO.

ENFORCEMENT The U.S. Department of Labor's Wage and Hour Division (WHD) is responsible for enforcing the EO. WHD can answer questions, in person or by telephone, about your workplace rights and protections. We can investigate employers, recover wages to which workers may be entitled, and pursue appropriate sanctions against covered contractors. All services are free and confidential. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the EO. If you are unable to file a complaint in English, WHD will accept the complaint in any language. You can find your nearest WHD office at https://www.dol.gov/whd/local/.

ADDITIONAL INFORMATION

- The EO applies only to new federal construction and service contracts, as defined by the Secretary in the regulations.
- Workers with disabilities whose wages are governed by certificates issued under section 14(c) of the Fair Labor Standards Act must also receive no less than the full EO minimum wage rate.
- Some state or local laws may provide greater worker protections; employers must comply with both.
- More information about the EO is available at: www.dol.gov/whd/flsa/eo13658.

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

1-866-487-9243
TTY 1-877-889-5627
www.dol.gov/whd

WH1089 REV 01/21

[FR Doc. 2020–19037 Filed 8–28–20; 8:45 am]
BILLING CODE 4510–27–C

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (20–069)]

Heliophysics Advisory Committee; Meeting.

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Heliophysics Advisory Committee (HPAC). This Committee functions in an advisory capacity to the Director, Heliophysics Division, in the NASA Science Mission Directorate. The meeting will be held for the purpose of soliciting, from the science community and other persons, scientific and technical information relevant to program planning.

DATES: Monday, September 21, 2020, 1:00 p.m.–5:00 p.m., Eastern Time.

ADDRESSES: Meeting will be virtual only, see dial-in and WebEx information below under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Dr. Janet Kozyra, Designated Federal Officer, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, at *janet.kozyra@nasa.gov,* 202–358–1258.

SUPPLEMENTARY INFORMATION: This meeting will be open to the public. The meeting will take place telephonically and via WebEx only. Any interested person must use a touch-tone phone to participate in this meeting. Any interested person may call the USA toll free number 1–800–857–9728, or toll number 1–415–228–3890, passcode 5951905 followed by the # sign to participate in this meeting by telephone on both days. The WebEx link is *https://nasaenterprise.webex.com/;* the meeting number is 199 049 7836 and the password is SeptHPAC2020! (case sensitive).

The agenda for the meeting includes the following topic:

- Heliophysics Program Annual Performance Review According to the Government Performance and Results Act Modernization Act.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2020–19166 Filed 8–28–20; 8:45 am]
BILLING CODE 7510–13–P

NATIONAL CREDIT UNION ADMINISTRATION

Request for Comment Regarding National Credit Union Administration Overhead Transfer Rate Methodology and Operating Fee Schedule Methodology

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice; request for comment.

SUMMARY: The NCUA Board (Board) is inviting comment on the methodology used to determine the Overhead Transfer Rate (OTR). The Board applies the OTR to the NCUA's operating budget to determine the portion of the budget that will be funded from the National Credit Union Share Insurance Fund (Share Insurance Fund). The Board welcomes all comments but specifically invites comments on the four principles used in the methodology to calculate the OTR as discussed below. The Board is also requesting comment on proposed changes to the methodology it uses to determine how it apportions operating fees charged to federal credit unions (FCUs). The Board uses operating fees to fund part of the NCUA's annual budget. In this notice, the Board proposes: Clarifying the treatment of capital project budgets when calculating the operating fees; clarifying the treatment of miscellaneous revenues when calculating the operating fees; and modifying the approach for calculating the annual inflationary adjustments to the thresholds for the operating fee rate tiers. The Board solicits comment on these proposed changes and also solicits comment on several questions to gather information on potential future enhancements to the methodology.

DATES: Comments must be received on or before October 30, 2020 to be assured of consideration.

ADDRESSES: You may submit written comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (703) 518–6319. Include ''[Your Name]—Request for Comment: Operating Fee Schedule Methodology'' in the transmittal.
- *Mail:* Address to Gerard S. Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

Public Inspection: You may view all public comments on the Federal eRulemaking Portal at *http://www.regulations.gov* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: James Holm, Supervisory Budget Analyst, Office of the Chief Financial Officer, at (703) 518–6570, Amy Ward or Julie Decker, Risk Officers, Office of Examination and Insurance at (703) 819–1770 or (703) 518–6384.

SUPPLEMENTARY INFORMATION: The Board has separately proposed amending its rule for determining total assets used as the basis for calculating the operating fee due from any FCU. Members of the public are encouraged to comment on this proposed amendment by responding to the appropriate proposed rule. A proposed rule relating to Fees Paid by Federal Credit Unions is published elsewhere in this issue of the **Federal Register**.

I. Legal Background

The NCUA charters, regulates, and insures deposits in FCUs and insures deposits in state-chartered credit unions that have their shares insured through the Share Insurance Fund (FISCUs). To cover expenses related to its tasks, the Board adopts an annual budget in the fall of each year. The Federal Credit Union Act (FCU Act) provides two primary sources to fund the budget: (1) Requisitions from the Share Insurance Fund, referred to as the OTR; [1] and (2) Operating Fees charged against FCUs.[2]

[1] *See, e.g.,* 12 U.S.C. 1783(a) (making the Share Insurance Fund available ''for such administrative and other expenses incurred in carrying out the purpose of [Title II of the FCU Act] as [the Board] may determine to be proper.'').

[2] 12 U.S.C. 1755(a) (''In accordance with rules prescribed by the Board, each [FCU] shall pay to the [NCUA] an annual operating fee which may be composed of one or more charges identified as to

The first budget funding source, the OTR, represents the formula the NCUA uses to allocate insurance-related expenses to the Share Insurance Fund under Title II of the FCU Act. Two statutory provisions directly limit the Board's discretion with respect to the OTR. First, expenses funded from the Share Insurance Fund must carry out the purposes of Title II of the Act, which relate to share insurance.[3] Second, the NCUA may not fund its entire annual budget through charges to the Share Insurance Fund.[4] The NCUA has not imposed additional policy or regulatory limitations on its discretion for determining the OTR.

With regard to the Operating Fee, the FCU Act requires each FCU to, ''in accordance with rules prescribed by the Board, . . . pay to the [NCUA] an annual operating fee which may be composed of one or more charges identified as to the function or functions for which assessed.'' [5] The fee must ''be determined according to a schedule, or schedules, or other method determined by the Board to be appropriate, which gives due consideration to the expenses of the [NCUA] in carrying out its responsibilities under the [FCU Act] and to the ability of [FCUs] to pay the fee.'' [6] The statute requires the Board to, among other things, ''determine the periods for which the fee shall be assessed and the date or dates for the payment of the fee or increments thereof.'' [7]

Accordingly, the FCU Act imposes three requirements on the Board in connection with assessing an operating fee on all FCUs: (1) The fee must be assessed according to a schedule or schedules, or other method that the Board determines to be appropriate, which gives due consideration to NCUA's responsibilities in carrying out the FCU Act and the ability of FCUs to pay the fee; (2) the Board must determine the period for which the fee will be assessed and the due date for payment; and (3) the Board must deposit collected fees into the Treasury to defray the Board's expenses in carrying out the FCU Act. Once collected, Operating Fees, ''may be expended by the Board to defray the expenses incurred in carrying out the provisions of [the FCU Act,] including the examination and supervision of [FCUs].'' [8]

II. Historical Practice in Determining the Overhead Transfer Rate and Assessing the Operating Fee

Overhead Transfer Rate

The Share Insurance Fund was established by Title II of the FCU Act on October 19, 1970. Section 1783(a) of Title II authorizes the Board to use Share Insurance Funds to pay for ''such administrative and other expenses incurred in carrying out the purposes of this title as it may determine to be proper.''

In 1973, a Government Accountability Office audit [9] recommended the NCUA adopt a method of allocating costs between the operating fund and the newly formed Share Insurance Fund. Between 1973 and 1980, various cost allocation methods were employed, including direct charges to the Share Insurance Fund for insurance expenses including costs to liquidate or merge credit unions and examiner time spent conducting safety and soundness examinations. Starting in 1981, the OTR ranged between 30 and 34 percent, and stayed in that range through 1984.

From 1985 through 1994, the NCUA conducted annual examiner time surveys (ETS) to determine an appropriate factor for apportioning the agency's total operating expenses. The survey results supported a transfer rate between 50.1 percent and 60.4 percent for insurance related activities; however, the Board maintained the OTR at 50 percent.

Following the 1994 survey, the Board approved surveys that were conducted every three years. Three-year surveys covered fiscal years 1995 through 1997 and fiscal years 1998 through 2000. During that period, the OTR was kept at 50 percent. The Board voted to resume annual ETS in 2000 and expanded the survey to include more examiners. The 2000 survey results supported an OTR of 66.72 percent and, after 15 years of holding the OTR at 50 percent, the Board increased the OTR to 66.72 percent for fiscal year 2001.

In 2001, the Board hired an independent party, Deloitte & Touche, to assess the OTR process. Deloitte & Touche's review [10] of the OTR process was issued on September 5, 2001 and included several recommendations to improve the OTR process. These recommendations were implemented in 2002.

At the November 20, 2003 Board meeting,[11] the Board adopted a revised, comprehensive methodology for calculating the OTR that was in place until 2017. The methodology used the results of an automated annual ETS process. The following were also factored into the methodology:

- The value to the Share Insurance Fund of the insurance-related work performed by state supervisory authorities (SSAs).
- The cost of the NCUA resources and programs with different allocation factors from the examination and supervision program.
- The distribution of insured shares between FCUs and FISCUs.
- Operational costs charged directly to the Share Insurance Fund.

In 2016, the NCUA published in the **Federal Register** the OTR methodology used to calculate the OTR and requested comments from the public.[12] In conjunction with the 2016 **Federal Register** notice, the Board committed to periodically review the methodologies for calculating both the OTR and the Operating Fee, and to propose changes to the methodologies that would result in more equitable alignment of fees to the resource levels required to supervise and regulate both FCUs and FISCUs.

In 2017, the NCUA published in the **Federal Register** a request for comment regarding a revised OTR methodology based on the Board's internal assessment and comments received from the 2016 notice.[13] The primary goal of the proposed changes to the OTR methodology at that time was to simplify and streamline the methodology and reduce the resources needed to administer the OTR. The simplified OTR methodology focused on assigning a percentage share of work to insurance costs in four categories of activities:

1. 50 percent insurance related—Time spent examining and supervising FCUs.
2. 100 percent insurance related—All time and costs the NCUA spends supervising or evaluating the risks posed by FISCUs or other entities the NCUA does not charter or regulate (*e.g.,* third-party vendors and credit union service organizations).
3. Zero percent insurance related—Time and costs related to the NCUA's role as charterer and enforcer of consumer protection and other noninsurance based laws governing the

the function or functions for which assessed.'') and 12 U.S.C. 1766(j)(3). Other sources of income for the Operating Budget include interest income, funds from publication sales, parking fee income, and rental income.

[3] 12 U.S.C. 1783(a).

[4] 12 U.S.C. 1755.

[5] 12 U.S.C. 1755(a).

[6] 12 U.S.C. 1755(b).

[7] *Id.*

[8] 12 U.S.C. 1755(d).

[9] Gen. Accounting Off., Examination of Financial Statements of the Nat'l Credit Union Admin. (Sept. 18, 1973), *available at http://www.gao.gov/assets/210/203181.pdf.*

[10] *https://www.ncua.gov/files/publications/budget/2001DeloitteReportonOTRProcess.pdf.*

[11] The methodology was refined in 2013.

[12] 81 FR 4804 (Jan. 27, 2016).

[13] 82 FR 29935 (June 30, 2017).

operation of credit unions, for example, field of membership requirements.

4. 100 percent insurance related—Time and costs related to the NCUA's role in administering federal share insurance and the Share Insurance Fund.

The Board adopted this principles-based OTR methodology in 2017.[14] At that time, the Board committed to subject the four principles, but not the particulars of their application, to public comment every three years and in the event it proposes a change to one or more of the principles.

III. Overhead Transfer Rate Methodology

To calculate the OTR, the four principles are applied to the activities and costs of the agency to arrive at the portion of the agency's budget to be charged to the Share Insurance Fund.

Step 1—Workload Program

Annually, the NCUA develops a workload budget based on the NCUA's examination and supervision program to carry out the agency's core mission. The workload budget reflects the time necessary to examine and supervise federally insured credit unions (FICUs), along with other related activities, and therefore the level of field staff needed to implement the exam program. Applying principles 1, 2, and 3 (those relevant to the workload budget) to the applicable elements of the workload budget results in a composite rate that reflects the portion of the agency's overall insurance related mission program activities.

Step 2—Annual Budget

The annual budget represents the costs of the activities associated with achieving the strategic goals and objectives set forth in the NCUA's Strategic Plan. The annual budget is based on agency priorities and initiatives that drive resulting resource needs and allocations. Information related to the NCUA's budget process, including details on the Board-approved budgets, is available on the agency's website.[15]

The agency achieves its primary mission through the examination and supervision program. The percentage of insurance-related workload hours derived from Step 1 represents the main allocation factor used in Step 2 and is applied to the budgets for the examination and supervision programs to calculate the insurance-related costs of the offices conducting field work (currently the Regions and ONES). A few agency offices have roles distinct enough to warrant their own allocation factors, which are developed by applying the four factors described above to their respective activities. Each of these offices tracks their activities annually to determine their factors. These factors are then applied to the respective offices' budgets to determine their insurance-related costs.

A weighted average allocation factor, calculated by dividing the aggregate insurance-related costs for the field offices conducting the examination and supervision program and the agency offices with their own unique allocation factors by their aggregate total budgets, is applied to the central offices that design or oversee the examination and supervision program or support the agency's overall operations. This factor is then applied to the aggregate budgets for the remaining offices. As such, the proportion of insurance-related activities for these offices corresponds to that of the mission offices. The NCUA's total insurance-related costs are calculated by summing the insurance cost calculated for the field offices, the offices with unique allocations factors, and the insurance cost for all other NCUA offices.

Step 3—Calculate the OTR

The OTR represents the percentage of the NCUA budget funded by a transfer from the Share Insurance Fund.[16] The OTR is calculated by dividing the total insurance-related costs determined in Step 2 by the NCUA's total annual budget.

Request for Comment on OTR Methodology

This principles-based OTR methodology has streamlined the process for calculating the OTR and reduced the resources needed to gather the cost center time allocation used in the calculation. In addition, the methodology established some consistency in the calculated OTR each year, seen previously only briefly during the three-year period ended 2013.

The consistency in the calculation allows for the minor variations in the OTR to be driven by the variables that affect the OTR, not the calculation itself. These variables include, but are not limited to, the normal fluctuations in the workload budget from one calendar year to the next, changes in FICU CAMEL ratings, variation in the number and size of FICUs that meet the annual exam and extended exam eligibility criteria, emerging risk indicators inherent in FICU operational changes, variations in individual state regulator programs, and small fluctuations in the timing of the examinations related to a particular calendar year. This streamlined and simplified approach to calculating the OTR has provided a level trend in the OTR, with only minor fluctuations due to the variables that affect the OTR.

The Board finds the current OTR methodology to be fair and equitable, more transparent and less complex than prior methodologies, reduced administrative costs related to the OTR, and recognizes that safety and soundness is not the sole domain of the NCUA as insurer. As a result, the NCUA Board does not propose any changes to the methodology at this time. The Board nevertheless invites comments on its OTR methodology. The Board specifically invites comments on the four principles used in the methodology to calculate the OTR discussed above.[17]

Operating Fee

The NCUA's regulations govern certain of the operating fee processes.[18] The regulation establishes: (i) The basis for charging operating fees (total assets); (ii) a notice process; (iii) rules for new charters, conversions, mergers, and liquidations; and (iv) administrative fees and interest for late payment, among other principles and processes.[19] Certain aspects of and adjustments to the operating fee process, such as changes to which FCUs are exempt from operating fees or the multipliers used to determine fees applicable to FCUs that fall within designated asset tiers, are usually not published in the **Federal Register**. Instead, in November 2015, the Board delegated authority to the NCUA's Chief Financial Officer to administer the Board-approved methodology, and to set the operating fees as calculated per the approved methodology during each annual budget cycle beginning with 2016. Although it is not required to do so under the Administrative Procedure Act,[20] in January 2016, the Board published its methodology in the **Federal Register** and requested comment.[21] The Board is doing so again now to provide notice of a clarification and seek comment on several potential updates to the

[14] 82 FR 55644 (Nov. 22, 2017).

[15] *https://www.ncua.gov/About/Pages/budget-strategic-planning/supplementary-materials.aspx.*

[16] The percentage of actual expenses funded by the Share Insurance Fund as they are incurred each month.

[17] *https://www.ncua.gov/files/publications/budget/overhead-transfer-rate-summary-2020.pdf.*

[18] 12 CFR 701.6.

[19] *Id.*

[20] 5 U.S.C. 551 *et seq.*

[21] 81 FR 4674 (Jan. 27, 2016).

methodology, as described in more detail in Section V below.

The Board proposed the current operating fee methodology in 1979, after Congress passed the Financial Institutions Regulatory and Interest Rate Control Act of 1978.[22] This legislation permitted the Board to consolidate previously separate chartering, supervision, and examination fees into a single operating fee, charged ''in accordance with schedules, and for time periods, as determined by the Board, in an amount necessary to offset the expenses of the Administration at a rate consistent with a credit union's ability to pay.'' [23] In combination with a proposed change to § 701.6 of the NCUA's regulations in 1979, the Board proposed an initial fee schedule in the **Federal Register**, including rates for 12 asset tiers.[24] It later published a final rule in the **Federal Register**, which included a finalized fee schedule for 1979.[25]

On four additional occasions, the Board has requested comments on potential changes to the operating fee schedule through a **Federal Register** notice, independent of any changes to 12 CFR 701.6. First, in 1990, the Board provided notice to the public that it was considering consolidating the operating fee schedule from 14 asset tiers to two asset tiers, retaining an exemption for FCUs under $50,000 in assets and implementing a $100 minimum fee.[26] Second, in 1992, the Board requested comments on a plan to limit operating fees to the first $1 billion of each FCU's assets.[27] Third, in 1995, the Board requested comments on a plan to restructure the operating fee schedule for natural person FCUs, to exempt FCUs with assets of $500,000 or less based on concern about small FCUs' ability to pay the fees.[28] The Board also requested comments on imposing a minimum fee of $100 on all natural person FCUs with assets over $500,000 but less than or equal to $750,000.[29]

Most recently, in 2016, the Board published its current methodology in detail in the **Federal Register** and solicited comment. The Board made no changes in response to comments on the methodology published in 2016 and delegated authority to the NCUA Chief Financial Officer to apply the published methodology. Since then, the Chief Financial Officer has applied the published Operating Fee methodology and explained its application in the NCUA's annual budget documents.

In general, the Board has not used **Federal Register** notices in connection with annual adjustments to the asset tiers and rates of the operating fee schedule. Instead, the Board has opted to adopt such changes at open meetings. As recently as 2012, for example, the Board increased the asset threshold used to exempt FCUs from operating fees from $500,000 to $1 million at an open meeting, without requesting advance comment in the **Federal Register**.[30] While the Board has varied its practice with respect to fee schedule changes, it has done so within the FCU Act's broad directive that the fee schedule should be as ''determined by the Board to be appropriate,'' subject to its consideration of its expenses and the ability of FCUs to pay.[31] In addition, the NCUA's regulation on operating fee processes includes a standing invitation for written comments from FCUs on existing fee schedules [32] and each year the Board invites comments on the draft NCUA budget, which includes a detailed explanation of how the operating fee is calculated and how changes to the operating fee rate are determined based on application of the published methodology.

IV. Methodology for Determining the Aggregate Operating Fee Amount

The Board adopts an annual budget in the fall of each year, which includes as an operating budget the costs of day-to-day operations such as employee compensation, travel and training expenses, support purchased through contracts with service providers that have expertise outside of the agency's core capabilities, and other miscellaneous administrative expenses. The annual budget also includes as a capital budget the estimated spending on capital projects, such as for computer hardware and software, and for investments in agency owned real property and equipment, and provides the resources required to execute the goals and objectives as outlined in the NCUA's strategic plan.[33] As discussed above, two primary sources fund the annual budget: (1) Requisitions from the Share Insurance Fund, determined through the OTR and (2) operating fees paid by FCUs.

Adjustments to the Budget. When calculating the aggregate annual operating fee requirements, the Board first subtracts amounts transferred from the Share Insurance Fund through the OTR and other expected income amounts, as discussed below, from the operating budget, which funds the day-to-day needs for the upcoming year.

Overhead Transfer Rate: As discussed above, the FCU Act authorizes the NCUA to expend funds from the Share Insurance Fund for administrative and other expenses related to federal share insurance.[34] An overhead transfer from the Share Insurance Fund covers the expenses associated with insurance-related functions of the NCUA's operations. The OTR is one of the funding sources for the budget, but the OTR does not affect the amount of the annual budget. The Board approves the annual budget separately and without regard to the OTR. The OTR is applied to actual expenses incurred each month.

Other Income: Other income reduces the required operating fees by providing an additional source of funds to cover regulatory (*i.e.,* non-insurance) related aspects of operating the NCUA. Other income is projected based on the latest financial statements and includes interest income and miscellaneous revenues. Interest income includes interest on operating fund balances invested in short-term Treasury securities because the funds are not immediately required to pay expenses. Other income includes miscellaneous revenues, such as revenues from the production or sale of NCUA reports and publications, rent collected from other federal agencies that share NCUA facilities, and parking fee revenues. The NCUA owns a share of the parking garage underneath the complex of buildings that includes the agency's Central Office, and the NCUA receives its share of the revenue collected from fees charged to those who park in the garage.

Adjustments for capital project budgets and notes payable. The budgets for capital projects and notes payable are added to the balance remaining after deducting the estimated overhead transfer share of the operating budget. These budgets include capital acquisitions planned for the year and the annual payment of the note payable for the NCUA Central Office building on King Street.

Capital Projects. Each year the NCUA conducts a rigorous assessment of its needs for information technology (IT),

[22] 44 FR 11785 (Mar. 2, 1979).
[23] *Id.* at 11786.
[24] *Id.* at 11787.
[25] 44 FR 27379 (May 10, 1979).
[26] 55 FR 29857 (July 23, 1990).
[27] 57 FR 34152 (Aug. 3, 1992).
[28] 60 FR 32925 (June 26, 1995).
[29] *Id.*
[30] Board Action Memorandum on 2013 Operating Fee (Nov. 15, 2012).
[31] 12 U.S.C. 1755(b).
[32] 12 CFR 701.6(c).
[33] Additional information on the NCUA budget may be found at the following Web address: *http://www.ncua.gov/About/Pages/budget-strategic-planning/supplementary-materials.aspx.*
[34] 12 U.S.C. 1783(a).

facility improvements and repairs, and other multi-year capital investments. Routine repairs and lifecycle-driven property renovations are necessary to properly maintain investments in the NCUA's Central Office building in Alexandria, Virginia, and the agency's office building in Austin, Texas. IT systems and hardware are another significant capital expenditure for modern organizations, and the budget includes investments both for maintaining and upgrading currently operational systems and networks as well for developing replacements for systems and hardware that has reached the end of its useful life.

Repayment of NCUA Central Office on King Street, Note Payable. In 1992, the Operating Fund entered into a commitment to borrow up to $42.0 million in a 30-year secured term note with the Share Insurance Fund to fund the costs of constructing the NCUA's Central Office in 1993. Since the Operating Fund borrowed monies from the Share Insurance Fund, the annual scheduled principal payments are excluded from the OTR and overhead transfer amount. The annual scheduled principal payments are treated as a cash need and applied as an increase to operating fee requirements.

Operating Fee Requirements. The result after adjustments for capital project and notes payable needs is the total budget subject to the operating fee and payable by both natural person and corporate FCUs. The natural person FCU operating fees are determined by deducting the corporate FCU operating fees from the total budget operating fee requirements.

V. Methodology for Determining the Operating Fee Schedule

The corporate credit union fee schedule was established in 1979 and has changed little over the years. Corporate FCUs hold assets of natural person credit unions, which are already assessed under the natural person operating fees for those members that are FCUs. Assessing corporate FCUs at the same rate would, effectively, assess the same assets twice for natural person FCU members of corporate FCUs. Corporate FCUs return a large portion of their earnings to natural person credit unions in the form of lower fees and higher dividends. Raising operating fee assessments for corporate FCUs would result in higher expenses for corporate FCUs. Corporate FCUs would need to pass the higher expenses to natural person credit unions in the form of higher fees and lower investment yields. The corporate FCU fee schedule is a method of charging corporate FCUs a supervisory fee to defray costs and is now published annually in the budget.

The Board delegated authority to the Chief Financial Officer to administer the methodology approved by the Board for calculating the operating fees, and to set the fee schedule as calculated per the approved methodology, beginning in 2016. After determining the operating fee requirements for natural person FCUs, the Chief Financial Officer creates the natural person FCU operating fee schedule for the upcoming year. The FCU operating fee schedule is published annually in the budget.

The current fee schedule for natural person FCUs uses three asset tiers. A different assessment rate is applied to each tier, and the threshold for each tier is adjusted annually to reflect inflationary growth of the credit union system. FCUs with $1 million or less in assets pay no operating fee.

There are two steps used to determine adjustments to the operating fee schedule for the upcoming year. They are: (1) Updating the prior-year asset tier thresholds using the projected asset growth rate and (2) updating the prior-year assessment rates for each asset tier by determining the average assessment rate adjustment.

Updating prior year asset levels. The first step in determining the new operating fee schedule is to increase the threshold for each asset tier from the prior-year by the projected asset growth rate. Tier thresholds are adjusted annually to preserve the same relative relationship of the scale to the applicable asset base.

The projected asset growth rate is a forecast of FCU asset growth rates for a year. The NCUA's Office of Chief Economist (OCE) uses three different methods to forecast asset growth and combines them to generate an overall asset growth rate forecast.

Forecasting method one uses Call Report data for the first half of the year to predict full-year asset growth. This is done by first calculating the ratio of first-half asset growth to full-year asset growth. The percentage of full-year growth accounted for by first-half asset growth varies from year to year but, on average, nearly 80 percent of the asset growth for FCUs occurs in the first half of the year. Using the growth rate in the first half of the year, OCE projects the full-year growth rate.

Forecasting Method two uses Call Report data to determine the most recent four-quarter growth rate and sets this rate to the full-year asset growth rate. This approach is based on the idea that an FCU is likely to establish and maintain a relatively constant growth rate over a short period, after accounting for variations in the growth rate that is attributable to seasonal fluctuations. This implies that a good forecast of full-year asset growth is the most recently available four-quarter asset growth.

Forecasting method three uses a time series statistical model. Using quarterly Call Report data, NCUA predicts future four-quarter asset growth using the four-quarter growth in assets for the period ending two quarters earlier (that is, four-quarter asset growth lagged two quarters).

In general, forecasting literature shows that combining forecasts from different approaches can improve forecast accuracy and decrease the likelihood of forecast errors. Using the root mean squared error statistic to calculate the accuracy of the individual approaches and combined forecast approaches, NCUA has found that the combined forecast approach is better at predicting the final asset growth rate than any of the individual approaches. NCUA therefore averages the forecasts from the three approaches to maximize accuracy.

Updating the prior year's assessment rates. After updating the prior-year asset tier thresholds, the next step is to project operating fees using the updated asset tier thresholds and the prior year assessment rates charged for each tier. The percentage difference between the projected operating fee collections and the operating fee collections required to support the budget is the average rate adjustment.

The average rate adjustment is used to amend the prior-year's assessment rates for each asset tier either upwards or downwards. If the projected amount of operating fees is less than the required budgeted amount, then the assessment rates for each asset tier are adjusted upwards. If the projected amount is more than the required budgeted amount, then the assessment rates for each asset tier are adjusted downwards.

The resulting new operating fee schedule and due date are communicated via a Letter to Federal Credit Unions and posted to *NCUA.gov* at least 30 days after Board approval of the annual budget. The Board also makes available an online operating fee calculator on the NCUA website for FCUs to estimate their individual fees for the upcoming year. No later than March of each year, natural person FCUs with assets greater than $1 million will receive an invoice for their operating fee. Operating fees are based on actual assets reported as of December 31 of the previous year. The NCUA combines operating fee and capitalization deposit adjustment into a single invoice normally due in April. As

required by the FCU Act, the NCUA will deposit the collected fees in the United States Treasury.[35]

VI. Proposed Changes to Methodology

As summarized above, the Board seeks comment on three proposed changes to the Operating Fee methodology and details each below. The Board will review the comments received through this notice and consider adopting these changes through subsequent Board action prior to assessment of the 2021 Operating Fees.

1. Treatment of Capital Budget

Currently, the Board initially funds the NCUA's planned capital projects budget entirely through operating fees assessed on FCUs. The Board proposes to change this practice by reimbursing the appropriate portion of these expenditures through the OTR.

In recent years, the NCUA Office of the Chief Financial Officer (OCFO) has worked to improve the agency's financial management processes and modified some of its practices to align with contemporary Federal financial management standards. This allows the agency to manage its cash flow more effectively and to record appropriately on its books the contractual commitments its makes, particularly for complex and multi-year capital projects.

As a result of these improvements and modifications, in the 2018 budget NCUA clarified how non-cash transactions such as the estimated value of employees' earned but unused annual leave and projected depreciation expenses for capital assets would be treated from a budgetary perspective. Namely, such amounts would no longer be included in annual budgets presented to the Board as they result in no expenditure tied to the recognition of an expense under GAAP. Since that time, the calculation for the operating fee has also excluded such items when determining the allocation of the annual budget between the share paid through the OTR and the share paid through the operating fee.

The NCUA Board now proposes to clarify that for the purposes of calculating the operating fee, the budget for capital projects will be included within the total annual budget subject to the OTR. This approach ensures that the cost of new capital acquisitions is borne equitably between FCUs and FISCUs *at the time such acquisitions are made* and is consistent with the 2018 change that excluded other non-cash expenses from the budget. Under the existing methodology, the Share Insurance Fund reimburses the operating fund for capital projects at the OTR and over several years according to depreciation schedules, which are non-cash transactions. Including capital project budgets in the total annual amount subject to the OTR at the point of acquisition effectively accelerates OTR reimbursements for capital project spending to the point at which such expenditures occur. This change also increases consistency with the current OTR methodology, which generally requires that a proportionate share of expenses not exclusively related to the regulation of FCUs be borne in part by the Share Insurance Fund.

The following table provides a comparison of how the operating fee calculation for the 2020 budget would have differed had funds for capital projects been subject to the OTR like for the other parts of the annual budget for that year.

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[35] *https://www.ncua.gov/files/agenda-items/AG20191212Item1b.pdf,* pages 57 to 64.

OPERATING FEE CALCULATION FOR BOARD-APPROVED 2020 BUDGET COMPARED TO 2020 OPERATING FEE CALCULATION SHOWING PROPOSED CAPITAL BUDGET TREATMENT

($ millions)

	Board-Approved 2020 Budget	2020 w/ Capital Budget Change
1 Proposed Operating Budget	**$ 315.883**	**$ 315.883**
Capital Acquisitions	$ -	$ 25.076
2 Remove King Street Station Note from Calculation	$ (1.340)	$ (1.340)
3 Operating Budget to apply OTR	**$ 314.543**	**$ 339.619**
4 Overhead Transfer Rate **61.3%**	$ (192.815)	$ (208.186)
5 Interest Income	$ (2.250)	$ (2.250)
6 Miscellaneous (rent and publication fees)	$ (1.000)	$ (1.000)
7 Net (sum lines 3 - 6)	**$ 118.478**	**$ 128.183**
8 Operating Fund adjustment	$ -	$ -
9 Capital Acquisitions	$ 25.076	$ -
10 Payment of King Street Note Payable (scheduled principal payments)*	$ 1.340	$ 1.340
11 Budgeted Operating Fee/Capital Requirements (sum lines 5 -10)	**$ 144.894**	**$ 129.523**
12 Corporate Federal CU Operating Fees	$ (0.200)	$ (0.200)
13 Natural Person FCU Operating Fees Required (sum lines 11 -12)	**$ 144.694**	**$ 129.323**
14 Fees projected with Asset Growth of **5.6%**	$ (143.072)	$ (143.072)
15 Difference (lines 13 & 14)	**$ 1.622**	**$ (13.749)**
16 Average Rate Adjustment Indicated (line 15 divided by line 14)	**1.13%**	**-9.61%**

2. Treatment of Miscellaneous Revenues

Currently, miscellaneous revenues collected by the NCUA reduce operating fees charged to FCUs. The Board proposes changing the treatment of miscellaneous revenues, reducing the percentage of the NCUA budget funded by the OTR transfer from the Share Insurance Fund.

As discussed above miscellaneous revenues includes revenues from the production and sale of NCUA reports and publications, rent collected from other federal agencies that share NCUA facilities, and parking fee revenues. The NCUA's miscellaneous revenues vary from year to year, but typically total approximately $1,000,000.

The Board proposes to clarify that for the purposes of calculating the operating fee, projected miscellaneous revenues will be included within the total annual budget subject to the OTR. The Board believes this approach is consistent with its proposed change to the treatment of capital project budgets, and that it better reflects the equitable distribution of the agency's net expenses between FCUs and FISCUs.

The table below provides a comparison of how the operating fee calculation for the 2020 budget would have differed had miscellaneous revenues reduced the amount of the budget funded through the OTR for that year.

OPERATING FEE CALCULATION FOR BOARD-APPROVED 2020 BUDGET COMPARED TO 2020 OPERATING FEE CALCULATION SHOWING PROPOSED MISC. REVENUE TREATMENT

($ millions)

	Board-Approved 2020 Budget	2020 w/ Misc. Revenue Change
1 Proposed Operating Budget	$ **315.883**	$ **315.883**
Miscellaneous Revenue (rent and publication fees)	$ -	$ (1.000)
2 Remove King Street Station Note from Calculation	$ (1.340)	$ (1.340)
3 Operating Budget to apply OTR	$ **314.543**	$ **313.543**
4 Overhead Transfer Rate **61.3%**	$ (192.815)	$ (192.202)
5 Interest Income	$ (2.250)	$ (2.250)
6 Miscellaneous (rent and publication fees)	$ (1.000)	$ -
7 Net (sum lines 3 - 6)	$ **118.478**	$ **119.091**
8 Operating Fund adjustment	$ -	$ -
9 Capital Acquisitions	$ 25.076	$ 25.076
10 Payment of King Street Note Payable (scheduled principal payments)*	$ 1.340	$ 1.340
11 Budgeted Operating Fee/Capital Requirements (sum lines 5 -10)	$ **144.894**	$ **145.507**
12 Corporate Federal CU Operating Fees	$ (0.200)	$ (0.200)
13 Natural Person FCU Operating Fees Required (sum lines 11 -12)	$ **144.694**	$ **145.307**
14 Fees projected with Asset Growth of **5.6%**	$ (143.072)	$ (143.072)
15 Difference (lines 13 & 14)	$ **1.622**	$ **2.235**
16 Average Rate Adjustment Indicated (line 15 divided by line 14)	**1.13%**	**1.56%**

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3. Annual inflationary updates to operating fee schedule asset tier thresholds

The Board has separately proposed amending its rule at 12 CFR 701.6 for determining total assets used as the basis for calculating the operating fee due from any FCU. Under the proposed rule, total assets would be calculated as the average of total assets reported on an FCU's previous four Call Reports available at the time the NCUA Board approves the agency's budget for the upcoming year. Members of the public are encouraged to comment on this proposed amendment by responding to the appropriate **Federal Register** notice.

To maintain consistency between the total assets used for billing the operating fee to an individual FCU and the asset thresholds used for determining the rate tier into which each FCU falls, the Board proposes changing its approach for adjusting the rate tier thresholds. Specifically, for purposes of determining the annual adjustment to the rate tier thresholds, the Board proposes comparing the average of total system assets reported in Call Reports for the four quarters available at the time it approves the budget to the average of total system assets in Call Reports for the four quarters of the respective previous years. In this way, the tier thresholds shown on the operating fee schedule would be increased each year based on the same reporting data that will be used for computing individual FCU invoice amounts.

Request for Comments

The Board solicits public comment on the proposed changes discussed above.

In addition, the Board solicits comment on the following questions to inform potential future enhancements to the methodology:

1. As discussed above, the Board has not substantially modified the current three-tier operating fee schedule since 1993. The current fee schedule is regressive; that is, credit unions with a larger amount of total assets pay a lower marginal rate on those assets above the threshold levels for the lower tiers. Given growth and consolidation in the credit union system, the Board is interested in whether such an approach is an equitable method for allocating the agency's operating costs. There is a potentially wide range of approaches for distributing the cost of the NCUA's budget that is funded by the operating fee. For example, the Board could adopt a single, flat-rate operating fee for all credit unions with total assets that exceed a standard exemption threshold. Overall, a flat-rate operating fee would shift costs away from relatively smaller credit unions to relatively larger ones, making the fee schedule less regressive. The Board could also make the operating fee schedule less regressive by increasing the rates for the second and third tiers on the schedule. Alternatively, adjusting the rates upward for the first and second tiers of the current operating fee would create a more regressive schedule. The Board is interested in receiving public comments on whether or how it should consider modifying the operating fee schedule and what specific aspects and conditions of the credit union system it should evaluate when making such decisions.

2. Currently, the Board does not assess an operating fee to FCUs with assets less than $1 million. This level was most recently adjusted in 2012 for the 2013 assessment. In the past, the Board has accounted for the ability of small FCUs to pay the fees by exempting those under this threshold from paying any fee. In light of growth in total FCU assets, and of consolidation among FCUs, the Board is interested in understanding what factors it might consider when adjusting this threshold. For example, growth in the credit union system since 2012 would suggest an exemption threshold of approximately $1,500,000. Alternatively, the FCU Act establishes that FCUs with less than $10,000,000 in assets do not have to apply Generally Accepted Accounting Principles, and is also the level below which a credit union could still be considered ''new'' under the FCU Act's prompt corrective action provisions. To inform respondents to this inquiry, the table below illustrates the number of FCUs and potential reallocated revenue, based on 2020 operating fee invoices that would result from changing the exemption threshold to various new levels.

Revenue Impact of Increasing Exclusion Level to New Minium Level

(counts based on 2019 Q4 Call Report, amounts based on 2020 Operating Fee invoices)

	Current Structure		Exclude FCUs with <$1.5M assets			Exclude FCUs with <$5M assets			Exclude FCUs with <$10M assets		
Rate Tier	Count	Revenue	Count	Revenue	Change in Revenue	Count	Revenue	Change in Revenue	Count	Revenue	Change in Revenue
Total Assets less than $1 million	180	---	180	---	---	180	---	---	180	---	---
Additional CUs with Assets between $1 million and new minium	N/A	N/A	60	-$ 20,315	-$ 20,315	401	-$ 317,170	-$ 317,170	765	-$ 1,054,870	-$ 1,054,870
Total Assets more than exclusion threshold and less than $1,599,193,665	3,005	$ 90,483,240	2,945	$90,495,885.69	$ 12,646	2,604	$ 90,680,673	$ 197,433	2,240	$ 91,139,878	$ 656,638
Total Assets more than $1,599,193,665 and less than $4,839,136,005	70	$ 35,838,526	70	$35,843,535.10	$ 5,009	70	$ 35,916,725	$ 78,199	70	$ 36,098,607	$ 260,081
Total Assets greater than $4,839,136,005	20	$ 19,036,855	20	$19,039,515.37	$ 2,661	20	$ 19,078,393	$ 41,538	20	$ 19,175,006	$ 138,151
Total	**3,275**	**$ 145,358,621**	**3,275**	**$ 145,358,621**	---	**3,275**	**$ 145,358,621**	---	**3,275**	**$ 145,358,621**	---

3. The NCUA provides credit unions an annual voluntary diversity self-assessment, as authorized by law.[36] The NCUA Board believes that diversity coupled with inclusion should be a strategic business goal for credit unions. The Board is interested in views on whether federal credit unions that complete an annual voluntary diversity self-assessment should receive a modest discount on the FCU operating fee due in the subsequent year. How much of a discount on operating fees would be a sufficient incentive to encourage participation in the voluntary diversity self-assessment? Because Federally Insured State-Chartered Credit Unions (FISCUs) pay an operating fee to their state regulatory agency rather than to the NCUA, what appropriate incentives could the Board provide to encourage FISCUs to participate in the survey? Alternatively, what other non-financial incentives might encourage both FCUs and FISCUs to participate?

By the National Credit Union Administration Board on July 30, 2020.

Gerard Poliquin,

Secretary of the Board.

[FR Doc. 2020–17009 Filed 8–28–20; 8:45 am]

BILLING CODE 7535–01–P

[36] Section 342(b)(2)(C) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203.

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meetings

TIME AND DATE: 9:30am, Tuesday, September 15, 2020.

PLACE: Virtual.

STATUS: The one item may be viewed by the public through webcast only.

MATTERS TO BE CONSIDERED: 65869 Railroad Accident Report: Collision of Two CSX Transportation Freight Trains, Carey, Ohio, August 12, 2019.

CONTACT PERSON FOR MORE INFORMATION: Candi Bing at (202) 590–8384 or by email at *bingc@ntsb.gov.*

Media Information Contact: Peter Knudson by email at *peter.knudson@ntsb.gov* or at (202) 314–6100.

This meeting will take place virtually. The public may view it through a live

or archived webcast by accessing a link under ''Webcast of Events'' on the NTSB home page at *www.ntsb.gov.*

There may be changes to this event due to the evolving situation concerning the novel coronavirus (COVID–19). Schedule updates, including weather-related cancellations, are also available at *www.ntsb.gov.*

The National Transportation Safety Board is holding this meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b).

Dated: August 27, 2020.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 2020–19262 Filed 8–27–20; 4:15 pm]

BILLING CODE 7533–01–P

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Privacy Act of 1974; System of Records

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Notice of a Modified System of Records.

SUMMARY: In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, as amended, the Occupational Safety and Health Review Commission (OSHRC) is revising the notice for Privacy Act system-of-records OSHRC–3.

DATES: Comments must be received by OSHRC on or before September 30, 2020. The revised system of records will become effective on that date, without any further notice in the **Federal Register**, unless comments or government approval procedures necessitate otherwise.

ADDRESSES: You may submit comments by any of the following methods:

- *Email: rbailey@oshrc.gov.* Include ''PRIVACY ACT SYSTEM OF RECORDS'' in the subject line of the message.
- *Fax:* (202) 606–5417.
- *Mail:* One Lafayette Centre, 1120 20th Street NW, Ninth Floor, Washington, DC 20036–3457.
- *Hand Delivery/Courier:* same as mailing address.

Instructions: All submissions must include your name, return address, and email address, if applicable. Please clearly label submissions as ''PRIVACY ACT SYSTEM OF RECORDS.''

FOR FURTHER INFORMATION CONTACT: Ron Bailey, Attorney-Advisor, Office of the General Counsel, via telephone at (202) 606–5410, or via email at *rbailey@oshrc.gov.*

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974, 5 U.S.C. 552a(e)(4), requires federal agencies such as OSHRC to publish in the **Federal Register** notice of any new or modified system of records. As detailed below, OSHRC is revising Public Transportation Benefit Program Records, OSHRC–3, to delete OSHRC's regional office in Atlanta from both the System Manager(s) and System Location(s).

The notice for OSHRC–3, provided below in its entirety, is as follows.

SYSTEM NAME AND NUMBER:

Transportation Subsidy Program Records, OSHRC–3.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Office of the Executive Director, OSHRC, 1120 20th Street NW, Ninth Floor, Washington, DC 20036–3457.

SYSTEM MANAGER(S):

Support Services Specialist, Office of the Executive Director, OSHRC, 1120 20th Street NW, Ninth Floor, Washington, DC 20036–3457; (202) 606–5100.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

29 U.S.C. 661; Executive Order 13150.

PURPOSE(S) OF THE SYSTEM:

This system of records is maintained for the purpose of documenting an employee's participation in the Transportation Subsidy Program.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system of records covers all current and former employees who are, or were, enrolled in the Transportation Subsidy Program.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records includes information submitted by current and former participants via the OSHRC Transportation Subsidy Program Application. This form contains the employee's name and home address. The system also contains a Pre-tax Transportation Program Application which includes the employee's name and the last four digits of his or her social security number. Lastly, the system includes a SmartTrip form with the employee's name.

RECORD SOURCE CATEGORIES:

Information in this system of records comes from applicants to, and current and former participants in, the Transportation Subsidy Program.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to disclosures generally permitted under 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system of records may be disclosed as a routine use pursuant to 5 U.S.C. 552a(b)(3) under the circumstances or for the purposes described below, to the extent such disclosures are compatible with the purposes for which the information was collected:

(1) To the Department of Justice (DOJ), or to a court or adjudicative body before which OSHRC is authorized to appear, when any of the following entities or individuals—(a) OSHRC, or any of its components; (b) any employee of OSHRC in his or her official capacity; (c) any employee of OSHRC in his or her individual capacity where DOJ (or OSHRC where it is authorized to do so) has agreed to represent the employee; or (d) the United States, where OSHRC determines that litigation is likely to affect OSHRC or any of its components—is a party to litigation or has an interest in such litigation, and OSHRC determines that the use of such records by DOJ, or by a court or other tribunal, or another party before such tribunal, is relevant and necessary to the litigation.

(2) To an appropriate agency, whether federal, state, local, or foreign, charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes civil, criminal or regulatory violations, and such disclosure is proper and consistent with the official duties of the person making the disclosure.

(3) To a federal, state, or local agency maintaining civil, criminal or other relevant enforcement information, such as current licenses, if necessary to obtain information relevant to an OSHRC decision concerning the hiring, appointment, or retention of an employee; the issuance, renewal, suspension, or revocation of a security clearance; the execution of a security or suitability investigation; the letting of a contract; or the issuance of a license, grant or other benefit.

(4) To a federal, state, or local agency, in response to that agency's request for a record, and only to the extent that the information is relevant and necessary to the requesting agency's decision in the matter, if the record is sought in connection with the hiring, appointment, or retention of an

employee; the issuance, renewal, suspension, or revocation of a security clearance; the execution of a security or suitability investigation; the letting of a contract; or the issuance of a license, grant or other benefit by the requesting agency.

(5) To an authorized appeal grievance examiner, formal complaints manager, equal employment opportunity investigator, arbitrator, or other duly authorized official engaged in investigation or settlement of a grievance, complaint, or appeal filed by an employee, only to the extent that the information is relevant and necessary to the case or matter.

(6) To OPM in accordance with the agency's responsibilities for evaluation and oversight of federal personnel management.

(7) To officers and employees of a federal agency for the purpose of conducting an audit, but only to the extent that the record is relevant and necessary to this purpose.

(8) To OMB in connection with the review of private relief legislation at any stage of the legislative coordination and clearance process, as set forth in Circular No. A–19.

(9) To a Member of Congress or to a person on his or her staff acting on the Member's behalf when a written request is made on behalf and at the behest of the individual who is the subject of the record.

(10) To the National Archives and Records Administration (NARA) for records management inspections and such other purposes conducted under the authority of 44 U.S.C. 2904 and 2906.

(11) To appropriate agencies, entities, and persons when: (a) OSHRC suspects or has confirmed that there has been a breach of the system of records; (b) OSHRC has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, OSHRC, 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 OSHRC's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(12) To NARA, Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h), to review administrative agency policies, procedures and compliance with FOIA, and to facilitate OGIS' offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

(13) To another federal agency or federal entity, when OSHRC 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.

(14) To other federal agencies to effect salary or administrative offsets, or for other purposes connected with the collection of debts owed to the United States, pursuant to sections 5 and 10 of the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996.

(15) To other federal, state, local or foreign agencies conducting computer matching programs to help eliminate fraud and abuse and to detect unauthorized overpayments made to individuals. When disclosures are made as part of computer matching programs, OSHRC will comply with the Computer Matching and Privacy Protection Act of 1988, and the Computer Matching and Privacy Protections Amendments of 1990.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are stored on paper in locked file cabinets.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Paper records can be retrieved manually by name.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained and disposed of in accordance with NARA's General Records Schedule 2.4, Items 130 and 131.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records are maintained in locked file cabinets. Access to the cabinets is limited to personnel having a need for access to perform their official functions.

RECORD ACCESS PROCEDURES:

Individuals who wish to gain access to their records should notify: Privacy Officer, OSHRC, 1120 20th Street NW, Ninth Floor, Washington, DC 20036–3457. For an explanation on how such requests should be drafted, refer to 29 CFR 2400.6 (procedures for requesting records).

CONTESTING RECORD PROCEDURES:

Individuals who wish to contest their records should notify: Privacy Officer, OSHRC, 1120 20th Street NW, Ninth Floor, Washington, DC 20036–3457. For an explanation on the specific procedures for contesting the contents of a record, refer to 29 CFR 2400.8 (Procedures for requesting amendment), and 29 CFR 2400.9 (Procedures for appealing).

NOTIFICATION PROCEDURES:

Individuals interested in inquiring about their records should notify: Privacy Officer, OSHRC, 1120 20th Street NW, Ninth Floor, Washington, DC 20036–3457. For an explanation on how such requests should be drafted, refer to 29 CFR 2400.5 (notification), and 29 CFR 2400.6 (procedures for requesting records).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

April 14, 2006, 71 FR 19556; August 4, 2008, 73 FR 45256; October 5, 2015, 80 FR 60182; September 28, 2017, 82 FR 45324; and July 12, 2018, 83 FR 32331.

Nadine N. Mancini,

General Counsel, Senior Agency Official for Privacy.

[FR Doc. 2020–19168 Filed 8–28–20; 8:45 am]

BILLING CODE 7600–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2020–228 and CP2020–258]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* September 2, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

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

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2020–228 and CP2020–258; *Filing Title:* USPS Request to Add Priority Mail & Parcel Select Contract 4 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 25, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* September 2, 2020.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2020–19135 Filed 8–28–20; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2020–225 and CP2020–255; MC2020–226 and CP2020–256; MC2020–227 and CP2020–257]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* September 1, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

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

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2020–225 and CP2020–255; *Filing Title:* USPS Request to Add Priority Mail & First-Class Package Service Contract 161 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 24, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* September 1, 2020.

2. *Docket No(s).:* MC2020–226 and CP2020–256; *Filing Title:* USPS Request to Add Priority Mail & First-Class Package Service Contract 162 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 24, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* September 1, 2020.

3. *Docket No(s).:* MC2020–227 and CP2020–257; *Filing Title:* USPS Request to Add Priority Mail Contract 650 to Competitive Product List and Notice of

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

Filing Materials Under Seal; *Filing Acceptance Date:* August 24, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* September 1, 2020.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2020–19043 Filed 8–28–20; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89662; File No. SR–BX–2020–019]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Add the Consolidated Audit Trail Industry Member Compliance Rules to the List of Minor Rule Violations

August 25, 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 August 13, 2020, Nasdaq BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons 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 IM–9216 and in Options 11, Section 1.

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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to add BX's CAT industry member compliance rules (the ''CAT Compliance Rules'') to the list of minor rule violations in IM–9216 and in Options 11, Section 1. 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.[3]

Proposed Rule Change

The Exchange adopted the CAT Compliance Rules in General 7, Sections 1 through 13 [4] 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 as the Exchange's General 7 Sections. 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.

IM–9216 sets forth the list of rules under which a member or associated person may be subject to a fine under Rule 9216(b). Exchange Rule 9216 permits the Exchange to impose a fine (not to exceed $2,500) and/or censure on any member or associated person with respect to any rule listed under IM–9216. The Exchange proposes to amend IM–9216 to add the CAT Compliance Rules in General 7 to the list of rules in IM–9216 eligible for disposition pursuant to a minor fine under Rule 9216(b). In addition, Options 11, Section 1 sets forth the minor rule violation plan for Options Participants on The BX Options Market. Accordingly, the Exchange proposes to make conforming changes in Options 11, Section 1 to add the CAT Compliance Rules to the list of rules therein, and specify that for failures to comply with the Consolidated Audit Trail Compliance Rule requirements under General 7, the Exchange may impose a minor rule violation fine of up to $2,500.[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

[3] *See* Securities Exchange Act Release No. 88870 (May 14, 2020), 85 FR 30768 (May 20, 2020) (SR–FINRA–2020–013); *see also* Release No. 89123 (June 23, 2020), 85 FR 39016 (June 29, 2020) (SR–NYSE–2020–51).

[4] The Nasdaq Stock Market LLC General 7 rules are incorporated by reference into BX General 7.

[5] *See* Securities Exchange Act Release No. 80256 (March 15, 2017), 82 FR 14526 (March 21, 2017) (SR–BX–2017–007) (Order Approving Proposed Rule Changes To Adopt Consolidated Audit Trail Compliance Rules).

[6] 17 CFR 242.613.

[7] FINRA's maximum fine for minor rule violations under FINRA Rule 9216(b) is $2,500. The Exchange will apply an identical maximum fine amount for eligible violations of the General 7 Sections 1 through 13 to achieve consistency with FINRA and also to amend its minor rule violation plan (''MRVP'') to include such fines. Like FINRA, the Exchange would be able to pursue a fine greater than $2,500 for violations of the rules in General 7, Sections 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 9–10, *infra.*

[8] *See* Securities Exchange Act Release No. 88366 (March 12, 2020), 85 FR 15238 (March 17, 2020) (File No. 4–618).

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 BX pursuant to the Rule 17d–2 Plan, 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. We expect that the other exchanges would be entering into a similar RSA.

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.[9] 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.[10]

Upon effectiveness of this rule change, the Exchange will publish a regulatory alert notifying its members, associated persons, or Options Participants 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,[11] in general, and furthers the objectives of Section 6(b)(5),[12] in particular, because it is 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 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 General 7 where a more formal disciplinary action may not be warranted or appropriate consistent with the approach of other Plan Participants for the same conduct.

The Exchange further believes that the proposed amendments to IM–9216 and Options 11, Section 1 are consistent with Section 6(b)(6) of the Act,[13] which provides that members, or associated persons, or Options Participants 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 General 7 pursuant to the Exchange's rules.

The Exchange also believes that the proposed changes are designed to provide a fair procedure for the disciplining of a member, or associated person, or Options Participant consistent with Sections 6(b)(7) and 6(d) of the Act.[14] IM–9216 and Options 11, Section 1 do not preclude a member, or associated person, or Options Participant 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 General 7 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 either solicited or received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule

[9] *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).

[10] *See id.*

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78f(b)(6).

[14] 15 U.S.C. 78f(b)(7) and 78f(d).

change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2020–019 the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2020–019. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2020–019 and should be submitted on or before September 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.[15] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[16] 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 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 [17] 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,[18] 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 IM–9216 and in Options 11, Section 1 to be consistent with the approach FINRA has taken for minor violations of its corresponding CAT Compliance Rules.[19] 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.[20] 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,[21] 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 [22] and Rule 19d–1(c)(2) thereunder,[23] that the proposed rule change (SR–BX–2020–019) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Jill M. Peterson,

Assistant Secretary.

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[15] 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).

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78f(b)(1) and 78f(b)(6).

[18] 17 CFR 240.19d–1(c)(2).

[19] 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.

[20] *See* SR–FINRA–2020–013.

[21] 15 U.S.C. 78s(b)(2).

[22] 15 U.S.C. 78s(b)(2).

[23] 17 CFR 240.19d–1(c)(2).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89663; File No. SR–NYSEArca–2020–48]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of Gabelli ETFs Under Rule 8.900–E, Managed Portfolio Shares

August 25, 2020.

I. Introduction

On May 15, 2020, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) [1] of the Securities

[1] 15 U.S.C. 78s(b)(1).

Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] a proposed rule change to list and trade shares (''Shares'') of the following funds under Rule 8.900–E (Managed Portfolio Shares): Gabelli Growth Innovators ETF, Gabelli Financial Services ETF, Gabelli Small Cap Growth ETF, Gabelli Small & Mid Cap ETF, Gabelli Micro Cap ETF, Gabelli ESG ETF, Gabelli Asset ETF, Gabelli Equity Income ETF, and Gabelli Green Energy ETF (each a ''Fund'' and, collectively, the ''Funds''). The proposed rule change was published for comment in the **Federal Register** on June 3, 2020.[4] On July 9, 2020, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to September 1, 2020.[5] On August 6, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.[6] The Commission has received no comment letters on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. The Exchange's Description of the Proposal[7]

NYSE Arca Rule 8.900–E(b)(1) requires the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Managed Portfolio Shares on the Exchange; thus, the Exchange submitted this proposal to list and trade Managed Portfolio Shares of the Funds. The Shares will be issued by the Gabelli ETFs Trust (''Trust''), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[8] The investment adviser to each Fund will be Gabelli Funds, LLC (''Adviser''). G.distributors, LLC will serve as the distributor of each of the Funds' Shares.

A. Description of the Funds

Each Fund's holdings will conform to the permissible investments as set forth in the Exemptive Application and Exemptive Order, and the holdings will be consistent with all requirements in the Exemptive Application and Exemptive Order.[9]

Gabelli Growth Innovators ETF. The Fund's primary objective is to seek to provide capital appreciation. The Fund will primarily invest in common stocks of companies that the Adviser believes are relevant to the Fund's investment theme of innovation, with assets invested primarily in a broad range of readily marketable equity securities consisting of U.S. exchange-listed common stock and preferred stock.

Gabelli Financial Services ETF. The Fund seeks to provide capital appreciation. The Fund intends to invest in the securities, including U.S. exchange-listed common stock and preferred stock, of companies principally engaged in the group of industries comprising the financial services sector.

Gabelli Small Cap Growth ETF. The Fund seeks to provide a high level of capital appreciation. The Fund intends to invest primarily in the U.S. exchange-listed common stocks of companies which the Adviser believes are likely to have rapid growth in revenues and above average rates of earnings growth.

Gabelli Small & Mid Cap ETF. The Fund seeks long term capital growth. The Fund intends to invest primarily in equity securities (such as U.S. exchange-listed common stock and preferred stock) of companies with small or medium sized market capitalizations.

Gabelli Micro Cap ETF. The Fund primarily seeks to provide investors with long term capital appreciation. The Fund intends to invest primarily in equity securities of micro-cap companies (as defined by the Fund). The Fund seeks to invest in equity securities including U.S. exchange-listed common stocks (including indirect holdings of common stock through American Depositary Receipts) and preferred stocks.

Gabelli ESG ETF. The Fund's investment objective is capital appreciation. The Fund seeks to invest primarily in companies that the Adviser believes meet the Fund's guidelines for social responsibility. The Fund intends to invest in common and preferred stocks that are listed on a national securities exchange.

Gabelli Asset ETF. The Fund primarily seeks to provide growth of capital. The Fund intends to invest primarily in U.S. exchange-listed common stocks and preferred stocks and may also invest in foreign securities by investing in American Depositary Receipts.

Gabelli Equity Income ETF. The Fund seeks a high level of total return on its assets with an emphasis on income. The Fund intends to invest in income producing equity securities including U.S. exchange-listed common stock and preferred stock.

Gabelli Green Energy ETF. The Fund seeks total return through current income and capital appreciation. The Fund intends to invest primarily in U.S. equity securities and American Depositary Receipts issued by clean energy companies.

B. The Funds' Investment Restrictions

Each Fund's holdings will be consistent with all requirements described in the Exemptive Application and Exemptive Order.[10] Each Fund's investments, including derivatives, will be consistent with its investment objective and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage). That is, for each Fund, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.,* 2X or –3X) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).[11]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, to list and trade the Shares is consistent with

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 88970 (May 28, 2020), 85 FR 34262.

[5] *See* Securities Exchange Act Release No. 89279, 85 FR 42925 (July 15, 2020).

[6] Because Amendment No. 1 does not materially alter the substance of the proposed rule change, Amendment No. 1 is not subject to notice and comment. Amendment No. 1 is available on the Commission's website at: *https://www.sec.gov/comments/sr-nysearca-2020-48/srnysearca202048-7529145-222118.pdf.*

[7] Additional information regarding the Fund, the Trust (defined *infra*), and the Shares can be found in Amendment No. 1, *supra* note 6, and the Registration Statement, *infra* note 8.

[8] The Trust is registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act''). On May 8, 2020, the Trust filed a registration statement on Form N–1A under the Securities Act of 1933 and the 1940 Act for the Funds (File No. 812–15036) (''Registration Statement''). The Commission issued an order granting exemptive relief to the Trust (''Exemptive Order'') under the 1940 Act on December 3, 2019 (Investment Company Act Release No. 33708). The Exemptive Order was granted in response to the Trust's application for exemptive relief (''Exemptive Application'') (File No. 812–15036).

[9] Pursuant to the Exemptive Order, the only permissible investments for a Fund are the following that trade on a U.S. exchange contemporaneously with the Funds' Shares: Exchange-traded funds (''ETFs''), exchange-traded notes, exchange-listed common stocks, exchange-traded American Depositary Receipts, exchange-traded real estate investment trusts, exchange-traded commodity pools, exchange-traded metals trusts, exchange-traded currency trusts and exchange-traded futures, as well as cash and cash equivalents (short-term U.S. Treasury securities, government money market funds, and repurchase agreements).

[10] *See id.* and *supra* note 8.

[11] Each Fund's broad-based securities benchmark index will be identified in a future amendment to the Registration Statement following that Fund's first full calendar year of performance.

the Act and the rules and regulations thereunder applicable to a national securities exchange.[12] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,[13] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

For each series, the Exchange will establish a minimum number of shares required to be outstanding at the time of commencement of trading on the Exchange.[14]

The Adviser is not registered as a broker-dealer but is affiliated with a broker-dealer.[15] The Adviser has implemented and will maintain a ''fire wall'' with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to a Fund's portfolio and Creation Basket.[16] Any person related to the Adviser or the Trust who makes decisions pertaining to a Fund's portfolio composition or that has access to information regarding a Fund's portfolio or changes thereto or the Creation Basket will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio or changes thereto and the Creation Basket.[17] Further, any person or entity, including an AP Representative,[18] custodian, Reporting Authority, distributor, or administrator, who has access to information regarding the Fund's portfolio composition or changes thereto or its Creation Basket, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Fund portfolio or changes thereto or the Creation Basket.[19] Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity must erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition of and/or changes to such Fund's portfolio or Creation Basket.[20]

The Exchange states that trading in the Shares will be subject to the Exchange's surveillance procedures for derivative products, and that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws.[21] NYSE Arca Rule 8.900–E(b)(3) requires each Fund's investment adviser to, upon request by the Exchange, or the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, to make available to the daily portfolio holdings of each series of Managed Portfolio Shares. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.[22] The Commission notes that, similarly, FINRA Rule 9910(d) generally prohibits FINRA employees from disseminating or disclosing, for a purpose unnecessary to the performance of FINRA job responsibilities any nonpublic information obtained in the course of his or her employment.

The Commission also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,[23] which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. The Commission believes that the proposal is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading in the Shares when a reasonable degree of certain pricing transparency cannot be assured. As such, the Commission believes the proposal is reasonably designed to maintain a fair and orderly market for trading the Shares.

Specifically, as required by NYSE Arca Rule 8.900–E(d)(1)(B), the Exchange will obtain a representation from the issuer that the net asset value (''NAV'') per Share of each Fund will be calculated daily and will be made available to all market participants at the same time.[24] Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.[25] Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association high-speed line.[26] In addition, the Verified Intraday Indicative Value (''VIIV''), as defined in Rule 8.900–E(c)(2),[27] will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during the Exchange's Core Trading Session and will be disseminated to all market participants at the same time.[28] Moreover, the Funds' website, *www.Gabelli.com,* will include a form of the prospectus for each Fund that may be downloaded. The Funds' website will include additional quantitative information updated on a daily basis, including, for each Fund, the prior Business Day's NAV, market closing price or mid-point of the bid/ask spread at the time of calculation of such NAV (''Bid/Ask Price''),[29] and a calculation of the

[12] 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).

[13] 15 U.S.C. 78f(b)(5).

[14] *See* NYSE Arca Rule 8.900–E(d)(1)(A).

[15] *See* Amendment No. 1, *supra* note 6, at 6.

[16] *See id.* See also NYSE Arca Rule 8.900–E(c)(5) (defining ''Creation Basket'').

[17] *See* Amendment No. 1, *supra* note 6, at 6. Furthermore, the Exchange represents that in the event that (a) the Adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, the Adviser will implement and maintain a fire wall with respect to personnel of the broker-dealer or broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio and/or Creation Basket. *See id.* at 18.

[18] *See* NYSE Arca Rule 8.900–E(c)(5) (defining ''AP Representative'').

[19] *See* NYSE Arca Rule 8.900–E(b)(5).

[20] *See id.*

[21] *See* Amendment No. 1, *supra* note 6, at 16.

[22] *See id.*

[23] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[24] *See* Amendment No. 1, *supra* note 6, at 15–16.

[25] *See id.* at 13.

[26] *See id.*

[27] NYSE Arca Rule 8.900–E(c)(2) defines the term ''Verified Intraday Indicative Value'' as the indicative value of a Managed Portfolio Share based on all of the holdings of a series of Managed Portfolio Shares as of the close of business on the prior business day and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, priced and disseminated in one second intervals during the Core Trading Session by the Reporting Authority. NYSE Arca Rule 8.900–E(c)(8) defines the term ''Reporting Authority'' with respect to a particular series of Managed Portfolio Shares as the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Managed Portfolio Shares (if the Exchange is trading such series pursuant to unlisted trading privileges), as the official source for calculating and reporting information relating to such series, including, but not limited to, the NAV, the VIIV, or other information relating to the issuance, redemption, or trading of Managed Portfolio Shares. A series of Managed Portfolio Shares may have more than one Reporting Authority, each having different functions.

[28] *See* NYSE Arca Rule 8.900–E(d)(2)(A). *See* Amendment No. 1, *supra* note 6, at 13.

[29] The Bid/Ask Price of a Fund's Shares will be the mid-point between the current national best bid and offer at the time of calculation of such Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Funds or their service providers. *See* Amendment No. 1, *supra* note 6, at 13.

premium and discount of the market closing price or Bid/Ask Price against the NAV. The website and information will be publicly available at no charge.[30]

The Commission also notes that the Exchange's rules regarding trading halts help to ensure the maintenance of fair and orderly markets for the Shares. Specifically, the Exchange may consider all relevant factors in exercising its discretion to halt trading in the Shares, and will halt trading in the Shares under the conditions specified in NYSE Arca Rule 7.12–E. Trading in the Shares will be subject to Rule 8.900–E(d)(2)(C), which sets forth circumstances under which trading in the Shares will be halted. Specifically, Rule 8.900–E(d)(2)(C)(i) provides that the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable. These may include: (a) The extent to which trading is not occurring in the securities and/or the financial instruments composing the portfolio; or (b) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[31] Rule 8.900–E(d)(2)(C)(ii) provides that, if the Exchange becomes aware that: (i) The VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the NAV with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (iii) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (iv) such holdings are not made available to all market participants at the same time (except as otherwise permitted under the applicable Exemptive Order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares), it will halt trading in such series until such time as the VIIV, the NAV, or the holdings are available, as required.

In support of this proposal, the Exchange has also made the following representations:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.900–E.

(2) The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities.[32]

(3) Prior to the commencement of trading, the Exchange will inform its members in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares.[33]

(4) FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, or both, will communicate as needed regarding trading in the Shares and certain exchange-traded instruments with other markets and other entities that are members of the Intermarket Surveillance Group (''ISG''), and FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, or both, may obtain trading information regarding trading such securities from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and certain exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

(5) The Exchange represents that, for initial and/or continued listing, each Fund will be in compliance with Rule 10A–3 under the Act.[34]

This approval order is based on all of the Exchange's statements and representations set forth above and in Amendment No. 1. Additionally, the Exchange states that all statements and representations made in its proposal regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules shall constitute continued listing requirements for listing the Shares on the Exchange, as provided under Rule 8.900–E(b)(1). The issuer of the Shares will be required to represent to the Exchange that it will advise the Exchange of any failure by a Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 5.5–E(m).[35]

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act[36] and Section 11A(a)(1)(C)(iii) of the Act[37] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[38] that the proposed rule change (SR–NYSEArca–2020–48), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

Jill M. Peterson,

Assistant Secretary.

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BILLING CODE 8011–01–P

[30] *See id.*

[31] The Exemptive Application provides that the Investment Company or their agent will request that the Exchange halt trading in the applicable series of Managed Portfolio Shares where: (i) The intraday indicative values calculated by the calculation engines differ by more than 25 basis points for 60 seconds in connection with pricing of the VIIV; or (ii) holdings representing 10% or more of a series of Managed Portfolio Shares' portfolio have become subject to a trading halt or otherwise do not have readily available market quotations. Any such requests will be one of many factors considered in order to determine whether to halt trading in a series of Managed Portfolio Shares, and the Exchange retains sole discretion in determining whether trading should be halted. As provided in the Exemptive Application, each series of Managed Portfolio Shares would employ a pricing verification agent to continuously compare two intraday indicative values during regular trading hours in order to ensure the accuracy of the VIIV. *See id.* at 15, n.21.

[32] *See id.* at 15.

[33] The Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares; (2) Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) how information regarding the VIIV is disseminated; (4) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) trading information; and (6) that the portfolio holdings of the Shares are not disclosed on a daily basis. *See id.* at 16–17.

[34] *See id.* at 7.

[35] *See id.* at 16.

[36] 15 U.S.C. 78f(b)(5).

[37] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[38] 15 U.S.C. 78s(b)(2).

[39] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89655; File No. SR–NYSE–2020–69]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Temporary Waiver of the Co-Location Hot Hands Fee

August 25, 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 August 11, 2020, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the temporary waiver of the co-location ''Hot Hands'' fee. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend of the temporary waiver of the co-location [4] ''Hot Hands'' fee through the reopening of the Mahwah, New Jersey data center (''Data Center''). The waiver of the Hot Hands fee is scheduled to expire on August 31, 2020.[5]

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. (''ICE''). Through its ICE Data Services (''IDS'') business, ICE operates the Data Center, from which the Exchange provides co-location services to Users.[6] Among those services is a ''Hot Hands'' service, which allows Users to use on-site Data Center personnel to maintain User equipment, support network troubleshooting, rack and stack a server in a User's cabinet; power recycling; and install and document the fitting of cable in a User's cabinet(s).[7] The Hot Hands fee is $100 per half hour.

ICE previously announced to Users that the Data Center would be closed to third parties starting on March 16, 2020, to help avoid the spread of COVID–19, which could negatively impact Data Center functions. Prior to the closure of the Data Center, the Chief Executive Officer of the Exchange took the actions required under NYSE Rule 7.1 to close the co-location facility of the Exchange to third parties. The closure period was extended three times, through August 31, 2020 (the ''Initial Closure'').[8]

ICE has announced to Users that, because the concerns that led to the Initial Closure still apply, the closure of the Data Center will be extended, with the date of the reopening announced through a customer notice.

If a User's equipment requires work while a Rule 7.1 closure is in effect, the User has to use the Hot Hands service and, absent a waiver, incurs Hot Hands fees for the work. Given that, the Exchange waived all Hot Hands fees for the duration of the Initial Closure.[9] Because the period has been extended, the Exchange proposes to extend the waiver of the Hot Hands Fee for the length of the period. To that end, the Exchange proposes to revise the footnote to the Hot Hands Fee in the Price List as follows (deletions bracketed, additions underlined):

† Fees for Hot Hands Services will be waived beginning on March 16, 2020 through [the earlier of August 31, 2020 and] the reopening of the Mahwah, New Jersey data center. *The date of the reopening will be announced through a customer notice.*

The Exchange believes that there will be sufficient Data Center staff on-site to comply with User requests for Hot Hands service.

The proposed extension of the waiver would apply equally to all Users. The proposed extension of the fee waiver would not apply differently to distinct types or sizes of market participants. Rather, it would continue to apply uniformly to all Users.

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In addition, it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in 2010. *See* Securities Exchange Act Release No. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR–NYSE–2010–56).

[5] *See* Securities Exchange Act Release No. 89172 (June 29, 2020), 85 FR 40347 (July 6, 2020) (SR–NYSE–2020–53).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR–NYSE–2015–40). As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (together, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR–NYSE–2013–59). Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSEAmer–2020–63, SR–NYSEArca–2020–74, SR–NYSECHX–2020–25, and SR–NYSENAT–2020–26.

[7] *See* Securities Exchange Act Release No. 72721 (July 30, 2014), 79 FR 45562 (August 5, 2014) (SR–NYSE–2014–37).

[8] *See* Securities Exchange Act Release Nos. 88397 (March 17, 2020), 85 FR 16406 (March 23, 2020) (SR–NYSE–2020–18); 88518 (March 31, 2020), 85 FR 19187 (April 6, 2020) (SR–NYSE–2020–25); and 88955 (May 27, 2020), 85 FR 33758 (June 2, 2020) (SR–NYSE–2020–44).

[9] *See* 85 FR 40347, *supra* note 5.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable for the following reasons.

Given that the closure of the Data Center has been extended, the Exchange believes that it is reasonable to grant the proposed corresponding extension of the waiver of the Hot Hands Fee. While a Rule 7.1 closure is in effect, User representatives are not allowed access to the Data Center. If a User's equipment requires work during such period, the User has to use the Hot Hands service. Absent a waiver, the User would incur Hot Hands fees for the work.

The proposed extension of the waiver would allow a User to have work carried out on its equipment notwithstanding the closure of the Data Center without incurring Hot Hands fees.

The Exchange does not know when the Mahwah data center will be reopened, and so believes it is reasonable to leave the date open ended. Adding a revised potential reopening date to the footnote may create an expectation that the closure has a stated end point. The Exchange believes that it is more reasonable to state that the waiver will continue until the data center is reopened, and to inform Users how they will receive notice of the reopening. The change would also be consistent with the announcement that ICE has made to Users.

The Proposed Rule Change Is Equitable

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits for the following reasons.

The proposed extension of the waiver would apply equally to all Users. The proposed extension would not apply differently to distinct types or sizes of market participants. Rather, it would apply uniformly to all Users.

The Exchange believes that the proposal is equitable because the extension of the waiver would mean that for the duration of the closure of the Data Center all similarly-situated Users would not be charged a fee to use the Hot Hands service.

The Proposed Change Is Not Unfairly Discriminatory and Would Protect Investors and the Public Interest

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period. For the reasons above, the proposed changes do not unfairly discriminate between or among market participants.

In addition, the Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest because it would allow a User to have work carried out on its equipment notwithstanding a Rule 7.1 closure without incurring Hot Hands fees. Accordingly, the Exchange believes that the requested extension of the waiver is designed to perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest by facilitating the uninterrupted availability of Users' equipment.

For all of the above reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[12] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate.

The proposed extension of the waiver is not designed to affect competition, but rather to provide relief to Users that, while a Rule 7.1 closure is in effect, have no option but to use the Hot Hands service.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period.

Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

The Exchange believes that the proposed change would not affect the competitive landscape among the national securities exchanges, as the Hot Hands service is solely charged within co-location to existing Users, and would be temporary.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[13] of the Act and subparagraph (f)(2) of Rule 19b–4[14] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[15] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2020–69 on the subject line.

[12] 15 U.S.C. 78f(b)(8).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(2).

[15] 15 U.S.C. 78s(b)(2)(B).

Paper Comments

• Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2020–69. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2020–69 and should be submitted on or before September 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19049 Filed 8–28–20; 8:45 am]

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[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89653; File No. SR–NYSENAT–2020–26]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Temporary Waiver of the Co-Location Hot Hands Fee

August 25, 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 August 11, 2020, NYSE National, Inc. (''NYSE National'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the temporary waiver of the co-location ''Hot Hands'' fee. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend of the temporary waiver of the co-location[4] ''Hot Hands'' fee through the reopening of the Mahwah, New Jersey data center (''Data Center''). The waiver of the Hot Hands fee is scheduled to expire on August 31, 2020.[5]

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. (''ICE''). Through its ICE Data Services (''IDS'') business, ICE operates the Data Center, from which the Exchange provides co-location services to Users.[6] Among those services is a ''Hot Hands'' service, which allows Users to use on-site Data Center personnel to maintain User equipment, support network troubleshooting, rack and stack a server in a User's cabinet; power recycling; and install and document the fitting of cable in a User's cabinet(s).[7] The Hot Hands fee is $100 per half hour.

ICE previously announced to Users that the Data Center would be closed to third parties starting on March 16, 2020, to help avoid the spread of COVID–19, which could negatively impact Data Center functions. Prior to the closure of the Data Center, the Chief Executive Officer of the Exchange took the actions required under NYSE National Rule 7.1 to close the co-location facility of the Exchange to third parties. The closure period was extended three times, through August 31, 2020 (the ''Initial Closure'').[8]

ICE has announced to Users that, because the concerns that led to the Initial Closure still apply, the closure of the Data Center will be extended, with the date of the reopening announced through a customer notice.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in May 2018. *See* Securities Exchange Act Release No. 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR–NYSENAT–2018–07).

[5] *See* Securities Exchange Act Release No. 89175 (June 29, 2020), 85 FR 40354 (July 6, 2020) (SR–NYSENAT–2020–20).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* 83 FR 26314, *supra* note 4, at note 9. As specified in the Exchange's Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates the New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., and NYSE Chicago, Inc. (together, the ''Affiliate SROs''). *See id.* at note 11. Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2020–69, SR–NYSEAmer–2020–63, SR–NYSEArca–2020–74, and SR–NYSECHX–2020–25.

[7] *See* 83 FR 26314, *supra* note 4.

[8] *See* Securities Exchange Act Release Nos. 88399 (March 17, 2020), 85 FR 16428 (March 23, 2020) (SR–NYSENAT–2020–10); 88521 (March 31, 2020), 85 FR 19194 (April 6, 2020) (SR–NYSENAT–2020–14); and 88958 (May 27, 2020), 85 FR 33764 (June 2, 2020) (SR–NYSENAT–2020–18).

If a User's equipment requires work while a Rule 7.1 closure is in effect, the User has to use the Hot Hands service and, absent a waiver, incurs Hot Hands fees for the work. Given that, the Exchange waived all Hot Hands fees for the duration of the Initial Closure.[9] Because the period has been extended, the Exchange proposes to extend the waiver of the Hot Hands Fee for the length of the period. To that end, the Exchange proposes to revise the footnote to the Hot Hands Fee in the Price List as follows (deletions bracketed, additions italicized):†

† Fees for Hot Hands Services will be waived beginning on March 16, 2020 through [the earlier of August 31, 2020 and] the reopening of the Mahwah, New Jersey data center. *The date of the reopening will be announced through a customer notice.*

The Exchange believes that there will be sufficient Data Center staff on-site to comply with User requests for Hot Hands service.

The proposed extension of the waiver would apply equally to all Users. The proposed extension of the fee waiver would not apply differently to distinct types or sizes of market participants. Rather, it would continue to apply uniformly to all Users.

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In addition, it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable for the following reasons.

Given that the closure of the Data Center has been extended, the Exchange believes that it is reasonable to grant the proposed corresponding extension of the waiver of the Hot Hands Fee. While a Rule 7.1 closure is in effect, User representatives are not allowed access to the Data Center. If a User's equipment requires work during such period, the User has to use the Hot Hands service. Absent a waiver, the User would incur Hot Hands fees for the work.

The proposed extension of the waiver would allow a User to have work carried out on its equipment notwithstanding the closure of the Data Center without incurring Hot Hands fees.

The Exchange does not know when the Mahwah data center will be reopened, and so believes it is reasonable to leave the date open ended. Adding a revised potential reopening date to the footnote may create an expectation that the closure has a stated end point. The Exchange believes that it is more reasonable to state that the waiver will continue until the data center is reopened, and to inform Users how they will receive notice of the reopening. The change would also be consistent with the announcement that ICE has made to Users.

The Proposed Rule Change Is Equitable

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits for the following reasons.

The proposed extension of the waiver would apply equally to all Users. The proposed extension would not apply differently to distinct types or sizes of market participants. Rather, it would apply uniformly to all Users.

The Exchange believes that the proposal is equitable because the extension of the waiver would mean that for the duration of the closure of the Data Center all similarly-situated Users would not be charged a fee to use the Hot Hands service.

The Proposed Change Is Not Unfairly Discriminatory and Would Protect Investors and the Public Interest

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period. For the reasons above, the proposed changes do not unfairly discriminate between or among market participants.

In addition, the Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest because it would allow a User to have work carried out on its equipment notwithstanding a Rule 7.1 closure without incurring Hot Hands fees. Accordingly, the Exchange believes that the requested extension of the waiver is designed to perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest by facilitating the uninterrupted availability of Users' equipment.

For all of the above reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[12] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate.

The proposed extension of the waiver is not designed to affect competition, but rather to provide relief to Users that, while a Rule 7.1 closure is in effect, have no option but to use the Hot Hands service.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period.

Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

[9] *See* 85 FR 40354, *supra* note 5.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

[12] 15 U.S.C. 78f(b)(8).

The Exchange believes that the proposed change would not affect the competitive landscape among the national securities exchanges, as the Hot Hands service is solely charged within co-location to existing Users, and would be temporary.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [13] of the Act and subparagraph (f)(2) of Rule 19b–4 [14] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [15] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSENAT–2020–26 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSENAT–2020–26. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSENAT–2020–26 and should be submitted on or before September 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19047 Filed 8–28–20; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(2).

[15] 15 U.S.C. 78s(b)(2)(B).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89667; File No. SR–Phlx–2020–40]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Add the Consolidated Audit Trail Industry Member Compliance Rules to the List of Minor Rule Violations

August 25, 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 August 13, 2020, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons 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 its rulebook.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to add Phlx's CAT industry member compliance rules (the ''CAT Compliance Rules'') to the list of minor rule violations in IM–9216, in Options 11, and in its Equity Minor Rule Violations. 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.[3]

Proposed Rule Change

The Exchange adopted the CAT Compliance Rules in General 7 in order to implement the National Market System Plan Governing the Consolidated Audit Trail (the ''CAT NMS Plan'' or ''Plan'').[4] The CAT NMS Plan was filed by the Plan Participants to comply with Rule 613 of Regulation NMS under the Exchange Act,[5] and each Plan Participant accordingly has adopted the same compliance rules as the Exchange's General 7. 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.

IM–9216 sets forth the list of rules specific to the Exchange's trading floor under which a member, member organization, or any partner, officer, director or person employed by or associated with any member organization (hereinafter, ''associated person'') may be subject to a fine. Exchange Rule 9216(b) permits the Exchange to impose a fine (not to exceed $2,500) on any member, member organization, or associated person with respect to any rule listed under IM–9216. The Exchange proposes to amend IM–9216 to add the CAT Compliance Rules in General 7 to the list of rules in IM–9216 eligible for disposition pursuant to a minor fine under Rule 9216(b). In addition, Options 11 sets forth the minor rule violation plan (''MRVP'') for members and member organizations on the Exchange's options market. Accordingly, the Exchange proposes to make conforming changes in Options 11 to add the CAT Compliance Rules to the list of rules therein, and specify that for failures to comply with the Consolidated Audit Trail Compliance Rule requirements under General 7, the Exchange may impose a minor rule violation fine of up to $2,500. Lastly, the Exchange proposes to make similar amendments to the Equity Minor Rule Violations, which sets forth the MRVP for members and member organizations on the Exchange's equities market. In particular, the Exchange proposes to add General 7 to the list of rules in the Equity Minor Rule Violations and provide that failures to comply with the CAT Compliance Rule requirements may be subject to fines of up to $2,500.[6]

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'').[7] 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 the Exchange pursuant to the Rule 17d–2 Plan, 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. We expect that the other exchanges would be entering into a similar RSA.

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.[8] Accordingly, in order to promote regulatory consistency, the Exchange plans to do the same. Specifically, application of a minor rule fine with respect to the 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.[9]

Upon effectiveness of this rule change, the Exchange will publish a regulatory alert notifying its members, member organizations, and associated persons 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

[3] *See* Securities Exchange Act Release No. 88870 (May 14, 2020), 85 FR 30768 (May 20, 2020) (SR–FINRA–2020–013); *see also* Release No. 89123 (June 23, 2020), 85 FR 39016 (June 29, 2020) (SR–NYSE–2020–51).

[4] *See* Securities Exchange Act Release No. 80256 (March 15, 2017), 82 FR 14526 (March 21, 2017) (SR–Phlx–2017–07) (Order Approving Proposed Rule Changes To Adopt Consolidated Audit Trail Compliance Rules).

[5] 17 CFR 242.613.

[6] FINRA's maximum fine for minor rule violations under FINRA Rule 9216(b) is $2,500. The Exchange will apply an identical maximum fine amount for eligible violations of General 7 to achieve consistency with FINRA and also to amend its MRVP to include such fines. Like FINRA, the Exchange would be able to pursue a fine greater than $2,500 for violations of General 7 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 8–9, *infra*.

[7] *See* Securities Exchange Act Release No. 88366 (March 12, 2020), 85 FR 15238 (March 17, 2020) (File No. 4–618).

[8] *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).

[9] *See id.*

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,[10] in general, and furthers the objectives of Section 6(b)(5),[11] in particular, because it is 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 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 General 7 where a more formal disciplinary action may not be warranted or appropriate consistent with the approach of other Plan Participants for the same conduct.

The Exchange further believes that the proposed amendments to IM–9216, Options 11, and the Equity Minor Rule Violations are consistent with Section 6(b)(6) of the Act,[12] which provides that a member, member organization, or associated person 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 General 7 pursuant to the Exchange's rules.

The Exchange also believes that the proposed changes are designed to provide a fair procedure for the disciplining of a member, member organization, or associated person, consistent with Sections 6(b)(7) and 6(d) of the Act.[13] IM–9216, Options 11, and the Equity Minor Rule Violations do not preclude a member, member organization, or associated 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 General 7 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 either solicited or received.

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–PHLX–2020–40 the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PHLX–2020–40. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PHLX–2020–40 and should be submitted on or before September 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.[14] In particular, the

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78f(b)(6).

[13] 15 U.S.C. 78f(b)(7) and 78f(d).

[14] 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).

Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[15] 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 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 [16] 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,[17] 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 IM–9216, Options 11, and the Equity Minor Rule Violations to be consistent with the approach FINRA has taken for minor violations of its corresponding CAT Compliance Rules.[18] 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.[19] 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,[20] 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 [21] and Rule 19d–1(c)(2) thereunder,[22] that the proposed rule change (SR–PHLX–2020–40) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19053 Filed 8–28–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89654; File No. SR–NYSECHX–2020–25]

Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Temporary Waiver of the Co-location Hot Hands Fee

August 25, 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 August 11, 2020 the NYSE Chicago, Inc. (''NYSE Chicago'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the temporary waiver of the co-location ''Hot Hands'' fee. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend of the temporary waiver of the co-location [4] ''Hot Hands'' fee through the reopening of the Mahwah, New Jersey data center (''Data Center''). The waiver of the Hot Hands fee is scheduled to expire on August 31, 2020.[5]

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. (''ICE''). Through its ICE Data Services (''IDS'') business, ICE operates the Data Center, from which the Exchange provides co-location services to Users.[6] Among those services is a

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[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b)(1) and 78f(b)(6).

[17] 17 CFR 240.19d–1(c)(2).

[18] 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.

[19] *See* SR–FINRA–2020–013.

[20] 15 U.S.C. 78s(b)(2).

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 240.19d-1(c)(2).

[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in October 2019. *See* Securities Exchange Act Release No. 87408 (October 28, 2019), 84 FR 58778 (November 1, 2019) (SR–NYSECHX–2019–27).

[5] *See* Securities Exchange Act Release No. 89176 (June 29, 2020), 85 FR 40377 (July 6, 2020) (SR–NYSECHX–2020–19).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* 84 FR 58778, *supra* note 4, at note 6. As specified in the Fee Schedule of NYSE Chicago, Inc. (''Fee Schedule''), a User that incurs co-location fees for a particular co-location service

Continued

''Hot Hands'' service, which allows Users to use on-site Data Center personnel to maintain User equipment, support network troubleshooting, rack and stack a server in a User's cabinet; power recycling; and install and document the fitting of cable in a User's cabinet(s).[7] The Hot Hands fee is $100 per half hour.

ICE previously announced to Users that the Data Center would be closed to third parties starting on March 16, 2020, to help avoid the spread of COVID–19, which could negatively impact Data Center functions. Prior to the closure of the Data Center, the Chief Executive Officer of the Exchange took the actions required under NYSE Chicago Rule 7.1 to close the co-location facility of the Exchange to third parties. The closure period was extended three times, through August 31, 2020 (the ''Initial Closure'').[8]

ICE has announced to Users that, because the concerns that led to the Initial Closure still apply, the closure of the Data Center will be extended, with the date of the reopening announced through a customer notice.

If a User's equipment requires work while a Rule 7.1 closure is in effect, the User has to use the Hot Hands service and, absent a waiver, incurs Hot Hands fees for the work. Given that, the Exchange waived all Hot Hands fees for the duration of the Initial Closure.[9] Because the period has been extended, the Exchange proposes to extend the waiver of the Hot Hands Fee for the length of the period. To that end, the Exchange proposes to revise the footnote to the Hot Hands Fee in the Fee Schedule as follows (deletions bracketed, additions underlined):

† Fees for Hot Hands Services will be waived beginning on March 16, 2020 through [the earlier of August 31, 2020 and] the reopening of the Mahwah, New Jersey data center. *The date of the reopening will be announced through a customer notice.*

The Exchange believes that there will be sufficient Data Center staff on-site to comply with User requests for Hot Hands service.

The proposed extension of the waiver would apply equally to all Users. The proposed extension of the fee waiver would not apply differently to distinct types or sizes of market participants. Rather, it would continue to apply uniformly to all Users.

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In addition, it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable for the following reasons.

Given that the closure of the Data Center has been extended, the Exchange believes that it is reasonable to grant the proposed corresponding extension of the waiver of the Hot Hands Fee. While a Rule 7.1 closure is in effect, User representatives are not allowed access to the Data Center. If a User's equipment requires work during such period, the User has to use the Hot Hands service. Absent a waiver, the User would incur Hot Hands fees for the work.

The proposed extension of the waiver would allow a User to have work carried out on its equipment notwithstanding the closure of the Data Center without incurring Hot Hands fees.

The Exchange does not know when the Mahwah data center will be reopened, and so believes it is reasonable to leave the date open ended. Adding a revised potential reopening date to the footnote may create an expectation that the closure has a stated end point. The Exchange believes that it is more reasonable to state that the waiver will continue until the data center is reopened, and to inform Users how they will receive notice of the reopening. The change would also be consistent with the announcement that ICE has made to Users.

The Proposed Rule Change Is Equitable

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits for the following reasons.

The proposed extension of the waiver would apply equally to all Users. The proposed extension would not apply differently to distinct types or sizes of market participants. Rather, it would apply uniformly to all Users.

The Exchange believes that the proposal is equitable because the extension of the waiver would mean that for the duration of the closure of the Data Center all similarly-situated Users would not be charged a fee to use the Hot Hands service.

The Proposed Change Is Not Unfairly Discriminatory and Would Protect Investors and the Public Interest

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period. For the reasons above, the proposed changes do not unfairly discriminate between or among market participants.

In addition, the Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest because it would allow a User to have work carried out on its equipment notwithstanding a Rule 7.1 closure without incurring Hot Hands fees. Accordingly, the Exchange believes that the requested extension of the waiver is designed to perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public

pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates the New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., and NYSE National, Inc. (together, the ''Affiliate SROs''). *See id.* at 58779. Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2020–69, SR–NYSEAmer-2020–63, SR–NYSEArca-2020–74, and SR–NYSENAT–2020–26.

[7] *See* 84 FR 58778, *supra* note 4.

[8] *See* Securities Exchange Act Release Nos. 88400 (March 17, 2020), 85 FR 16434 (March 23, 2020) (SR–NYSECHX–2020–07); 88522 (March 31, 2020), 85 FR 19191 (April 6, 2020) (SR–NYSECHX–2020–10); and 88957 (May 27, 2020), 85 FR 33766 (June 2, 2020) (SR–NYSECHX–2020–15).

[9] *See* 85 FR 40377, *supra* note 5.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

interest by facilitating the uninterrupted availability of Users' equipment.

For all of the above reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[12] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate.

The proposed extension of the waiver is not designed to affect competition, but rather to provide relief to Users that, while a Rule 7.1 closure is in effect, have no option but to use the Hot Hands service.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period.

Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

The Exchange believes that the proposed change would not affect the competitive landscape among the national securities exchanges, as the Hot Hands service is solely charged within co-location to existing Users, and would be temporary.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[13] of the Act and subparagraph (f)(2) of Rule 19b–4[14] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[15] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSECHX–2020–25 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSECHX–2020–25. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSECHX–2020–25 and should be submitted on or before September 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19048 Filed 8–28–20; 8:45 am]

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[12] 15 U.S.C. 78f(b)(8).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(2).

[15] 15 U.S.C. 78s(b)(2)(B).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89668; File No. SR–LTSE–2020–13]

Self-Regulatory Organizations; Long-Term Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 11.410(a)

August 25, 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 August 18, 2020, Long-Term Stock Exchange, Inc. (''LTSE'' 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.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

LTSE proposes a rule change to amend Rule 11.410(a) to (i) update the Exchange's source of data feeds for purposes of order handling and execution, and regulatory compliance, to include data regarding MEMX LLC (''MEMX''); and (ii) make ministerial changes to the existing list of exchanges

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

to address name changes and to re-alphabetize the list.

The text of the proposed rule change is available at the Exchange's website at *https://longtermstockexchange.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement on 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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 on the Purpose of, and the Statutory Basis for, the Proposed Rule Change [3]

1. Purpose

The Exchange proposes to amend the Market Data Sources identified in LTSE Rule 11.410(a), which sets forth on a market-by-market basis the data feeds that the Exchange utilizes as its source for quotes, trades and administrative messages. Currently, LTSE utilizes the securities information processor (''SIP'') consolidated quotation (*i.e.,* CQS/UQDF), trade and administrative (*i.e.,* CTS/UTDF) data feeds for data on all national securities exchanges. The Exchange proposes to amend the table in Rule 11.410(a) to add a new exchange, MEMX, and specify that the Exchange also will utilize the consolidated quotation (*i.e.,* CQS/UQDF), trade and administrative (*i.e.,* CTS/UTDF) data feeds for MEMX.

Additionally, the Exchange proposes to update the names of exchanges that have been renamed, as well as alphabetize the list of exchanges in the table.

The Exchange proposes that this rule change become operative on or before the day that MEMX launches operations as an equities exchange, which is currently expected on September 4, 2020.[4]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, to foster 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.

The Exchange believes that the proposed rule change is consistent with the Act because including MEMX in the list of market data sources the Exchange will use to determine each away trading center's Top of Book quotes will facilitate transparency in the Exchange's operations and support the Exchange's compliance with the applicable requirements of Regulation NMS.

The Exchange believes its proposal to amend the table in Rule 11.410(a) to update the data feed source for MEMX will ensure that Rule 11.410 correctly identifies and publicly states on a market-by-market basis all of the specific data feeds that the Exchange utilizes for the handling and execution of orders, and for regulatory compliance. The proposed rule change also removes impediments to and perfects the mechanism of a free and open market and protects investors and the public interest by providing additional specificity, clarity, and transparency in the Exchange's rules.

Further, the Exchange believes it is consistent with the Act to update the referenced rule to list all the away trading centers in alphabetical order, to enhance clarity to market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue, but rather would provide the public and market participants with up-to-date information about the data feeds the Exchange will use for the handling and execution of orders, as well as for regulatory compliance.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [9] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately. According to the Exchange, the proposed rule change does not significantly affect the protection of investors or the public interest or impose a significant burden on competition because it merely provides specificity regarding the Exchange's use of data feeds by identifying which data feed would be used for MEMX and enables market participants to understand how the Exchange views trade and quote information from other national securities exchanges and does not impose any burden on Members or market participants. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as doing so will ensure that the rule change becomes operative on or before the day that MEMX launches operations as an equities exchange, which is currently expected on

[3] Unless otherwise defined, capitalized terms are used herein as defined in the LTSE Rulebook.

[4] *See https://memx.com/memx-timeline-update-launch-set-for-september-4th/.*

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6)(iii).

September 4, 2020, which, in turn, will ensure that the Exchange rules clearly and accurately reflect the market data sources it utilizes in generating quotes, trades and administrative messages. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–LTSE–2020–13 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–LTSE–2020–13. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All

submissions should refer to File Number SR–LTSE–2020–13 and should be submitted on or before September 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19054 Filed 8–28–20; 8:45 am]

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[11] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89664; File No. SR–BOX–2020–35]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend BOX Rule 7160 (Transfer of Positions)

August 25, 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 August 18, 2020, BOX Exchange LLC (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 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.

[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).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend BOX Rule 7160 (Transfer of Positions). The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxoptions.com.*

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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange recently filed a proposed change to establish new Rule 7160 to provide a process by which Participants may transfer option positions in limited circumstances off the BOX Trading Floor.[5] Currently, Rule 7160 permits market participants to move positions from one account to another without first exposure of the transaction on the Exchange, provided certain exceptions are met. Specifically, the exception in Rule 7160(a)(2) provides that off the Exchange transfers of positions are permissible if from one account to another account where no change in ownership is involved (*i.e.,* accounts of the same Person),[6] provided the accounts are not in separate aggregation units or otherwise subject to information barrier or account segregation requirements. These transfers are subject to, among other things, the requirement to submit prior written notice of the transfers to the

[5] *See* Securities Exchange Act Release No. 88810 (May 5, 2020), 85 FR 27782 (May 11, 2020)(SR–BOX–2020–09). The Exchange notes that the proposed change was similar to Cboe Rule 6.7.

[6] ''Person'' is defined as ''an individual, partnership (general or limited), joint stock company, corporation, limited liability company, trust or unincorporated organization, or any governmental entity or agency or political subdivision thereof.'' This definition is identical to Cboe Rule 1.1.

Exchange pursuant to paragraph (d) and the restriction on effecting these transfers repeatedly or routinely.

The Exchange now proposes to amend Rule 7160 to be in line with a recent proposal submitted by Cboe.[7] The proposed rule change excepts off-floor position transfers effected pursuant to Rule 7160(a)(2) from the prior written notice requirement in paragraph (d) and from repeated, recurring use restriction in paragraph (g). Off-floor position transfers pursuant to Rule 7160(a)(2) do not involve a change in ownership. In other words, such transfers may only occur between the same individual or legal entity. These types of transfer are merely transfers of positions from one account to another, both of which accounts are attributable to the same individual or legal entity, and thus the transferred option positions will continue to be attributable to the same Person. A market participant effecting an off Exchange position transfer pursuant to Rule 7160(a)(2) is analogous to an individual transferring funds from a checking account to a savings account, or from an account at one bank to an account at another bank—the money still belongs to the same person, who is just holding it in a different account for personal financial reasons.

Because there is no change in ownership of positions transferred pursuant to Rule 7160(a)(2), the Exchange believes it is appropriate to permit them to occur as routinely and repeatedly as a market participant would like. These transfers will continue to be subject to the prohibition on netting set forth in Rule 7160(b), and thus may not result in the closing of any positions. While the off-floor position transfers permitted by Rule 7160 were intended to accommodate non-routine and non-recurring transfers, the Exchange believes permitting routine, recurring off-floor position transfers that do not result in a change in ownership or reduction in open interest is consistent with the purpose of not being used to circumvent the normal auction purpose. Additionally, given that these transfers may occur on a regular basis in accordance with a market participants' business needs and procedures, the Exchange believes prior written notice would be onerous and would not serve any purpose given the lack of change in ownership and in open interest. The Exchange believes this will provide market participants with additional flexibility to structure their option position accounts as they believe is appropriate and move their positions between accounts as they deem necessary and appropriate for their business and trading needs, including for risk management purposes.

The proposed rule change also corrects an erroneous cross-reference in Rule 7160(d)(1), as the method for determining the transfer price is in paragraph (c) rather than paragraph (e) of Rule 7160.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[8] in general, and Section 6(b)(5) of the Act,[9] in particular, in that it is 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 facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest because it will provide market participants with a more efficient process to transfer open positions between their accounts in accordance with their own business and trading needs, including to respond to then-current market conditions. Because these transfers would not result in a change in ownership or reduction in open interest, the Exchange believes the proposed rule change remains consistent with the purpose of Rule 7160, which was to prohibit the use of off-floor transfer procedure in circumvention of the normal auction process, as the normal auction process involves the opening and closing of positions through a transaction among multiple market participants. Market participants may maintain different accounts for a variety of reasons, such as the structure of their businesses, the manner in which they trade, their risk management procedures, and for capital purposes. Given that these transfers may occur on a regular basis in accordance with a market participants' business needs and procedures, the Exchange believes prior written notice would be onerous and would not serve any purpose given the lack of change in ownership and in open interest. Therefore, the proposed rule change will benefit investors by permitting market participants to manage their open positions in their accounts in a manner consistent with their businesses.

The Exchange recognizes the numerous benefits of executing options transactions on an exchange, including price transparency, potential price improvement, and a clearing guarantee. However, the Exchange believes it is appropriate to permit position transfers among accounts of the same individual or legal entity where there is no impact on open interest to occur off the exchange, as these benefits are inapplicable to those transfers. These transfers have a narrow scope and are intended to permit market participants to achieve their own business needs. These transfers are not intended to be a competitive trading tool. There is no need for price discovery or improvement, as the transfer merely moves positions to different accounts for the same Person and does not open or close any positions. These transfers will result in no change in ownership. The transactions that resulted in open positions to be transferred pursuant to Rule 7160(a)(2) were already guaranteed by a clearing member of The Options Clearing Corporation (''OCC''), and the positions may not be closed pursuant to the transfer and will continue to be subject to OCC rules, as they will continue to be held in an account with an OCC clearing member.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a response to a filing submitted by Cboe.[11] The proposed rule change is not intended to address competitive issues. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the

[7] *See* Securities Exchange Act Release No. 89389 (July 23, 2020), 85 FR 45709 (July 29, 2020)(SR–CBOE–2020–067).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *Id.*

[11] *See supra* note 5.

proposed rule change will apply to all market participants in the same manner. All market participants will be able to effect off-floor position transfers pursuant to Rule 7160(a)(2) on a recurring or routine basis without providing the Exchange with notice of such transfers. The Exchange does not believe the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it relates solely to the notice required for off-floor transfers that may occur today, and the frequency with which those transfers may occur. These transfers will continue to not result in a change in ownership or netting, and thus will have no impact on outstanding options positions.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b-4(f)(6) thereunder.[13]

A proposed rule change filed under Rule 19b-4(f)(6) [14] normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay to so that it may adopt the proposed position transfer rules as soon as possible which, according to the Exchange, would benefit investors and the general public because it will provide Participants with the ability to request a transfer, for limited, non-recurring types of transfers, without the need for exposing those orders on the Exchange. The proposed rule change does not present any unique or novel regulatory issues and is substantively identical to provisions in Cboe Rule 6.7. Accordingly, the Commission hereby waives the operative delay and designates the proposal operative upon filing.[16]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. 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-*BOX–2020–35 *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–BOX–2020–35. 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–BOX–2020–35 and should be submitted on or before September 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Jill M. Peterson,

Assistant Secretary.

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[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89652; File No. SR–NYSEArca-2020–74]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Temporary Waiver of the Co-Location Hot Hands Fee

August 25, 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 August 11, 2020, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the temporary waiver of the co-location ''Hot Hands'' fee. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend of the temporary waiver of the co-location [4] ''Hot Hands'' fee through the reopening of the Mahwah, New Jersey data center (''Data Center''). The waiver of the Hot Hands fee is scheduled to expire on August 31, 2020.[5]

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. (''ICE''). Through its ICE Data Services (''IDS'') business, ICE operates the Data Center, from which the Exchange provides co-location services to Users.[6] Among those services is a ''Hot Hands'' service, which allows Users to use on-site Data Center personnel to maintain User equipment, support network troubleshooting, rack and stack a server in a User's cabinet; power recycling; and install and document the fitting of cable in a User's cabinet(s).[7] The Hot Hands fee is $100 per half hour.

ICE previously announced to Users that the Data Center would be closed to third parties starting on March 16, 2020, to help avoid the spread of COVID–19, which could negatively impact Data Center functions. Prior to the closure of the Data Center, the Chief Executive Officer of the Exchange took the actions required under NYSE Arca Rules 7.1–E and 7.1–O to close the co-location facility of the Exchange to third parties. The closure period was extended three times, through August 31, 2020 (the ''Initial Closure'').[8]

ICE has announced to Users that, because the concerns that led to the Initial Closure still apply, the closure of the Data Center will be extended, with the date of the reopening announced through a customer notice.

If a User's equipment requires work while a Rules 7.1–E and 7.1–O closure is in effect, the User has to use the Hot Hands service and, absent a waiver, incurs Hot Hands fees for the work. Given that, the Exchange waived all Hot Hands fees for the duration of the Initial Closure.[9] Because the period has been extended, the Exchange proposes to extend the waiver of the Hot Hands Fee for the length of the period. To that end, the Exchange proposes to revise the footnote to the Hot Hands Fee in the Fee Schedules as follows (deletions bracketed, additions underlined):

† Fees for Hot Hands Services will be waived beginning on March 16, 2020 through [the earlier of August 31, 2020 and] the reopening of the Mahwah, New Jersey data center. *The date of the reopening will be announced through a customer notice.*

The Exchange believes that there will be sufficient Data Center staff on-site to comply with User requests for Hot Hands service.

The proposed extension of the waiver would apply equally to all Users. The proposed extension of the fee waiver would not apply differently to distinct types or sizes of market participants. Rather, it would continue to apply uniformly to all Users.

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In addition, it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable for the following reasons.

Given that the closure of the Data Center has been extended, the Exchange believes that it is reasonable to grant the proposed corresponding extension of the waiver of the Hot Hands Fee. While a Rules 7.1–E and 7.1–O closure is in effect, User representatives are not allowed access to the Data Center. If a User's equipment requires work during such period, the User has to use the Hot Hands service. Absent a waiver, the User would incur Hot Hands fees for the work.

The proposed extension of the waiver would allow a User to have work carried out on its equipment notwithstanding

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in 2010. *See* Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR–NYSEArca–2010–100).

[5] *See* Securities Exchange Act Release No. 89174 (June 29, 2020), 85 FR 40349 (July 6, 2020) (SR–NYSEArca–2020–58).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR–NYSEArca–2015–82). As specified in the NYSE Arca Options Fees and Charges and the NYSE Arca Equities Fees and Charges (together, the ''Fee Schedules''), a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates the New York Stock Exchange LLC, NYSE American LLC, NYSE Chicago, Inc., and NYSE National, Inc. (together, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70173 (August 13, 2013), 78 FR 50459 (August 19, 2013) (SR–NYSEArca-2013–80). Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2020–69, SR–NYSEAmer–2020–63, SR–NYSECHX–2020–25, and SR–NYSENAT–2020–26.

[7] *See* Securities Exchange Act Release No. 72720 (July 30, 2014), 79 FR 45577 (August 5, 2014) (SR–NYSEArca–2014–81).

[8] *See* Securities Exchange Act Release Nos. 88398 (March 17, 2020), 85 FR 16398 (March 23, 2020) (SR–NYSEArca–2020–22); 88520 (March 31, 2020), 85 FR 19208 (April 6, 2020) (SR–NYSEArca–2020–26); and 88961 (May 27, 2020), 85 FR 33755 (June 2, 2020) (SR–NYSEArca–2020–47).

[9] *See* 85 FR 40349, *supra* note 5.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

the closure of the Data Center without incurring Hot Hands fees.

The Exchange does not know when the Mahwah data center will be reopened, and so believes it is reasonable to leave the date open ended. Adding a revised potential reopening date to the footnote may create an expectation that the closure has a stated end point. The Exchange believes that it is more reasonable to state that the waiver will continue until the data center is reopened, and to inform Users how they will receive notice of the reopening. The change would also be consistent with the announcement that ICE has made to Users.

The Proposed Rule Change Is Equitable

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits for the following reasons.

The proposed extension of the waiver would apply equally to all Users. The proposed extension would not apply differently to distinct types or sizes of market participants. Rather, it would apply uniformly to all Users.

The Exchange believes that the proposal is equitable because the extension of the waiver would mean that for the duration of the closure of the Data Center all similarly-situated Users would not be charged a fee to use the Hot Hands service.

The Proposed Change Is Not Unfairly Discriminatory and Would Protect Investors and the Public Interest

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period. For the reasons above, the proposed changes do not unfairly discriminate between or among market participants.

In addition, the Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest because it would allow a User to have work carried out on its equipment notwithstanding a Rules 7.1–E and 7.1–O closure without incurring Hot Hands fees. Accordingly, the Exchange believes that the requested extension of the waiver is designed to perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest by facilitating the uninterrupted availability of Users' equipment.

For all of the above reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[12] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate.

The proposed extension of the waiver is not designed to affect competition, but rather to provide relief to Users that, while a Rules 7.1–E and 7.1–O closure is in effect, have no option but to use the Hot Hands service.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period.

Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

The Exchange believes that the proposed change would not affect the competitive landscape among the national securities exchanges, as the Hot Hands service is solely charged within co-location to existing Users, and would be temporary.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[12] 15 U.S.C. 78f(b)(8).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [13] of the Act and subparagraph (f)(2) of Rule 19b–4 [14] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [15] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca-2020–74 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca-2020–74. 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

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(2).

[15] 15 U.S.C. 78s(b)(2)(B).

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–74 and should be submitted on or before September 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19046 Filed 8–28–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89659; File No. TP 20–02]

Order Granting Exemptions From Certain Rules Related to the Sale and Delivery of Physical Securities Under Regulation SHO Related to COVID–19

August 25, 2020.

I. Introduction

The Depository Trust & Clearing Corporation (''DTCC'') has intermittently suspended physical securities processing services provided by the Depository Trust Company (''DTC''), its subsidiary, due to ongoing concerns related to the effects of COVID–19.[1] While DTCC has resumed limited services for new physical securities transactions,[2] there are likely to be delays in settlement for the sales of equity securities that the seller is ''deemed to own'' pursuant to Rule 200(b) of Regulation SHO,[3] and for which settlement is dependent on the delivery of physical certificates (''owned physical securities''), which may result in extended failures to deliver[4] and have resulting implications for compliance with Regulation SHO under the Securities Exchange Act of 1934 (the ''Exchange Act'').[5] The Securities Industry and Financial Markets Association (''SIFMA'') has requested on behalf of its member firms exemptive relief from certain provisions of Regulation SHO[6] in connection with the intermittent suspension of physical securities processing at DTC due to ongoing concerns related to COVID–19.[7]

The Commission is providing certain exemptive relief from the ''locate'' and close-out requirements of Regulation SHO, as described in more detail below, for sales of owned physical securities.

II. Regulation SHO

A. Rule 200 Marking Requirement and Rule 203 ''Locate'' Requirement

Rule 200(g) of Regulation SHO[8] provides that broker-dealers must mark all sell orders of any equity security as ''long,'' ''short,'' or ''short exempt.'' Under Rule 200(g)(1), a broker-dealer may mark an order to sell ''long'' only if the seller is ''deemed to own'' the security being sold pursuant to paragraphs (a) through (f) of Rule 200 *and* either: (1) the security to be delivered is in the physical possession or control of the broker-dealer; or (2) it is reasonably expected that the security will be in the physical possession or control of the broker-dealer no later than the settlement of the transaction.

Due to the intermittent inaccessibility of physical certificates at DTC as a result of ongoing concerns related to the effects of COVID–19, sell orders for owned physical securities may not qualify for ''long'' order marking under Rule 200(g)(1).[9] Specifically, a broker-dealer may not have a reasonable expectation that such securities will be in the physical possession or control of the broker-dealer by the settlement date.[10] Therefore, the broker-dealer would be required to mark such sale orders as ''short'' or, if eligible for Rule 201(c) or (d), ''short exempt.''[11]

Pursuant to Rule 203(b) of Regulation SHO, a broker-dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker-dealer has: (1) Borrowed the security, or entered into a *bona fide* arrangement to borrow the security; or (2) reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due.[12] This requirement is known as the ''locate'' requirement, and must be met and

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[16] 17 CFR 200.30–3(a)(12).

[1] *E.g.,* ''Temporary Suspension of DTC Physical Securities Processing as of Close of Business on April 8, 2020,'' Important Notice B# 13276–20 (Apr. 8, 2020) available at *https://www.dtcc.com/-/media/Files/pdf/2020/4/8/13276-20.pdf;* ''Update on Temporary Suspension of DTC Physical Securities Processing,'' Important Notice B#13352-20 (Apr. 30, 2020) available at *https://www.dtcc.com/-/media/Files/pdf/2020/4/30/13353-20.pdf.*

[2] ''Coronavirus Client FAQ,'' DTCC (Aug. 4, 2020) available at *https://www.dtcc.com/~/media/Files/PDFs/Email-Files/Client-FAQ-Coronavirus.pdf?mkt_tok=eyJpIjoiTURFellqVXhPR0V5TVRSaiIsInQiOiJPSzFvVE1qM0ZWTWdXR1ZzZlB3c1pNYWJmOWZUUjh1Qyt0b29sYmV4cnIwWWRXYXdWTjQrSXNaOHpyYWQ1RlNlWVFQeGhoYTN3cDJaRFwvb1JPRGdzR2c9PSJ9.* DTC has requested that participants only submit urgent time-sensitive transactions. ''Partial Resumption of DTC Physical Securities Processing,'' Important Notice B# 13402–20 (May 14, 2020) available at *https://www.dtcc.com/-/media/Files/pdf/2020/5/14/13402-20.pdf.*

[3] 17 CFR 242.200(b).

[4] Specifically, failures to deliver securities may occur at the Continuous Net Settlement system, or ''CNS,'' which is operated by the National Securities Clearing Corporation (''NSCC''), a subsidiary of DTCC. Rule 204 of Regulation SHO applies specifically to failures to deliver in equity securities occurring at CNS. 17 CFR 242.204.

[5] 17 CFR 242.200 *et seq.*

[6] Letter from Robert Toomey, Managing Director & Associate General Counsel, SIFMA, dated May 21, 2020. SIFMA stated in its request that the Commission granted similar exemptive relief in 2012 in the aftermath of Hurricane Sandy. *See* Order Granting Exemptions From Certain Rules of Regulation SHO Related to Hurricane Sandy, Release No. 34–68419 (Dec. 12, 2012) (the ''2012 Hurricane Sandy Order''), available at *https://www.sec.gov/rules/exorders/2012/34-68419.pdf.* The 2012 Hurricane Sandy Order granted exemptions from certain provisions of Regulation SHO related to the inaccessibility of physical certificates that resulted from water damage incurred at DTCC's vault used as part of its Custody Service for safekeeping of physical certificates.

[7] DTCC suspended but recently resumed processing of physical securities. ''Partial Resumption of DTC Physical Securities Processing,'' Important Notice B# 13402–20 (May 14, 2020) available at *https://www.dtcc.com/-/media/Files/pdf/2020/5/14/13402-20.pdf.* However, based on conversations with SIFMA, we understand that regular processing may be intermittent during the current crisis, and that there may be delays in processing certain physical securities after DTCC resumes processing after a suspension. *See, e.g.,* letter from Robert Toomey, *supra* note 6 (''While DTCC has resumed limited services in connection with processing physical securities . . . we believe the requested relief continues to be appropriate and should also provide, given the ongoing uncertainties in connection with the COVID–19 crisis, mechanisms that would allow market participants to rely on the relief should there be further intermittent suspensions of physical securities processing during this crisis period.'').

[8] 17 CFR 242.200(g).

[9] *See* Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48012, 48015 (Aug. 6, 2004) (''Regulation SHO Adopting Release''). As noted below, sales marked ''short'' and ''short exempt'' are generally subject to the Rule 203(b) locate requirement absent an exception.

[10] 17 CFR 242.200(g)(1)(ii).

[11] Certain sales of owned physical securities may also qualify under Rule 201(d)(1) to be marked ''short exempt'' provided that the broker-dealer executing the transaction makes the required determination regarding the seller's ownership of the security, and that the seller intends to deliver the security as soon as the current restrictions on delivery have been removed. 17 CFR 242.201(d)(1).

[12] 17 CFR 242.203(b).

documented prior to effecting a short sale.[13]

The Commission provided a specific exception to the ''locate'' requirement, however, for sales of such securities that the person is ''deemed to own'' pursuant to Rule 200(b) of Regulation SHO. Pursuant to Rule 203(b)(2)(ii), sales of such ''deemed to own'' securities are excepted from the ''locate'' requirement provided that the seller intends to deliver the securities as soon as all restrictions on delivery have been removed, and further provided that if the seller has not delivered such securities within 35 days after the trade date, the broker-dealer that effected the sale must borrow securities or close out the short position by purchasing securities of like kind and quantity.[14] In adopting this exception, the Commission emphasized that these sales are treated as short sales solely because the seller is unable to deliver the security that it owns to its broker-dealer prior to settlement, based on circumstances outside the seller's control and through no fault of the seller or the broker-dealer.[15]

SIFMA has stated in conversations with Commission staff that fail to deliver positions resulting directly from DTC's intermittent suspension of physical securities processing may persist for longer than the 35 day delivery requirement provided for under the Rule 203(b)(2)(ii) exception to the locate requirement for sales of securities that the seller is ''deemed to own.'' Therefore, absent the requested exemptive relief, SIFMA stated that broker-dealers effecting short sales for such owned physical securities would be required to either comply with the Rule 203(b) locate requirement, or alternatively, comply with the delivery requirement under Rule 203(b)(2)(ii) (*i.e.,* if the seller has not delivered such security within 35 days after the trade date, the broker-dealer that effected the sale must borrow securities or close out the short position by purchasing securities of like kind and quantity). We believe that requiring compliance with the Rule 203(b) ''locate'' requirement or the delivery requirement under Rule 203(b)(2(ii) in spite of the anticipated delivery delays as a result of DTC's intermittent suspension of physical securities processing due to ongoing concerns related to COVID–19 may cause undue burdens on various market participants, particularly in the context of physical securities for which lending markets are small or non-existent. As a result, we believe that the temporary relief from the Rule 203(b) ''locate'' requirement of Regulation SHO for owned physical securities provided by this Exemptive Order is appropriate in the public interest and consistent with the protection of investors.

Accordingly, *it is ordered*, pursuant to Section 36 of the Exchange Act,[16] that a broker-dealer is exempt from the ''locate'' requirement of Rule 203(b), including the delivery requirement of Rule 203(b)(2)(ii), with respect to a short sale order in an owned physical security, subject to the following conditions:[17]

(a) The broker-dealer determines, prior to accepting such short sale order from another person, or effecting such short sale for its own account, that the sale is a sale of an owned physical security that the seller is ''deemed to own'' pursuant to Rule 200 of Regulation SHO; [18]

(b) The broker-dealer maintains contemporaneous records reflecting any reliance on this Order, and makes this information available to Commission staff upon request; and

(c) The broker-dealer provides notice on its website promptly upon its initial reliance on the Order and maintains the notice on its website until it ceases reliance on the Order.

B. Close-Out Requirements Under Rule 204 of Regulation SHO

Rule 204(a) of Regulation SHO [19] generally requires that participants of a registered clearing agency (''Participants'') close out fail to deliver positions at a registered clearing agency [20] in any equity security for a sale transaction in that equity security by no later than the beginning of regular trading hours on the next settlement day after a fail to deliver resulting from a short sale (generally T+3), and no later than the beginning of regular trading hours on the third settlement day after a fail to deliver resulting from a long sale or a sale resulting from *bona fide* market making activities at the time of the sale (generally T+5). A close-out of a fail to deliver position is effected by purchasing or borrowing shares of like kind and quantity.

Similar to the exception to the ''locate'' requirement discussed above, Rule 204(a)(2) provides an extended close-out timeframe (T+35) for fail to deliver positions resulting from a sale of a security that a person is ''deemed to own'' and intends to deliver as soon as all restrictions on delivery have been removed.[21] Thus, fail to deliver positions resulting from sales of owned physical securities would ordinarily be eligible for the extended close-out timeframe provided by Rule 204(a)(2).[22] As noted above, however, SIFMA has stated in discussions with the Commission staff that, due to the inaccessibility of the physical certificates resulting from DTC's intermittent suspension of physical securities processing, there may be instances in which sales of owned

[13] Certain exceptions to the ''locate'' requirement are provided under Rule 203(b)(2). *See* 17 CFR 242.203(b)(2).

[14] *See* 17 CFR 242.203(b)(2)(ii); *see also* Regulation SHO Adopting Release, 69 FR at 48015.

[15] *See* Regulation SHO Adopting Release, 69 FR at 48015; *see also* Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232, 11266 (Mar. 10, 2010).

[16] Section 36 of the Exchange Act authorizes the Commission, by rule, regulation or order, to exempt, either conditionally or unconditionally, any person, security or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. 15 U.S.C. 78mm(a).

[17] These conditions are designed to (1) ensure that executing brokers do not rely on the relief from Rule 203(b) granted in this Order beyond the extent to which the seller is ''deemed to own'' the relevant security, and (2) aid in ensuring participants' compliance with this Order (to the extent they choose to avail themselves of the relief). The relief granted in this Order applies only in the context of suspensions of physical securities processing resulting directly from ongoing concerns related to COVID–19.

[18] 17 CFR 242.200.

[19] 17 CFR 242.204(a).

[20] The term ''registered clearing agency'' means a clearing agency, as defined in Section 3(a)(23)(A) of the Exchange Act, that is registered as such pursuant to Section 17A of the Exchange Act. *See* 15 U.S.C. 78c(a)(23)(A); 15 U.S.C. 78q–1. The majority of equity trades in the United States are cleared and settled through systems administered by clearing agencies registered with the Commission. NSCC clears and settles the majority of equity securities trades conducted on the exchanges and in the over-the-counter market. NSCC clears and settles trades through CNS, which nets the securities delivery and payment obligations of all of its members. *See* Exchange Act Release No. 60388 (July 27, 2009), 74 FR 38266, 38268 n.35 (July 31, 2009) (''Rule 204 Adopting Release'').

[21] *See* 17 CFR 242.204(a)(2); *see also* Rule 204 Adopting Release, 74 FR at 38277 n.141. Under Rule 204(a)(2), a Participant that has a fail to deliver position resulting from a sale of a security that a person is ''deemed to own'' pursuant to Rule 200 of Regulation SHO and that such person intends to deliver as soon as all restrictions on delivery have been removed must, by no later than the beginning of regular trading hours on the thirty-fifth consecutive calendar day following the trade date for the transaction, immediately close out the fail to deliver position by purchasing or borrowing securities of like kind and quantity.

[22] *See* Rule 204 Adopting Release, 74 FR at 38277–38278. In providing an extended close-out timeframe for sales of ''deemed to own'' securities, the Commission stated that additional time is warranted for these sales and such additional time would not undermine the goal of reducing fail to deliver positions because ''these are sales of owned securities that cannot be delivered by settlement date due solely to processing delays outside the seller's or broker-dealer's control,'' and that ''[m]oreover, delivery will be made on such sales as soon as all restrictions on delivery have been removed.'' *Id.*

physical securities may result in a CNS fail to deliver position that persists beyond the T+35 close-out timeframe.

Pursuant to Rule 204(b) of Regulation SHO,[23] if a Participant has not closed out a fail to deliver position in an equity security in accordance with Rule 204(a), the Participant and any broker-dealer from which the Participant receives trades for clearance and settlement, may not accept a short sale order in that equity security from another person or effect a short sale in that equity security for its own account, without first borrowing, or arranging to borrow, the security until the Participant closes out the fail to deliver position by purchasing securities of like kind and quantity, and that purchase has cleared and settled at a registered clearing agency. This requirement is known as the ''Penalty Box'' provision. As stated by the Commission, this provision is ''intended to act as an additional incentive to broker-dealers to deliver securities by settlement date, and to close out fail to deliver positions in accordance with the requirements of Rule 204.'' [24] Absent relief, Participants would be required to close out any fail to deliver positions resulting from the sale of owned physical securities pursuant to Rule 204(a)(2) and, if they did not, would be subject to the Penalty Box provision.

We believe that, due to DTC's intermittent suspension of physical securities processing, sales of owned physical securities raise policy considerations that warrant granting limited exemptive relief.[25] Moreover, requiring compliance with the Rule 204(a)(2) close-out requirement may create undue burdens for Participants and other broker-dealers for which they clear and settle trades, and we do not believe that subjecting Participants or other broker-dealers to the Penalty Box provision in this context would further the policy goal of incentivizing broker-dealers to deliver securities by settlement and to close out fail to deliver positions in accordance with Rule 204. Thus, we believe that the temporary relief from the close-out requirement of Regulation SHO provided by this Exemptive Order is appropriate in the public interest and consistent with the protection of investors.

Accordingly, *it is further ordered*, pursuant to Section 36 of the Exchange Act,[26] that a Participant is exempt from the close-out requirement of Rule 204(a) [27] and the Penalty Box provision of Rule 204(b) [28] of Regulation SHO with respect to a fail to deliver position resulting from the sale of an owned physical security,[29] subject to the following conditions: [30]

(a) The Participant must determine and document that the fail to deliver position resulted from a sale of an owned physical security [31] that a person is ''deemed to own'' pursuant to Rule 200 of Regulation SHO; [32]

(b) The Participant must check DTCC systems on a daily basis to determine when an owned physical security, the sale of which resulted in a fail to deliver position, is available for settlement; [33]

(c) The Participant must deliver the owned physical security as soon as possible, and in any event, must deliver the security or close out the fail to deliver position resulting from the sale by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on the fourth settlement day following the date on which the Participant determines, in accordance with condition (b) above, that the owned physical security, the sale of which resulted in the fail to deliver position, is available for settlement;

(d) The Participant's books and records must reflect that it made delivery of the owned physical security or closed out the fail to deliver position resulting from the sale within the applicable time period, consistent with this Exemptive Order;

(e) The Participant must maintain contemporaneous records reflecting any reliance on this Order, and make this information available to Commission staff upon request; and

(f) The participant provides notice on its website promptly upon its initial reliance on the Order and maintains the notice on its website until it ceases reliance on the Order.

III. Modification, Revocation, and Expiration of Exemptions

The relief provided in this Order shall expire on December 31, 2020. The Commission intends to continue to monitor the current situation. The time period for any or all of the relief may, if necessary, be extended with any additional conditions that are deemed appropriate, and the Commission may issue other relief as necessary or appropriate.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Jill M. Peterson,

Assistant Secretary.

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BILLING CODE 8011–01–P

[23] 17 CFR 242.204(b).

[24] Rule 204 Adopting Release at 38275.

[25] These policy considerations are similar to those considered in the context of the 2012 Hurricane Sandy Order. *See supra* note 6.

[26] *See supra* note 16.

[27] 17 CFR 242.204(a).

[28] 17 CFR 242.204(b).

[29] Rule 203(b)(3) of Regulation SHO provides that if a Participant has a fail to deliver position at a registered clearing agency in a threshold security, as defined by Rule 203(c)(6), for thirteen consecutive settlement days, the Participant shall immediately thereafter close out the fail to deliver position by purchasing securities of like kind and quantity. If the sale of an owned physical security resulted in a fail to deliver position in a threshold security and that fail to deliver position persisted for thirteen consecutive settlement days because the close-out date applicable under this Exemptive Order had not yet arrived, Rule 203(b)(3) would nonetheless require the Participant to close out the fail to deliver position. Accordingly, Participants are exempt from the close-out requirements of Rule 203(b)(3) with respect to fail to deliver positions in threshold securities resulting from sales of owned physical securities, provided that the Participants close out the fail to deliver positions in compliance with this Exemptive Order. *See* 17 CFR 242.203(b)(3).

[30] These conditions are designed to (1) promote the prompt delivery of securities by participants as soon as practical under the circumstances surrounding COVID–19 without putting undue burdens on participants or their customers, and (2) aid in ensuring participants' compliance with this Order.

[31] Such determination could be based, for example, on records indicating that the sale involves a physical certificate custodied at DTCC.

[32] 17 CFR 242.200.

[33] We understand based on conversations with SIFMA that processing for certain securities may resume prior to that for others. As such, this determination must be made on a security-by-security basis. We further understand that DTC systems (including the Participant Browser System and the Participant Terminal System) enable Participants to verify their positions in physical securities held at DTC and issue withdrawal instructions. We understand that these systems permit Participants, in conjunction with the Participant's own books and records, to track when physical securities have been debited (withdrawn) and sent to the transfer agent and when the physical securities are available for settlement after they have been returned to DTC and are available for Participant pickup, are mailed directly to the customer, or are set up as a Direct Registration System account, and that Participants check these systems for completed status of physical certificate processing on a daily basis.

[34] *See* 17 CFR 200.30–3(a)(11).

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–10826; 34–89671/August 26, 2020]

Order Making Fiscal Year 2021 Annual Adjustments to Registration Fee Rates

I. Background

The Commission collects fees under various provisions of the securities laws. Section 6(b) of the Securities Act of 1933 (''Securities Act'') requires the Commission to collect fees from issuers

on the registration of securities.[1] Section 13(e) of the Securities Exchange Act of 1934 (''Exchange Act'') requires the Commission to collect fees on specified repurchases of securities.[2] Section 14(g) of the Exchange Act requires the Commission to collect fees on specified proxy solicitations and statements in corporate control transactions.[3] These provisions require the Commission to make annual adjustments to the applicable fee rates.

II. Fiscal Year 2021 Annual Adjustment to Fee Rates

Section 6(b)(2) of the Securities Act requires the Commission to make an annual adjustment to the fee rate applicable under Section 6(b).[4] The annual adjustment to the fee rate under Section 6(b) of the Securities Act also sets the annual adjustment to the fee rates under Sections 13(e) and 14(g) of the Exchange Act.[5]

Section 6(b)(2) sets forth the method for determining the annual adjustment to the fee rate under Section 6(b) for fiscal year 2021. Specifically, the Commission must adjust the fee rate under Section 6(b) to a ''rate that, when applied to the baseline estimate of the aggregate maximum offering prices for [fiscal year 2021], is reasonably likely to produce aggregate fee collections under [Section 6(b)] that are equal to the target fee collection amount for [fiscal year 2021].'' That is, the adjusted rate is determined by dividing the ''target fee collection amount'' for fiscal year 2021 by the ''baseline estimate of the aggregate maximum offering prices'' for fiscal year 2021.

III. Target Fee Collection Amount for FY 2021

The statutory ''target fee collection amount'' for fiscal year 2021 and ''each fiscal year thereafter'' is ''an amount that is equal to the target fee collection amount for the prior fiscal year, adjusted by the rate of inflation.'' The target fee collection amount for fiscal year 2020 was $705,000,000. To adjust the fiscal year 2020 target fee collection amount by the rate of inflation to determine the fiscal year 2021 target fee collect amount, the Commission has determined that it will use an approach similar to one that it uses to annually adjust civil monetary penalties by the rate of inflation.[6] Under this approach, the Commission will use the Consumer Price Index for All Urban Consumers (''CPI–U''), not seasonally adjusted, rounded to five decimal places, in calculating the target fee collection amount, which is then rounded to the nearest whole dollar. The calculation for the fiscal year 2021 target fee collection amount is described in more detail below.

The most recent CPI–U index value, not seasonally adjusted, available for use by the Commission is for June 2020. This value is 257.797.[7] The CPI–U index value, not seasonally adjusted, for June 2019 is 256.143.[8] Dividing the June 2020 value by the June 2019 value and rounding to five decimal places yields a multiplier value of 1.00646. Multiplying the fiscal year 2020 target fee collection amount of $705,000,000 by the multiplier value of 1.00646 and rounding to the nearest whole dollar yields a fiscal year 2021 target fee collection amount of $709,554,300.

Section 6(b)(6)(B) defines the ''baseline estimate of the aggregate maximum offering prices'' for fiscal year 2021 as ''the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during [fiscal year 2021] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget . . . .''

To make the baseline estimate of the aggregate maximum offering price for fiscal year 2021, the Commission is using the methodology it has used in prior fiscal years and that was developed in consultation with the Congressional Budget Office and the Office of Management and Budget (''OMB''). [9] Using this methodology, the Commission determines the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2021 to be $6,506,143,522,561. Based on this estimate and the fiscal year 2021 target fee collection amount, the Commission calculates the fee rate for fiscal 2021 to be $109.10 per million. This adjusted fee rate applies to Section 6(b) of the Securities Act, as well as to Sections 13(e) and 14(g) of the Exchange Act. IV. Effective Dates of the Annual Adjustments

The fiscal year 2021 annual adjustments to the fee rates applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act will be effective on October 1, 2020.[10]

V. Conclusion

Accordingly, pursuant to Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act,[11]

It is hereby ordered that the fee rates applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act shall be $109.10 per million effective on October 1, 2020.

By the Commission.

Vanessa A. Countryman,

Secretary.

Appendix A

Congress has established a target amount of monies to be collected from fees charged to issuers based on the value of their registrations. This appendix provides the formula for determining such fees, which the Commission adjusts annually. Congress has mandated that the Commission determine these fees based on the ''aggregate maximum offering prices,'' which measures the aggregate dollar amount of securities registered with the Commission over the course of the year. In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected aggregate maximum offering prices. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected aggregate maximum offering prices.

For 2021, the Commission has estimated the aggregate maximum offering prices by projecting forward the trend established in the previous decade. More specifically, an auto-regressive integrated moving average (''ARIMA'') model was used to forecast the value of the aggregate maximum offering prices for months subsequent to July 2020,

[1] 15 U.S.C. 77f(b).

[2] 15 U.S.C. 78m(e).

[3] 15 U.S.C. 78n(g).

[4] 15 U.S.C. 77f(b)(2). The annual adjustments are designed to adjust the fee rate in a given fiscal year so that, when applied to the aggregate maximum offering price at which securities are proposed to be offered for the fiscal year, it is reasonably likely to produce total fee collections under Section 6(b) equal to the ''target fee collection amount'' specified in Section 6(b)(6)(A) for that fiscal year.

[5] 15 U.S.C. 78m(e)(4) and 15 U.S.C. 78n(g)(4).

[6] The Commission annually adjusts for inflation the civil money penalties that can be imposed under the statutes administered by Commission, as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, pursuant to guidance from the Office of Management and Budget (''OMB''). See OMB December 16, 2019 Memorandum for the Heads of Executive Departments and Agencies,'' M–20–05, on ''Implementation of Penalty Inflation Adjustments for 2020, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.''

[7] This was announced on July 14, 2020. See *https://www.bls.gov/news.release/archives/cpi_07142020.htm.*

[8] See Supplemental Tables, ''CPI–U News Release Companion File'' from the July 14, 2020 press release.

[9] Appendix A explains how we determined the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2021 using our methodology, and then shows the arithmetical process of calculating the fiscal year 2021 annual adjustment based on that estimate. The appendix includes the data used by the Commission in making its ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2021.

[10] 15 U.S.C. 77f(b)(4), 15 U.S.C. 78m(e)(6) and 15 U.S.C. 78n(g)(6).

[11] 15 U.S.C. 77f(b), 78m(e) and 78n(g).

the last month for which the Commission has data on the aggregate maximum offering prices.

The following sections describe this process in detail.

A. Baseline Estimate of the Aggregate Maximum Offering Prices for Fiscal Year 2021

First, calculate the aggregate maximum offering prices (AMOP) for each month in the sample (July 2010–July 2020). Next, calculate the percentage change in the AMOP from month to month.

Model the monthly percentage change in AMOP as a first order moving average process. The moving average approach allows one to model the effect that an exceptionally high (or low) observation of AMOP tends to be followed by a more ''typical'' value of AMOP.

Use the [estimated moving average] [ARIMA] model to forecast the monthly percent change in AMOP. These percent changes can then be applied to obtain forecasts of the total dollar value of registrations. The following is a more formal (mathematical) description of the procedure:

1. Begin with the monthly data for AMOP. The sample spans ten years, from July 2010 to July 2020.

2. Divide each month's AMOP (column C) by the number of trading days in that month (column B) to obtain the average daily AMOP (AAMOP, column D).

3. For each month t, the natural logarithm of AAMOP is reported in column E.

4. Calculate the change in log(AAMOP) from the previous month as $\Delta_t = \log(AAMOP_t)\text{-}\log(AAMOP_{t-1})$. This approximates the percentage change.

5. Estimate the first order moving average model $\Delta_t = \alpha + \beta e_{t-1} + e_t$, where e_t denotes the forecast error for month t. The forecast error is simply the difference between the one-month ahead forecast and the actual realization of Δ_t. The forecast error is expressed as $e_t = \Delta_t - \alpha - \beta e_{t-1}$. The model can be estimated using standard commercially available software. Using least squares, the estimated parameter values are $\alpha = 0.0070920641$ and $\beta = 0.8803315102$.

6. For the month of August 2020 forecast $\Delta_{t = 8/2020} = \alpha + \beta e_{t = 7/2020}$. For all subsequent months, forecast $\Delta_t = \alpha$.

7. Calculate forecasts of log(AAMOP). For example, the forecast of log(AAMOP) for October 2020 is given by $FLAAMOP_{t = 10/2020} = \log(AAMOP_{t = 7/2020}) + \Delta_{t = 8/2020} + \Delta_{t = 9/2020} + \Delta_{t = 10/2020}$.

8. Under the assumption that e_t is normally distributed, the n-step ahead forecast of AAMOP is given by $\exp(FLAAMOP_t + \sigma_n{}^2/2)$, where σ_n denotes the standard error of the n-step ahead forecast.

9. For October 2020, this gives a forecast AAMOP of $24.705 billion (Column I), and a forecast AMOP of $543.503 billion (Column J).

10. Iterate this process through September 2021 to obtain a baseline estimate of the aggregate maximum offering prices for fiscal year 2021 of $6,506,143,522,561.

B. Using the Forecasts From A To Calculate the New Fee Rate

1. Using the data from Table A, estimate the aggregate maximum offering prices between 10/01/20 and 9/30/21 to be $6,506,143,522,561.

2. The rate necessary to collect the target $709,554,300 in fee revenues set by Congress is then calculated as: $709,554,300 ÷ $6,506,143,522,561 = 0.00010906.

3. Round the result to the seventh decimal point, yielding a rate of 0.0001091 (or $109.10 per million).

TABLE A—ESTIMATION OF BASELINE OF AGGREGATE MAXIMUM OFFERING PRICES

Fee rate calculation	
a. Baseline estimate of the aggregate maximum offering prices, 10/01/20 to 09/30/21 ($Millions)	6,506,144
b. Implied fee rate ($709,554,300 / a)	$109.10

Month	Number of trading days in month	Aggregate maximum offering prices, in $millions	Average daily aggregate max. offering prices (AAMOP) in $millions	Log(AAMOP)	Log (change in AAMOP)	forecast log(AAMOP)	Standard error	Forecast AAMOP, in $millions	Forecast aggregate maximum offering prices, in $millions
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Jul–10	21	171,191	8,152	22.822					
Aug–10	22	240,793	10,945	23.116	0.295				
Sep–10	21	260,783	12,418	23.242	0.126				
Oct–10	21	214,988	10,238	23.049	–0.193				
Nov–10	21	340,112	16,196	23.508	0.459				
Dec–10	22	297,992	13,545	23.329	−0.179				
Jan–11	20	233,668	11,683	23.181	−0.148				
Feb–11	19	252,785	13,304	23.311	0.130				
Mar–11	23	595,198	25,878	23.977	0.665				
Apr–11	20	236,355	11,818	23.193	−0.784				
May–11	21	319,053	15,193	23.444	0.251				
Jun–11	22	359,727	16,351	23.518	0.073				
Jul–11	20	215,391	10,770	23.100	−0.418				
Aug–11	23	179,870	7,820	22.780	−0.320				
Sep–11	21	168,005	8,000	22.803	0.023				
Oct–11	21	181,452	8,641	22.880	0.077				
Nov–11	21	256,418	12,210	23.226	0.346				
Dec–11	21	237,652	11,317	23.150	−0.076				
Jan–12	20	276,965	13,848	23.351	0.202				
Feb–12	20	228,419	11,421	23.159	−0.193				
Mar–12	22	430,806	19,582	23.698	0.539				
Apr–12	20	173,626	8,681	22.884	−0.813				
May–12	22	414,122	18,824	23.658	0.774				
Jun–12	21	272,218	12,963	23.285	−0.373				
Jul–12	21	170,462	8,117	22.817	−0.468				
Aug–12	23	295,472	12,847	23.276	0.459				
Sep–12	19	331,295	17,437	23.582	0.305				
Oct–12	21	137,562	6,551	22.603	−0.979				
Nov–12	21	221,521	10,549	23.079	0.476				

Month	Number of trading days in month	Aggregate maximum offering prices, in $millions	Average daily aggregate max. offering prices (AAMOP) in $millions	Log(AAMOP)	Log (change in AAMOP)	forecast log(AAMOP)	Standard error	Forecast AAMOP, in $millions	Forecast aggregate maximum offering prices, in $millions
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Dec–12	20	321,602	16,080	23.501	0.422				
Jan–13	21	368,488	17,547	23.588	0.087				
Feb–13	19	252,148	13,271	23.309	−0.279				
Mar–13	20	533,440	26,672	24.007	0.698				
Apr–13	22	235,779	10,717	23.095	−0.912				
May–13	22	382,950	17,407	23.580	0.485				
Jun–13	20	480,624	24,031	23.903	0.322				
Jul–13	22	263,869	11,994	23.208	−0.695				
Aug–13	22	253,305	11,514	23.167	−0.041				
Sep–13	20	267,923	13,396	23.318	0.151				
Oct–13	23	293,847	12,776	23.271	−0.047				
Nov–13	20	326,257	16,313	23.515	0.244				
Dec–13	21	358,169	17,056	23.560	0.045				
Jan–14	21	369,067	17,575	23.590	0.030				
Feb–14	19	298,376	15,704	23.477	−0.113				
Mar–14	21	564,840	26,897	24.015	0.538				
Apr–14	21	263,401	12,543	23.252	−0.763				
May–14	21	403,700	19,224	23.679	0.427				
Jun–14	21	423,075	20,146	23.726	0.047				
Jul–14	22	373,811	16,991	23.556	−0.170				
Aug–14	21	405,017	19,287	23.683	0.127				
Sep–14	21	409,349	19,493	23.693	0.011				
Oct–14	23	338,832	14,732	23.413	−0.280				
Nov–14	19	386,898	20,363	23.737	0.324				
Dec–14	22	370,760	16,853	23.548	−0.189				
Jan–15	20	394,127	19,706	23.704	0.156				
Feb–15	19	466,138	24,534	23.923	0.219				
Mar–15	22	753,747	34,261	24.257	0.334				
Apr–15	21	356,560	16,979	23.555	−0.702				
May–15	20	478,591	23,930	23.898	0.343				
Jun–15	22	446,102	20,277	23.733	−0.166				
Jul–15	22	402,062	18,276	23.629	−0.104				
Aug–15	21	334,746	15,940	23.492	−0.137				
Sep–15	21	289,872	13,803	23.348	−0.144				
Oct–15	22	300,276	13,649	23.337	−0.011				
Nov–15	20	409,690	20,485	23.743	0.406				
Dec–15	22	308,569	14,026	23.364	−0.379				
Jan–16	19	457,411	24,074	23.904	0.540				
Feb–16	20	554,343	27,717	24.045	0.141				
Mar–16	22	900,301	40,923	24.435	0.390				
Apr–16	21	250,716	11,939	23.203	−1.232				
May–16	21	409,992	19,523	23.695	0.492				
Jun–16	22	321,219	14,601	23.404	−0.291				
Jul–16	20	289,671	14,484	23.396	−0.008				
Aug–16	23	352,068	15,307	23.452	0.055				
Sep–16	21	326,116	15,529	23.466	0.014				
Oct–16	21	266,115	12,672	23.263	−0.203				
Nov–16	21	443,034	21,097	23.772	0.510				
Dec–16	21	310,614	14,791	23.417	−0.355				
Jan–17	20	503,030	25,152	23.948	0.531				
Feb–17	19	255,815	13,464	23.323	−0.625				
Mar–17	23	723,870	31,473	24.172	0.849				
Apr–17	19	255,275	13,436	23.321	−0.851				
May–17	22	569,965	25,908	23.978	0.657				
Jun–17	22	445,081	20,231	23.730	−0.247				
Jul–17	20	291,167	14,558	23.401	−0.329				
Aug–17	23	263,981	11,477	23.164	−0.238				
Sep–17	20	372,705	18,635	23.648	0.485				
Oct–17	22	173,749	7,898	22.790	−0.858				
Nov–17	21	377,262	17,965	23.612	0.822				
Dec–17	20	281,126	14,056	23.366	−0.245				
Jan–18	21	593,025	28,239	24.064	0.698				
Feb–18	19	353,182	18,589	23.646	−0.418				
Mar–18	21	685,784	32,656	24.209	0.563				
Apr–18	21	367,569	17,503	23.586	−0.624				
May–18	22	543,840	24,720	23.931	0.345				
Jun–18	21	477,967	22,760	23.848	−0.083				
Jul–18	21	327,710	15,605	23.471	−0.377				

Month	Number of trading days in month	Aggregate maximum offering prices, in $millions	Average daily aggregate max. offering prices (AAMOP) in $millions	Log(AAMOP)	Log (change in AAMOP)	forecast log(AAMOP)	Standard error	Forecast AAMOP, in $millions	Forecast aggregate maximum offering prices, in $millions
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Aug–18	23	347,239	15,097	23.438	−0.033				
Sep–18	19	259,874	13,678	23.339	−0.099				
Oct–18	23	300,814	13,079	23.294	−0.045				
Nov–18	21	447,767	21,322	23.783	0.489				
Dec–18	19	276,130	14,533	23.400	−0.383				
Jan–19	21	495,624	23,601	23.885	0.485				
Feb–19	19	372,166	19,588	23.698	−0.186				
Mar–19	21	604,813	28,801	24.084	0.385				
Apr–19	21	267,737	12,749	23.269	−0.815				
May–19	22	476,892	21,677	23.800	0.531				
Jun–19	20	399,178	19,959	23.717	−0.083				
Jul–19	22	359,438	16,338	23.517	−0.200				
Aug–19	22	401,391	18,245	23.627	0.110				
Sep–19	20	382,876	19,144	23.675	0.048				
Oct–19	23	181,113	7,874	22.787	−0.888				
Nov–19	20	553,889	27,694	24.044	1.258				
Dec–19	21	438,062	20,860	23.761	−0.283				
Jan–20	21	636,403	30,305	24.135	0.373				
Feb–20	19	424,133	22,323	23.829	−0.306				
Mar–20	22	409,403	18,609	23.647	−0.182				
Apr–20	21	389,821	18,563	23.644	−0.002				
May–20	20	731,835	36,592	24.323	0.679				
Jun–20	22	650,219	29,555	24.110	−0.214				
Jul–20	22	457,871	20,812	23.759	−0.351				
Aug–20	21					23.858	0.336	24,317	510,665
Sep–20	21					23.865	0.338	24,510	514,715
Oct–20	22					23.872	0.341	24,705	543,503
Nov–20	20					23.879	0.343	24,901	498,013
Dec–20	22					23.886	0.346	25,098	552,159
Jan–21	19					23.893	0.348	25,297	480,647
Feb–21	19					23.901	0.350	25,498	484,460
Mar–21	23					23.908	0.353	25,700	591,103
Apr–21	21					23.915	0.355	25,904	543,984
May–21	20					23.922	0.357	26,109	522,189
Jun–21	22					23.929	0.359	26,317	578,965
Jul–21	21					23.936	0.362	26,525	557,032
Aug–21	22					23.943	0.364	26,736	588,186
Sep–21	21					23.950	0.366	26,948	565,904

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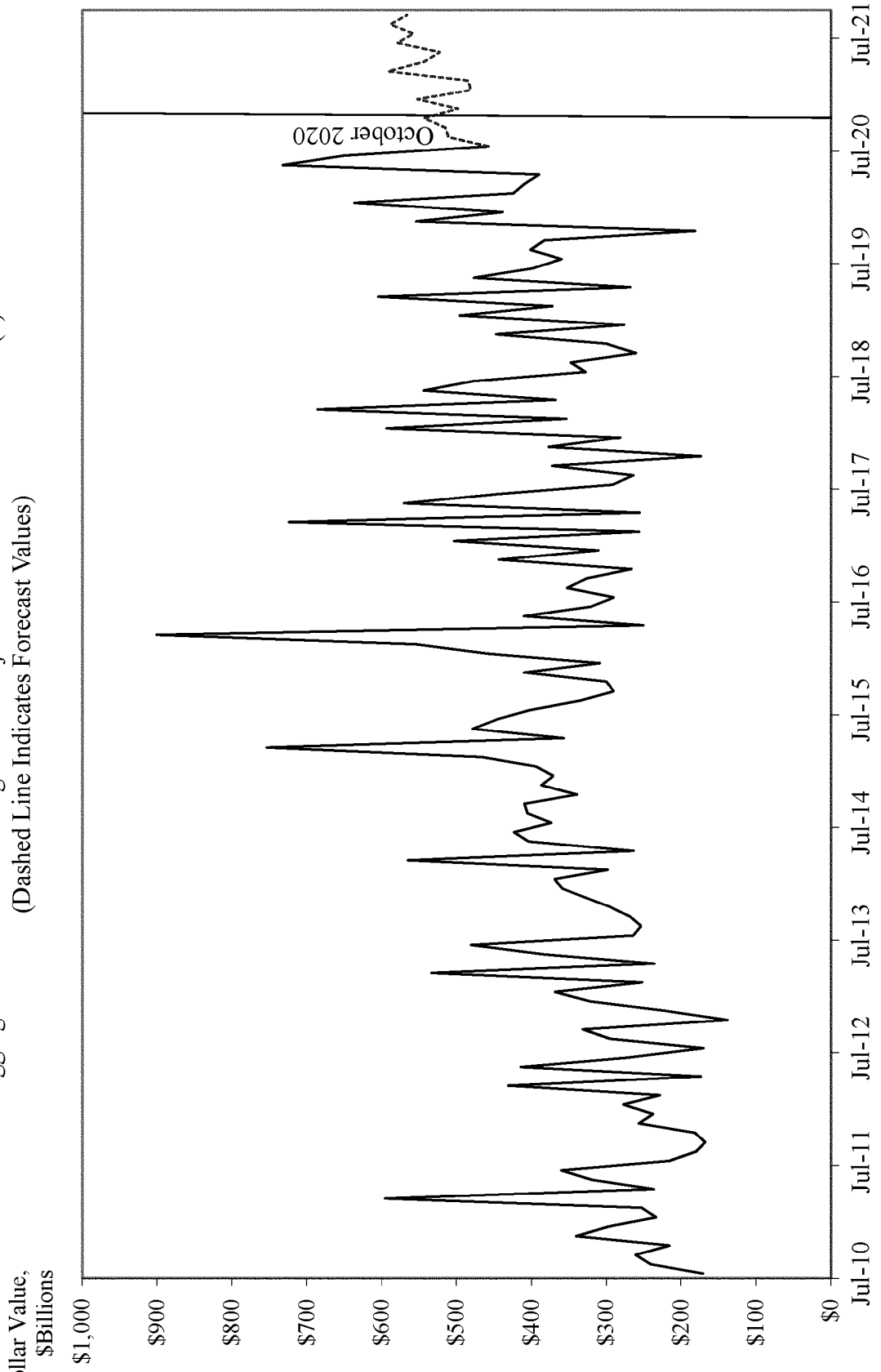
Figure A
Aggregate Maximum Offering Prices Subject to Securities Act Section 6(b)
(Dashed Line Indicates Forecast Values)



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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89651; File No. SR–NYSEAMER–2020–63]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Extend the Temporary Waiver of the Co-Location Hot Hands Fee

August 25, 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 August 11, 2020, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the temporary waiver of the co-location ''Hot Hands'' fee. The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 extend of the temporary waiver of the co-location [4] ''Hot Hands'' fee through the reopening of the Mahwah, New Jersey data center (''Data Center''). The waiver of the Hot Hands fee is scheduled to expire on August 31, 2020.[5]

The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. (''ICE''). Through its ICE Data Services (''IDS'') business, ICE operates the Data Center, from which the Exchange provides co-location services to Users.[6] Among those services is a ''Hot Hands'' service, which allows Users to use on-site Data Center personnel to maintain User equipment, support network troubleshooting, rack and stack a server in a User's cabinet; power recycling; and install and document the fitting of cable in a User's cabinet(s).[7] The Hot Hands fee is $100 per half hour.

ICE previously announced to Users that the Data Center would be closed to third parties starting on March 16, 2020, to help avoid the spread of COVID–19, which could negatively impact Data Center functions. Prior to the closure of the Data Center, the Chief Executive Officer of the Exchange took the actions required under NYSE American Rules 7.1E and 901NY to close the co-location facility of the Exchange to third parties. The closure period was extended twice, through June 30, 2020 (the ''Initial Closure'').[8]

ICE has announced to Users that, because the concerns that led to the Initial Closure still apply, the closure of the Data Center will be extended, with the date of the reopening announced through a customer notice.

If a User's equipment requires work while a Rules 7.1E and 901NY closure is in effect, the User has to use the Hot Hands service and, absent a waiver, incurs Hot Hands fees for the work. Given that, the Exchange waived all Hot Hands fees for the duration of the Initial Closure.[9] Because the period has been extended, the Exchange proposes to extend the waiver of the Hot Hands Fee for the length of the period. To that end, the Exchange proposes to revise the footnote to the Hot Hands Fee in the Price List and Fee Schedule as follows (deletions bracketed, additions underlined):

† Fees for Hot Hands Services will be waived beginning on March 16, 2020 through [the earlier of August 31, 2020 and] the reopening of the Mahwah, New Jersey data center. *The date of the reopening will be announced through a customer notice.*

The Exchange believes that there will be sufficient Data Center staff on-site to comply with User requests for Hot Hands service.

The proposed extension of the waiver would apply equally to all Users. The proposed extension of the fee waiver would not apply differently to distinct types or sizes of market participants. Rather, it would continue to apply uniformly to all Users.

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members,

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in 2010. *See* Securities Exchange Act Release No. 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR–NYSEAmex–2010–80).

[5] *See* Securities Exchange Act Release No. 89173 (June 29, 2020), 85 FR 40352 (July 6, 2020) (SR–NYSEAmer–2020–46).

[6] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR–NYSEMKT–2015–67). As specified in the NYSE American Equities Price List and Fee Schedule and the NYSE American Options Fee Schedule (together, the ''Price List and Fee Schedule''), a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (together, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR–NYSEMKT–2013–67). Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2020–69, SR–NYSEArca–2020–74, SR–NYSECHX–2020–25, and SR–NYSENAT–2020–26.

[7] *See* Securities Exchange Act Release No. 72719 (July 30, 2014), 79 FR 45502 (August 5, 2014) (SR–NYSEMKT–2014–61).

[8] *See* Securities Exchange Act Release Nos. 88403 (March 17, 2020), 85 FR 16400 (March 23, 2020) (SR–NYSEAMER–2020–19); 88523 (March 31, 2020), 85 FR 19179 (April 6, 2020) (SR–NYSEAMER–2020–23); and 88956 (May 27, 2020), 85 FR 33760 (June 2, 2020) (SR–NYSEAmer–2020–39).

[9] *See* 85 FR 40352, *supra* note 5.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In addition, it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Rule Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable for the following reasons.

Given that the closure of the Data Center has been extended, the Exchange believes that it is reasonable to grant the proposed corresponding extension of the waiver of the Hot Hands Fee. While a Rules 7.1E and 901NY closure is in effect, User representatives are not allowed access to the Data Center. If a User's equipment requires work during such period, the User has to use the Hot Hands service. Absent a waiver, the User would incur Hot Hands fees for the work.

The proposed extension of the waiver would allow a User to have work carried out on its equipment notwithstanding the closure of the Data Center without incurring Hot Hands fees.

The Exchange does not know when the Mahwah data center will be reopened, and so believes it is reasonable to leave the date open ended. Adding a revised potential reopening date to the footnote may create an expectation that the closure has a stated end point. The Exchange believes that it is more reasonable to state that the waiver will continue until the data center is reopened, and to inform Users how they will receive notice of the reopening. The change would also be consistent with the announcement that ICE has made to Users.

The Proposed Rule Change Is Equitable

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits for the following reasons.

The proposed extension of the waiver would apply equally to all Users. The proposed extension would not apply differently to distinct types or sizes of market participants. Rather, it would apply uniformly to all Users.

The Exchange believes that the proposal is equitable because the extension of the waiver would mean that for the duration of the closure of the Data Center all similarly-situated Users would not be charged a fee to use the Hot Hands service.

The Proposed Change Is Not Unfairly Discriminatory and Would Protect Investors and the Public Interest

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period. For the reasons above, the proposed changes do not unfairly discriminate between or among market participants.

In addition, the Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest because it would allow a User to have work carried out on its equipment notwithstanding a Rules 7.1E and 901NY closure without incurring Hot Hands fees. Accordingly, the Exchange believes that the requested extension of the waiver is designed to perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest by facilitating the uninterrupted availability of Users' equipment.

For all of the above reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[12] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate.

The proposed extension of the waiver is not designed to affect competition, but rather to provide relief to Users that, while a Rules 7.1E and 901NY closure is in effect, have no option but to use the Hot Hands service.

The proposed extension of the waiver would not apply differently to distinct types or sizes of market participants. Rather, all Users whose equipment requires work during the extension of the Data Center closure would have the resulting fees waived, and the extension of the waiver would apply uniformly to all Users during the period.

Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

The Exchange believes that the proposed change would not affect the competitive landscape among the national securities exchanges, as the Hot Hands service is solely charged within co-location to existing Users, and would be temporary.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[13] of the Act and subparagraph (f)(2) of Rule 19b–4[14] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[15] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and

[12] 15 U.S.C. 78f(b)(8).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(2).

[15] 15 U.S.C. 78s(b)(2)(B).

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–2020–63 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–2020–63. 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–2020–63 and should be submitted on or before September 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19045 Filed 8–28–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, the Securities and Exchange Commission will hold an Open Meeting on Wednesday, September 2, 2020 at 9:00 a.m.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will begin at 9:00 a.m. (ET) and will be open to the public via audio webcast only on the Commission's website at *www.sec.gov.*

MATTERS TO BE CONSIDERED: The Commission will consider whether to adopt amendments to the Commission's rules implementing its whistleblower program that would enhance claim processing efficiency, and clarify and bring greater transparency to the framework used by the Commission in exercising its discretion in determining award amounts, as well as otherwise address specific issues that have developed during the whistleblower program's history. The amendments reflect the Commission's experience administering the program over the past decade. The Commission will also consider whether to adopt interpretive guidance concerning the term ''independent analysis'' in the Commission's rules implementing its whistleblower program.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact Vanessa A. Countryman, Office of the Secretary, at (202) 551–5400.

Dated: August 26, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–19201 Filed 8–27–20; 11:15 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 11180]

Report to Congress Pursuant to Section 1245(e) of the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA)

ACTION: Notice of Report.

FOR FURTHER INFORMATION CONTACT: Thomas Zarzecki, (202) 647 7594

Report: (July 30, 2020)

Section 1245(e) of the National Defense Authorization Act for Fiscal Year 2013, (also known as the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA)), as delegated by Presidential Memorandum of June 3, 2013 (78 FR 35545), requires the Secretary of State, in consultation with the Secretary of the Treasury, to determine: (1) Whether Iran is (A) using any of the materials described in subsection (d) of Section 1245 of IFCA as a medium for barter, swap, or any other exchange or transaction, or (B) listing any of such materials as assets of the Government of Iran for purposes of the national balance sheet of Iran; (2) which sectors of the economy of Iran are controlled directly or indirectly by Iran's Islamic Revolutionary Guard Corps (IRGC); and (3) which of the materials described in subsection (d) are used in connection with the nuclear, military, or ballistic missile programs of Iran. Materials described in subsection (d) of Section 1245 are graphite, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes.

This report pursuant to Section 1245(e) of IFCA covers the period January 1, 2019 to June 30, 2020.

Following a review of the available information, and in consultation with the Department of the Treasury, the Secretary of State has determined that Iran is not using the materials described in Section 1245(d) as a medium for barter, swap, or any other exchange or transaction.

Following a review of the available information, and in consultation with the Department of the Treasury, the Secretary of State has determined Iran is listing gold as an asset of the Government of Iran for the purposes of the National Balance Sheet of Iran. Following a review of the available information, and in consultation with the Department of the Treasury, the Secretary of State has determined that the construction sector of Iran is controlled directly or indirectly by the IRGC.

Following a review of the available information, and in consultation with the Department of the Treasury, the Secretary of State has determined that the following certain types of materials are used in connection with the nuclear, military, or ballistic missile programs of Iran:

ALUMINIUM 319
ALUMINIUM 1100
ALUMINIUM 225
ALUMINIUM 6061
ALUMINIUM 6063
ALUMINIUM 6082
ALUMINIUM 7075
ALUMINIUM BROZE ALLOY UNS C63600 (CDA alloy 636)
ALUMINIUM OXIDE (Al_2O_3)
STEEL 302
STEEL 4130
STAINLESS STEEL 321
STAINLES SSTEEL 316
A877 STEEL
A228 STEEL
100Cr6–52100 STEEL
350 MARAGING STEEL (also known as MARAGING STEEL350)
300 MARAGING STEEL (also known as MARAGING STEEL300)
UNS Cl7200–TD01 [BERYLLIUM COPPER]
UNS C37000—CuZn38Pb1
TUNGSTEN COPPER
ALUMINIUM POWDER with purity above 98 percent

Gonzalo O. Suarez,

Acting Deputy Assistant Secretary, Bureau of International Security and Nonproliferation, Department of State.

[FR Doc. 2020–19118 Filed 8–28–20; 8:45 am]

BILLING CODE 4710–27–P

DEPARTMENT OF STATE

[Public Notice 11192]

30-Day Notice of Proposed Information Collection: Education and Cultural Affairs Monitoring and Evaluation Initiative

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 September 30, 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 Natalie Donahue, Chief of Evaluation, Bureau of Educational and Cultural Affairs, who may be reached at *ECAEvaluation@state.gov* or at 202–632–6193.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Monitoring Data for ECA (MODE) Framework.
- *OMB Control Number:* None.
- *Type of Request:* New collection.
- *Originating Office:* Educational and Cultural Affairs (ECA/P/V).
- *Form Number:* No form.
- *Respondents:* ECA program participants, alumni, and host/home communities.
- *Estimated Number of Participant Post-Program Survey Respondents:* 66,691.
- *Estimated Number of Participant Post-Program Survey Responses:* 50,532.
- *Average Time per Participant Post-Program Survey:* 8 minutes.
- *Total Estimate Participant Post-Program Survey Burden Time:* 6,738 hours.
- *Estimated Number of Alumni Survey Respondents:* 13,591.
- *Estimated Number of Alumni Survey Responses:* 6,063.
- *Average Time per Alumni Survey:* 30 minutes.
- *Total Estimated Alumni Survey Burden Time:* 3,032 hours.
- *Estimated Number of Host/Home Community Survey Respondents:* 5,000.
- *Estimated Number of Host/Home Community Survey Responses:* 500.
- *Average Time per Host/Home Community Survey:* 20 minutes.
- *Total Estimated Host/Home Community Survey Burden Time:* 167 hours.
- *Total Estimated Number of Respondents:* 57,095.
- *Total Estimated Burden Time:* 9,937 hours annual hours.
- *Frequency:* For participants, once after program participation; for Alumni, once every one, three and five years; for host/home communities, once every year.
- *Obligation to Respond:* Voluntary

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 Department of State's Bureau of Educational and Cultural Affairs (ECA) regularly monitors and evaluates its programs through the collection of data about program accomplishments in order to enable program staff to assess the results of its programs, where improvements may be necessary, and to modify/plan future programs. In order to more systematically assess the efficacy and impact of ECA funded-programs and to address the requirements of the Foreign Aid Transparency and Accountability Act (FATAA) and the Department of State's updated monitoring and evaluation guidance (18 FAM 300), ECA's Evaluation Division has created a robust performance monitoring framework that is responsive to these directives, measures programmatic goals and objectives, and provides a comprehensive view of overall Bureau activities. The Monitoring Data for ECA (MODE) Framework (*https://eca.state.gov/impact/eca-evaluation-division/monitoring-data-eca-mode-framework*) includes a results framework with indicators designed to track program performance and the direction, pace, and magnitude of change of ECA programs—leading to strengthened feedback mechanisms resulting in more effective programs. Each of these indicators has corresponding data collection questions defined so data will be collected uniformly whether by the program office, the Evaluation Division, or an award recipient. Implementation of the MODE Framework will enable ECA to standardize and utilize its data in the following ways:

- Assess data and performance metrics to enhance program performance
- Inform strategic planning activities at the Bureau, division, and individual exchange program levels
- Supplement the information ECA program officers receive from their award recipients and exchange participants to provide a comprehensive view of programmatic activities
- Respond quickly and reliably to ad-hoc requests from Congress, the Office of Management and Budget (OMB), and internal Department of State stakeholders

In order to collect data for the MODE Framework, the ECA Evaluation Division intends to conduct ongoing surveys of program participants, alumni, and participant host and home communities to monitor program performance, assess impact, and identify issues for further evaluation. Specifically, ECA will coordinate with award recipients to provide standard survey questions for both foreign national and U.S. citizen exchange participants immediately after completing the exchange (''Participant Post-Program Survey''). ECA's Evaluation Division also intends to administer standard surveys to foreign national and U.S. citizen exchange alumni roughly one year, three years and five years after completing their exchange experience. Conducting post-program surveys, particularly after three and five years, will provide information on the impact of ECA programs and insight into the achievements of participants.

To examine multiplier effects of ECA exchange programs on foreign and U.S. communities and institutions that sponsor, support, or provide exchange programs support or services, ECA intends to administer standard surveys to foreign and U.S. host community members (individuals or institutions) where feasible.

Methodology

In previous years, the ECA Evaluation Division surveyed foreign alumni from a sample of 10 ECA programs. The suggested MODE Framework data collections represent an expansion to include American participants and standardization of the data collection tools. Additionally, ECA has not collected these data in a systematic manner from U.S. and foreign host community members in the past.

Currently, ECA award recipients administer post- program surveys to their participants as part of their internal program monitoring data collection approach. ECA intends to leverage this ongoing survey process by providing program awardees standard indicators (we estimate anywhere from 10–15 for each award) and corresponding data collection questions, depending on the program orientation. In many instances, these standard indicators and questions will supplant existing awardee defined comparable indicators and questions with ECA defined uniform data requirements. This will ensure the data ECA gathers are valid and reliable across the range of exchange programs.

Zachary Parker,

Director.

[FR Doc. 2020–19148 Filed 8–28–20; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice:11168]

United States Passports Invalid for Travel to, in, or Through the Democratic People's Republic of Korea

AGENCY: Department of State.

ACTION: Notice of extension of passport travel restriction.

SUMMARY: On September 1, 2017, all United States passports were declared invalid for travel to, in, or through the Democratic People's Republic of Korea (DPRK) unless specially validated for such travel. The restriction was extended for one year in 2018 and 2019, and, if not renewed, the restriction is set to expire on August 31, 2020. This notice extends the restriction until August 31, 2021 unless extended or revoked by the Secretary of State.

DATES: The extension of the travel restriction is in effect on September 1, 2020.

FOR FURTHER INFORMATION CONTACT: Anita Mody, Bureau of Consular Affairs, Passport Services, Office of Legal Affairs, 202–485–6500.

SUPPLEMENTARY INFORMATION: On September 1, 2017, pursuant to the authority of 22 U.S.C. 211a and Executive Order 11295 (31 FR 10603), and in accordance with 22 CFR 51.63(a)(3), all United States passports were declared invalid for travel to, in, or through the Democratic People's Republic of Korea (DPRK) unless specially validated for such travel. The restriction was renewed on September 1, 2018 and again for another year effective September 1, 2019. If not renewed again, the restriction is set to expire on August 31, 2020.

The Department of State has determined that there continues to be serious risk to United States citizens and nationals of arrest and long-term detention representing imminent danger to their physical safety, as defined in 22 CFR 51.63(a)(3). Accordingly, all United States passports shall remain invalid for travel to, in, or through the DPRK unless specially validated for such travel under the authority of the Secretary of State. This extension to the restriction of travel to the DPRK shall be effective on September 1, 2020, and shall expire August 31, 2021 unless extended or revoked by the Secretary of State.

Dated: August 18, 2020.

Michael R. Pompeo,

Secretary of State.

[FR Doc. 2020–19167 Filed 8–28–20; 8:45 am]

BILLING CODE 4710–06–P

TENNESSEE VALLEY AUTHORITY

Privacy Act of 1974: Notice of Systems of Records

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of a new System of Records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Tennessee Valley Authority (TVA) proposes to establish a new system of records entitled Freedom of Information Act (FOIA) Requests and Administrative Appeals Files to cover both electronic and paper files created during the processing of access requests and appeals under the FOIA.

DATES: This notice will be effective without further notice on October 30, 2020. unless modified by a subsequent notice to incorporate comments received from the public. Written or electronic comments must be received on or before September 30, 2020 to be assured consideration.

ADDRESSES: Comments should be directed to the Senior Privacy Program Manager: Christopher A. Marsalis, Tennessee Valley Authority, 400 W. Summit Hill Dr. (WT 5D), Knoxville, Tennessee 37902–1401; telephone (865) 632–2467 or by email at *camarsalis@tva.gov.*

FOR FURTHER INFORMATION CONTACT: Christopher A. Marsalis at (865) 632–2467 or *camarsalis@tva.gov.*

SUPPLEMENTARY INFORMATION: The FOIA system contains electronic information of each request and administrative appeal made to TVA pursuant to the FOIA, as well as correspondence related to the requests and appeals. In addition, the system allows the public to submit FOIA requests and appeals.

The system includes a public access link on the TVA website where the public can submit a request. It also has interoperability with the National FOIA Portal which is required for all federal agencies no later than 2023.

SYSTEM NAME AND NUMBER:

Freedom of Information Act (FOIA) Requests and Appeals Files. TVA–40.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The records in this system are maintained at the Tennessee Valley Authority, Knoxville, Tennessee.

SYSTEM MANAGER(S):

TVA FOIA Officer, Tennessee Valley Authority, 400 W Summit Hill Dr. SW, Knoxville, TN 37902.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

FOIA, 5 U.S.C. 552, as amended.

PURPOSE(S) OF THE SYSTEM:

Only authorized FOIA officials will utilize this system to effectively monitor and track access requests and administrative appeals under the FOIA; and to satisfy TVA's reporting obligations under the FOIA.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records on individuals or their representatives who have submitted FOIA requests for records and/or FOIA administrative appeals with TVA, and individuals whose FOIA requests for records have been referred to TVA by other Federal agencies.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system consists of records created or compiled in response to FOIA requests for records or subsequent administrative appeals to include: the requester's name, home phone, home address, home email, work address, work phone, and work email; the original requests and administrative appeals; responses to such requests and appeals; all related memoranda, correspondence, notes, and other related or supporting documentation, summary of log; and in some instances copies of requested records.

RECORD SOURCE CATEGORIES:

Information in this system of records is obtained from the individual submitting the request, TVA officials, and other Federal agencies, if appropriate.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

TVA 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 a purpose for which the record was collected.

(1) To respond to a request from a Member of Congress regarding an individual's request.

(2) When a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, disclosure may be made to the appropriate agency, whether Federal, foreign, State, local, or tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto, if the information disclosed is relevant to any enforcement, regulatory, investigative or prosecute responsibility of the receiving entity.

(3) To the National Archives and Records Administration for purposes of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

(4) To the National Archives and Records Administration, Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h), to review administrative agency policies, procedures, and compliance with the Freedom of Information Act, and to facilitate OGIS' offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

(5) To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal government, when necessary to accomplish an agency function related to this system of records.

(6) To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

(7) To a Federal agency in order to obtain advice and recommendations concerning matters on which the agency has specialized experience or particular competence, for use in making required determinations under the FOIA.

(8) To a submitter or subject of a record or information in order to obtain assistance to TVA in making a determination as to access or amendment.

(9) In litigation to which TVA is a party or in which TVA provides legal representation for a party by TVA attorneys or otherwise, for use for any purpose including the presentation of evidence and disclosure in the course of discovery. In all other litigation, to respond to process issued under color of authority or a court of competent jurisdiction.

(10) To appropriate agencies, entities, and persons when (1) TVA suspects or has confirmed that there has been a breach of the system of records, (2) TVA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, TVA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with TVA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(11) To another Federal agency or Federal entity, when TVA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Hardcopy records are stored in secure locations. Electronic records are maintained in various computer databases and in electronic files maintained by TVA component offices.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Electronic and paper records are generally retrieved by the name of the requester, tracking number, or the subject of the request.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained and disposed of in accordance with the National Archives and Records Administration's General Records Schedule 4.2, but may

be retained for a longer period as required by litigation, open investigation, and/or audit.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Information in this system is safeguarded in accordance with applicable laws, rules, and policies including TVA's automated systems security and access policies. In general, records and technical equipment are maintained in buildings with restricted access. The required use of password protection identification features and other system protection methods also restrict access. Access is limited to those employees who have an official need for access in order to perform their duty.

RECORD ACCESS PROCEDURES:

Individuals seeking to gain access to information about them in this system of records should contact the system manager. Your full name and current address should accompany requests for access.

CONTESTING RECORD PROCEDURES:

Individuals desiring to contest or amend information about them maintained in this system should direct their request to the system manager. Please state clearly and concisely what information is being contested, the reasons for contesting it, and the proposed amendment to the information sought.

NOTIFICATION PROCEDURES:

Individuals wishing to learn if information on them is maintained in this system of records should address inquires to system manager.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

During the course of a FOIA action, material from other Privacy Act systems of records may become part of the case records in this system of records. To the extent that copies of these records from these other systems of records are entered into these case records, TVA hereby claims the same status for the records as claimed in the original, primary system of records from which they originated, or in which they are maintained.

HISTORY:

This is a new system of record notice.

Andrea S. Brackett,

Vice President, TVA Cybersecurity.

[FR Doc. 2020–19170 Filed 8–28–20; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Membership in the National Parks Overflights Advisory Group

AGENCY: Federal Aviation Administration, Transportation.

ACTION: Notice.

SUMMARY: By **Federal Register** notice on April 17, 2020 the National Park Service (NPS) and the Federal Aviation Administration (FAA) invited interested persons to apply to fill three current and three future openings on the National Parks Overflights Advisory Group (NPOAG) to represent air tour operator and environmental concerns and Native American interests. This notice informs the public of the selection made for the vacancies representing air tour operator and environmental concerns and invites persons interested in serving on the NPOAG to apply for the ongoing current opening representing Native American concerns.

DATES: Persons interested in applying for the NPOAG opening representing Native American interests need to apply by September 30, 2020.

FOR FURTHER INFORMATION CONTACT: Keith Lusk, Special Programs Staff, Federal Aviation Administration, Western-Pacific Region Headquarters, 727 S. Aviation Boulevard, Suite #150, El Segundo, CA 90245, telephone: (424) 405–7017, email: *Keith.Lusk@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The National Parks Air Tour Management Act of 2000 (the Act) was enacted on April 5, 2000, as Public Law 106–181, and subsequently amended in the FAA Modernization and Reform Act of 2012. The Act required the establishment of the advisory group within one year after its enactment. The NPOAG was established in March 2001. The advisory group is comprised of a balanced group of representatives of general aviation, commercial air tour operations, environmental concerns, and Native American tribes. The Administrator of the FAA and the Director of NPS (or their designees) serve as ex officio members of the group. Representatives of the Administrator and Director serve alternating one-year terms as chairman of the advisory group.

In accordance with the Act, the advisory group provides ''advice, information, and recommendations to the Administrator and the Director-

(1) On the implementation of this title [the Act] and the amendments made by this title;

(2) On commonly accepted quiet aircraft technology for use in commercial air tour operations over a national park or tribal lands, which will receive preferential treatment in a given air tour management plan;

(3) On other measures that might be taken to accommodate the interests of visitors to national parks; and

(4) At the request of the Administrator and the Director, safety, environmental, and other issues related to commercial air tour operations over a national park or tribal lands.''

Membership

The current NPOAG is made up of one member representing general aviation, three members representing the commercial air tour industry, four members representing environmental concerns, and two members representing Native American interests. Members serve 3-year terms. Current members of the NPOAG are as follows:

Melissa Rudinger represents general aviation; Eric Lincoln represents commercial air tour operators with two open seats; Les Blomberg, Robert Randall, John Eastman, and Dick Hingson represent environmental interests; and Carl Slater represents Native American interests with one open seat.

Selection

John Becker of Papillon Grand Canyon Helicopters and James Viola of Helicopter Association International have been selected for the two current open seats to represent commercial air tour operators. Incumbents Les Blomberg of the Noise Pollution Clearinghouse, John Eastman of the Jackson Hole Airport Board, and Dick Hingson of the Sierra Club have been selected to serve new 3 year terms when their current membership expires in September. No selection was made for the current open seat representing Native American interests. These NPOAG members 3 year terms commence on the publication date of this **Federal Register** notice.

The FAA and NPS invite persons interested in applying for the one remaining opening on the NPOAG to contact Mr. Keith Lusk (contact information is written above in **FOR FURTHER INFORMATION CONTACT**). Requests to serve on the NPOAG must be made to Mr. Lusk in writing and postmarked or emailed on or before September 30, 2020. The request should indicate your affiliation with federally-recognized Native American tribes, as

appropriate. The request should also state what expertise you would bring to the NPOAG as related to issues and concerns with aircraft flights over tribal lands and national parks. The term of service for NPOAG members is 3 years.

On August 13, 2014, the Office of Management and Budget issued revised guidance regarding the prohibition against appointing or not reappointing federally registered lobbyists to serve on advisory committees (79 FR 47482).

Therefore, before appointing an applicant to serve on the NPOAG, the FAA and NPS will require the prospective candidate to certify that they are not a federally registered lobbyist.

Issued in El Segundo, CA, on August 26, 2020.

Keith Lusk,

Program Manager, Special Programs Staff, Western-Pacific Region.

[FR Doc. 2020–19064 Filed 8–28–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Early Scoping Notice for Charlotte Area Transit System (CATS) Proposed LYNX Silver Line Project in the Charlotte Metropolitan Area, North Carolina

AGENCY: Federal Transit Administration, Transportation (DOT).

ACTION: Early scoping notice.

SUMMARY: The Federal Transit Administration (FTA) and the Charlotte Area Transit System (CATS) issue this early scoping notice to advise other agencies and the public that they intend to explore, through the early scoping process of the Council on Environmental Quality (CEQ), proposed light rail transit in the West and Southeast Corridors, now known as the proposed LYNX Silver Line Project (SLP).

DATES: Written comments on the scope of the ongoing planning analysis, including previous studies developed by local planning and transportation agencies, purpose and need, alternatives to be considered, potential impacts to be assessed, and public outreach methods should be sent to CATS by October 14, 2020. See **ADDRESSES** below for the address to which written public comments may be sent. Instructions for participating in online and live virtual early scoping meetings are available at *http://RideTransit.org/LYNXSilverLine,* along with early scoping materials. CATS will conduct live virtual public meetings on the following dates:

Tuesday, September 15, 2020 at 5:30 p.m.; Focus Area 1: Wilkinson Boulevard (City of Belmont to I–485)

Wednesday, September 16, 2020 at 5:30 p.m.; Focus Area 2: Wilkinson Boulevard (I–485 to West Morehead Street)

Thursday, September 17, 2020 at 5:30 p.m.; Focus Area 3: Center City (West Morehead Street to Charlottetowne Avenue)

Tuesday, September 22, 2020 at 5:30 p.m.; Focus Area 4: Independence Boulevard (Charlottetowne Avenue to Idlewild Road)

Thursday, September 24, 2020 at 5:30 p.m.; Focus Area 5: Independence Boulevard (Idlewild Road to just south of I–485 at CPCC Levine)

Tuesday, September 29, 2020 at 5:30 p.m.; Focus Area 6: Union County Extension

Individuals who require special assistance to participate in early scoping should contact Ms. Ajonelle Poole, CATS Public and Community Relations Specialist, at 704–336–RIDE or *LYNXSilverLine@publicinput.com* at least seven days prior to the meetings. Ms. Poole can also be contacted for hard copies of the early scoping materials.

An interagency early scoping meeting will be conducted virtually on Monday, September 14, 2020 from 9:30 a.m. to 11:30 a.m. Representatives of Native American tribal governments and of Federal, State and local agencies that may have an interest in the project will be invited by phone, letter, or email.

In addition to the early scoping meetings described herein, CATS and FTA will conduct the scoping activities required by the subsequent NEPA process to identify the nature and scope of environmental issues to be addressed in the NEPA document. If the proposed action resulting from the planning analysis would have significant impacts requiring an environmental impact statement (EIS), FTA will publish a Notice of Intent (NOI) to prepare an EIS in the **Federal Register**, and that NOI will announce the dates and locations for EIS scoping meetings.

ADDRESSES: Written comments should be sent to Ms. Ajonelle Poole, CATS Public and Community Relations Specialist, 600 E. Fourth Street, Charlotte, NC 28202, phone: 704–336–RIDE, email: *LYNXSilverLine@publicinput.com.* The details of early scoping meetings are given above under **DATES**.

FOR FURTHER INFORMATION CONTACT: Ms. Julia Walker, Environmental Protection Specialist, Region 4, Federal Transit Administration, 230 Peachtree Street NW, Suite 1400, Atlanta, GA 30303, phone: 404–865–5600, email: *julia.walker@dot.gov.*

SUPPLEMENTARY INFORMATION: The early scoping process will be part of the ongoing planning analysis required by Title 49, United States Code (U.S.C.) Sec. 5309. Early scoping meetings have been planned and are announced below. The planning analysis completed to date has resulted in a locally preferred, planning-level light rail transit alternative which was adopted by the Metropolitan Transit Commission (MTC) and the metropolitan planning organizations (MPOs) for the Charlotte region. CATS recently initiated further study to refine the locally preferred alternative, which will then be the ''proposed action'' subject to environmental review under the National Environmental Policy Act (NEPA) and other environmental laws and regulations.

The SLP Corridor is approximately 26 miles in length. From the City of Belmont, it traverses through Center City Charlotte, and the Town of Matthews, with a potential two-mile extension into Union County. The transit improvements passing through these communities would serve residential neighborhoods and employment centers, key destinations like Charlotte Douglas International Airport, future Charlotte Gateway Station (with intercity rail and bus connections), Bank of America Stadium, BB&T Ballpark, Ovens Auditorium, Bojangles Coliseum, Novant Health Presbyterian and Matthews Medical Center, and Central Piedmont Community College, and will connect to the existing CATS LYNX Blue Line Light Rail and the CATS CityLYNX Gold Line Streetcar.

At the conclusion of the planning analysis, the MTC will adopt a refined locally preferred planning-level alternative, which will then be the ''proposed action'' subject to an appropriate environmental review under NEPA. If the proposed action would have significant impacts, FTA and CATS would initiate an EIS by conducting a scoping process to determine the appropriate scope of the EIS. In particular, the purpose and need for the project, the range of alternatives to be considered in the EIS, the environmental and community impacts to be evaluated, and the evaluation methodologies to be used would be subject to public and interagency review and comment, in accordance with 40 CFR parts 1500–1508 and 23 CFR part 771.

Previous Studies

Rapid transit has been discussed in Charlotte for decades, and in 1998, the City of Charlotte prepared the 2025 Integrated Transit/Land Use Plan. This was the original transit and land use plan that proposed using rapid transit to support focusing future growth in Charlotte's key centers and corridors. The West Corridor (along Wilkinson Boulevard) and the Southeast Corridor (along Independence Boulevard) were two of the identified corridors. Since 1998, there have been various planning efforts, and the plan has since been updated to the 2030 Transit System Plan.

In 2016, CATS completed the Southeast Corridor Transit Study, which considered various transit technologies and alignments. The MTC approved the recommendation of a light rail locally preferred alternative for the 13-mile Southeast Corridor from Center City Charlotte to the Mecklenburg and Union County border. The locally preferred alternative resulted from a detailed technical evaluation and outreach effort to the public and stakeholders.

More recently, CATS studied various technology and alignment alternatives for the West Corridor and Center City as part of the LYNX System Update, and in February 2019, the MTC adopted a light rail locally preferred alternative for the West Corridor, and combined the West and Southeast Corridor locally preferred alternatives as one continuous 26-mile light rail corridor from Belmont to Matthews known as the LYNX Silver Line. An extension into Union County will also be evaluated, as directed by the MTC.

Purpose and Need for Action

Previous planning analysis and discussions with stakeholders have helped to identify key transportation needs in the West and Southeast Corridors. These needs will be refined and detailed during planning and through environmental review, as analysis continues, and input is received from the public, stakeholders, and regulatory agencies. Initially, the key transportation concerns are continued population and employment growth in the Charlotte region, a congested roadway network with increased travel times, reduced reliability of the transportation system, and local goals to address equity concerns such as limited transportation options for transit-dependent populations, and inadequate connectivity between and access to transit, affordable housing, employment, and community services by environmental justice populations.

The preliminary purpose of the SLP is to provide high-capacity transit service in dedicated right-of-way along the US 74 (Wilkinson Boulevard), Cedar Street/Graham Street, 11th Street, US 74 (Independence Boulevard), and Monroe Road transportation corridors that:

- Provides a competitive and reliable alternative to automobiles;
- Improves local connectivity between and access to transit, housing, employment, and community services in the corridor;
- Promotes opportunities for development consistent with local vision, goals, plans, and policies;
- Provides a transit system that is financially sustainable to build, operate, and maintain; and,
- Preserves and protects the natural and built environment.

Alternatives

FTA and CATS are considering refinements to the light rail locally preferred alternative which came out of the Southeast Corridor Transit Study and the LYNX System Update, including shifts in alignment to address new opportunities and risks, and terminus options including an approximate two-mile extension into Union County.

In addition to what is described above, other reasonable alternatives identified through the early scoping process will be considered for potential inclusion in the planning analysis.

FTA Procedures

Early scoping is an optional element of the National Environmental Policy Act (NEPA) process that is particularly useful in situations where, as here, alignment variations are under consideration in a broadly-defined study area. While NEPA scoping normally begins with issuance of a Notice of Intent which describes the proposed action, it ''may be initiated earlier, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.'' See the Council on Environmental Quality's ''Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,'' 46 FR 18026, 18030 (1981). In this case, the available information is more than adequate to permit the public and relevant agencies to participate effectively in early scoping and the planning analysis. Early scoping can also serve to link transportation planning and NEPA. CATS intends to formalize the Federal Planning and Environmental Linkages (PEL) process with the initiation of early scoping, so that the results of planning studies may be considered during the formal NEPA environmental review process.

CATS may seek New Starts funding for the proposed project under 49 U.S.C. Sec. 5309 and will, therefore, be subject to New Starts regulation (49 CFR part 611). The New Starts regulation requires a planning analysis that leads to the selection of a locally preferred alternative by CATS and the inclusion of the locally preferred alternative in the long-range transportation plan adopted by MPOs. The planning analysis will examine alignments, station locations, costs, funding, ridership, economic development, land use, engineering feasibility, and environmental factors in the study area. The New Starts regulation also requires the submission of certain project-justification information in support of a request to initiate the engineering phase.

Authority: 49 CFR 622.101, 23 CFR 771.111, and 40 CFR 1501.7.

Yvette Taylor,

Regional Administrator.

[FR Doc. 2020–19069 Filed 8–28–20; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF THE TREASURY

Open Meeting of the Federal Advisory Committee on Insurance

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of open meeting.

SUMMARY: This notice announces that the U.S. Department of the Treasury's Federal Advisory Committee on Insurance (''Committee'') will meet via teleconference on Tuesday, September 29, 2020 from 12:30 p.m.–4:30 p.m. Eastern Standard Time. The meeting is open to the public.

DATES: The meeting will be held via teleconference on Tuesday, September 29, 2020, from 12:30 p.m.–4:30 p.m. Eastern Time.

ADDRESSES: The Committee meeting will be held via teleconference and is open to the public. The public can attend remotely via live webcast at *www.yorkcast.com/treasury/events/2020/09/29/faci.* The webcast will also be available through the Committee's website at *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/federal-advisory-committee-on-insurance-faci.*

Requests for reasonable accommodations under Section 504 of the Rehabilitation Act should be directed to Mariam G. Harvey, Office of Civil Rights and Diversity, Department of the Treasury at (202) 622–0316, or *mariam.harvey@do.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Lindsey Baldwin, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220, at (202) 622–3220 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 10(a)(2), through implementing regulations at 41 CFR 102–3.150.

Public Comment: Members of the public wishing to comment on the business of the Federal Advisory Committee on Insurance are invited to submit written statements by any of the following methods:

Electronic Statements

• Send electronic comments to *faci@treasury.gov.*

Paper Statements

• Send paper statements in triplicate to the Federal Advisory Committee on Insurance, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220.

In general, the Department of the Treasury will post all statements on its website at *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/federal-advisory-committee-on-insurance-faci* without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. The Department of the Treasury will also make such statements available for public inspection and copying in the Department of the Treasury's Library, 720 Madison Place NW, Room 1020, Washington, DC 20220, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect statements by telephoning (202) 622–2000. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

Tentative Agenda/Topics for Discussion: This will be the third Committee meeting of 2020. In this meeting, the Committee will receive updates from its four subcommittees, which include the COVID–19 subcommittee, Availability of Insurance Products subcommittee, FIO's International Work subcommittee, and Addressing the Protection Gap Through Public-Private Partnerships and Other Mechanisms subcommittee. The COVID–19 subcommittee consists of two workstreams on ''Protection'' and ''Preparedness,'' each of which will discuss their ongoing work related to the insurance sector's preparation for future pandemics and other emergencies. The subcommittee on the Availability of Insurance Products will hold a discussion on its ongoing work. The subcommittee on FIO's International Work and the subcommittee on Addressing the Protection Gap Through Public-Private Partnerships and Other Mechanisms will each provide an update on its ongoing work. The Committee will also receive an update from FIO staff on FIO's activities and consider any new business.

Dated: August 25, 2020.

Steven Seitz,

Director, Federal Insurance Office.

[FR Doc. 2020–19055 Filed 8–28–20; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Provisions Pertaining to Certain Investments in the United States by Foreign Persons and Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests 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. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before September 30, 2020 to be assured of consideration.

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: Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Title: Provisions Pertaining to Certain Investments in the United States by Foreign Persons and Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States.

OMB Control Number: 1505–0121.

Type of Review: Extension without change of currently approved collection.

Description: Section 721 of the Defense Production Act of 1950, as amended (section 721), provides the President, acting through the Committee on Foreign Investment in the United States (CFIUS or the Committee), authority to review certain foreign investments in the United States in order to determine the effects of those transactions on the national security of the United States. In August 2018, section 721 was amended by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Subtitle A of Title XVII, Public Law 115–232, 132 Stat. 2173 (Aug. 13, 2018). FIRRMA maintains CFIUS's jurisdiction over any merger, acquisition, or takeover that could result in foreign control of any U.S. business, and broadens the authorities of the President and CFIUS under section 721 to review and take action to address any national security concerns arising from certain noncontrolling investments and certain real estate transactions involving foreign persons.

Executive Order 13456, 73 FR 4677 (Jan. 23, 2008), directs the Secretary of the Treasury to issue regulations implementing section 721. Most recently, on January 17, 2020, the Department of the Treasury issued final regulations (85 FR 3112 and 85 FR 3158) implementing FIRRMA, including information collections related to notices and declarations filed with or submitted to the Committee regarding transactions that could result in foreign control of a U.S. business, certain noncontrolling investments and certain

real estate transactions involving foreign persons.

In May 2020, the Department of the Treasury launched a new CFIUS Case Management System, featuring an online public portal for external parties to submit declarations and file notices with CFIUS in a standard form. As of June 1, 2020 use of this online system is now mandatory for all CFIUS submissions and filings. The only substantive change related to the information required in order for CFIUS to review a declaration or notice is the requirement that parties use the new online public portal to submit declarations and file notices, instead of by email.

Form: None.

Affected Public: Individuals and entities.

Estimated Number of Respondents: 1,100.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 1,100.

Estimated Time per Response: Varies from 15–20 hours per declaration and 116–130 hours per notice.

Estimated Total Annual Burden Hours: 57,400 hours.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: August 26, 2020.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2020–19147 Filed 8–28–20; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Internal Revenue Service Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests 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. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before September 30, 2020 to be assured of consideration.

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: Copies of the submissions may be obtained from Molly Stasko by emailing *PRA@treasury.gov,* calling (202) 622–8922, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

1. Title: Escrow Funds and Other Similar Funds.

OMB Control Number: 1545–1631.

Type of Review: Extension without change of a currently approved collection.

Description: Section 468B(g) of the Internal Revenue Code requires that escrow accounts, settlement funds, and similar funds be subject to current taxation either as grantor trusts or otherwise. The final regulations relate to the taxation and reporting of income earned on qualified settlement funds and certain other escrow accounts, trusts, and funds, and other related rules. The final regulations affect qualified settlement funds, escrow accounts established in connection with sales of property, disputed ownership funds, and the parties to these escrow accounts, trusts, and funds. An election statement is filed for a qualified settlement fund (QSF) that the QSF has elected grantor trust treatment for the QSF and a statement is required from a transferor with respect to the transfer of cash or property to a disputed ownership fund.

Regulation Project Number: TD 9249.

Affected Public: Businesses and other for-profit organizations, Individuals or Households, Not-For-Profit Institutions, and Federal, State, Local, or Tribal governments.

Estimated Number of Respondents: 9,300.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 9,300.

Estimated Time per Response: 24 minutes.

Estimated Total Annual Burden Hours: 3,720 hours.

2. Title: Recommendation for Juvenile Employment with the Internal Revenue Service.

OMB Control Number: 1545–1746.

Type of Review: Extension without change of a currently approved collection.

Description: The Form ''Recommendation for Juvenile Employment with the Internal Revenue Service'', is used by 13 Delegated Examining Units and 16 Area Personnel Offices throughout the IRS as a mechanism to screen out questionable applicants when considering juveniles for employment in taxpayers remittance and submission processing functions.

Form: Form 13094.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 2,500.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 2,500.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 208 hours.

3. Title: Contract Coverage Under Title II of the Social Security Act.

OMB Control Number: 1545–0137.

Type of Review: Extension without change of a currently approved collection.

Description: U.S. citizens and resident aliens employed abroad by foreign affiliates of American employers are exempt from social security taxes. Under Internal Revenue Code section 3121(1), American employers may file an agreement on Form 2032 to waive this exemption and obtain social security coverage for U.S. citizens and resident aliens employed abroad by their foreign affiliates. The American employers can later file Form 2032 to cover additional foreign affiliates as an amendment to their original agreement.

Form: IRS Form 2032.

Affected Public: Businesses and other for-profit organizations, and Individuals or Households.

Estimated Number of Respondents: 26.

Frequency of Response: On occasion.

Estimated Total Number of Annual Responses: 26.

Estimated Time per Response: 6 hours, 4 minutes.

Estimated Total Annual Burden Hours: 158 hours.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: August 26, 2020.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2020–19146 Filed 8–28–20; 8:45 am]

BILLING CODE 4830–01–P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Hearing

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public hearing.

SUMMARY: Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission.

The Commission is mandated by Congress to investigate, assess, and report to Congress annually on ''the national security implications of the economic relationship between the United States and the People's Republic of China.'' Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC on September 9, 2020 on ''U.S.-China Relations in 2020: Enduring Problems and Emerging Challenges.''

DATES: The hearing is scheduled for Wednesday, September 9, 2020, time TBD.

ADDRESSES: This hearing will be held with panelists and Commissioners participating in-person or online via videoconference. Members of the audience will be able to view a live webcast via the Commission's website at *www.uscc.gov.* Also, please check the Commission's website for possible changes to the hearing schedule. *Reservations are not required to attend the hearing.*

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning the hearing should contact Jameson Cunningham, 444 North Capitol Street NW, Suite 602, Washington, DC 20001; via email at *jcunningham@uscc.gov*. *Reservations are not required to attend the hearing.*

ADA Accessibility: For questions about the accessibility of the event or to request an accommodation, please contact Jameson Cunningham via email at *jcunningham@uscc.gov.* Requests for an accommodation should be made as soon as possible, and at least five business days prior to the event.

SUPPLEMENTARY INFORMATION:

Background: This is the seventh public hearing the Commission will hold during its 2020 report cycle. The hearing will evaluate key developments in China's economy, military capabilities, and foreign relations, during 2020. The first panel will address the Chinese Communist Party's perceptions of its strategic environment and domestic legitimacy, as well as recent changes in its approach to foreign policy. The second panel will assess China's current strengths and weaknesses in its foreign policy, military capabilities, and economy. The third panel will review the economic and security implications for the United States of China's approach to Taiwan and the South China Sea. The fourth panel will examine the implications for the United States of China's relationships with India and Iran.

The hearing will be co-chaired by Chairman Robin Cleveland and Vice Chairman Carolyn Bartholomew. Any interested party may file a written statement by September 9, 2020 by transmitting to the contact above. A portion the hearing will include a question and answer period between the Commissioners and the witnesses.

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005), as amended by Public Law 113–291 (December 19, 2014).

Dated: August 25, 2020.

Daniel W. Peck,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2020–19065 Filed 8–28–20; 8:45 am]

BILLING CODE 1137–00–P

DEPARTMENT OF VETERANS AFFAIRS

Solicitation of Nomination for Appointment to the Advisory Committee on Disability Compensation

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA), Advisory Committee on Disability Compensation (the Committee), is seeking nominations of qualified candidates to be considered for appointment as a member of the Advisory Committee for the 2020—2021 membership cycle.

DATES: Nominations for membership on the Committee must be received by September 18, 2020, no later than 4:00 p.m., eastern standard time. Packages received after this time will not be considered for the current membership cycle.

ADDRESSES: All nomination packages should be emailed to the Designated Federal Officer (DFO), Janice Stewart at *Janice.Stewart@va.gov.*

SUPPLEMENTARY INFORMATION: In carrying out the duties set forth, the Committee responsibilities include:

(1) Advising the Secretary and Congress on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities.

(2) Providing a biennial report to Congress assessing the needs of Veterans with respect to disability compensation and outlining recommendations, concerns, and observations on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities.

(3) Meeting with VA officials, Veterans Service Organizations, and other stakeholders to assess the Department's efforts on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities.

Management and support services for the Committee are provided by VBA.

Authority: The Committee is authorized by 38 U.S.C. 546 and operates under the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App. 2.

Membership Criteria: VBA is requesting nominations for upcoming vacancies on the Committee. The Committee is currently composed of 13 members. As required by statute, the members of the Committee are appointed by the Secretary from the general public, including:

(1) Individuals with experience with the provision of disability compensation by VA;

(2) Individuals who are leading medical and scientific experts in relevant fields.

In accordance with § 546, the Secretary determines the number, terms of service, and pay and allowances of members of the Committee, except that a term of service of any such member may not exceed four years. The Secretary may reappoint any member for additional terms of service. Professional Qualifications: In addition to the criteria above, VA seeks: (1) Diversity in professional and personal qualifications; (2) Experience in military service and military deployments (please identify branch of service and rank); (3) Current work with Veterans; (4) Disability compensation subject matter expertise; (5) Experience working in large and complex organizations. Requirements for Nomination Submission: Nominations should be typewritten (one nomination per nominator).

Requirements for Nomination Submission:

The nomination package should include:

(1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.,* specific attributes that qualify the nominee for service in this capacity), and a statement from the nominee indicating a willingness to serve as a member of the Committee;

(2) the nominee's contact information, including name, mailing address, telephone numbers, and email address;

(3) the nominee's curriculum vitae, and

(4) a summary of the nominee's experience and qualifications relative to the membership criteria and professional qualifications listed above.

Individuals selected for appointment to the Committee shall be invited to serve a two-year term. Committee members will receive a stipend for attending Committee meetings, including per diem and reimbursement for travel expenses incurred.

The Department makes every effort to ensure that the membership of its Federal advisory committees is fairly balanced in terms of points of view represented. Every effort is made to ensure that a broad representation of geographic areas, gender, and racial and ethnic minority groups, and that the disabled are given consideration for membership. Appointment to this Committee shall be made without discrimination because of a person's race, color, religion, sex (including gender identity, transgender status, sexual orientation, and pregnancy), national origin, age, disability, or genetic information. Nominations must state that the nominee is willing to serve as a member of the Committee and appears to have no conflict of interest that would preclude membership.

Dated: August 26, 2020.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2020–19173 Filed 8–28–20; 8:45 am]

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Part II

Department of Labor

Occupational Safety and Health Administration

29 CFR Parts 1915 and 1926
Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1915 and 1926

[Docket No. OSHA–H005C–2006–0870]

RIN 1218–AD29

Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: OSHA is amending its existing construction and shipyard standards for occupational exposure to beryllium and beryllium compounds to clarify certain provisions and simplify or improve compliance. These changes are designed to accomplish three goals: to more appropriately tailor the requirements of the construction and shipyards standards to the particular exposures in these industries in light of partial overlap between the beryllium standards' requirements and other OSHA standards; to aid compliance and enforcement across the beryllium standards by avoiding inconsistency, where appropriate, between the shipyards and construction standards and recent revisions to the general industry standard; and to clarify certain requirements with respect to materials containing only trace amounts of beryllium. This final rule does not affect the general industry beryllium standard.

DATES: This rule is effective September 30, 2020.

ADDRESSES: For purposes of 28 U.S.C. 2112(a), OSHA designates Mr. Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health, to receive petitions for review of the final rule. Contact the Associate Solicitor at the Office of the Solicitor, Room S–4004, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–5445.

Copies of this **Federal Register** document and news releases: Electronic copies of these documents are available at OSHA's web page at *https://www.osha.gov.*

FOR FURTHER INFORMATION CONTACT: *Press inquiries:* Mr. Frank Meilinger, OSHA Office of Communications; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General information and technical inquiries: Ms. Maureen Ruskin, Directorate of Standards and Guidance; telephone: (202) 693–1950; email: *ruskin.maureen@dol.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

On January 9, 2017, OSHA published its final rule *Occupational Exposure to Beryllium and Beryllium Compounds* in the **Federal Register** (82 FR 2470). The final rule established three comprehensive health standards to protect workers from occupational exposure to beryllium and beryllium compounds in the general industry (29 CFR 1910.1024), construction (29 CFR 1926.1124), and shipyards (29 CFR 1915.1024) sectors. In the final rule, OSHA concluded that employees exposed to beryllium and beryllium compounds at the preceding permissible exposure limits (PELs) were at significant risk of material impairment of health, specifically chronic beryllium disease (CBD) and lung cancer. The agency further determined that limiting employee exposure to an 8-hour time-weighted average (TWA) PEL of 0.2 μg/m^3 would reduce this significant risk to the maximum extent feasible. Therefore, the 2017 final rule adopted a TWA PEL of 0.2 μg/m^3. In addition to the revised PEL, the 2017 final rule established a new short-term exposure limit (STEL) of 2.0 μg/m^3 over a 15-minute sampling period and an action level of 0.1 μg/m^3 as an 8-hour TWA, along with a number of ancillary provisions intended to provide additional protections to employees. The ancillary provisions included requirements for exposure assessment, methods for controlling exposure, respiratory protection, personal protective clothing and equipment, housekeeping, medical surveillance, hazard communication, and recordkeeping that are similar to those found in other OSHA health standards. The 2017 final rule went into effect on May 20, 2017, and OSHA began enforcing the PEL and STEL in the construction and shipyard sectors on May 11, 2018. See Updated Interim Enforcement Guidance for the Beryllium Standards, available at *https://www.osha.gov/laws-regs/standardinterpretations/2018-12-11.*

On June 27, 2017, based on stakeholder feedback and a review of applicable existing standards, OSHA published a notice of proposed rulemaking (NPRM) proposing to revoke the ancillary provisions for both the construction and shipyards standards while retaining the new lower PEL of 0.2 μg/m^3 and STEL of 2.0 μg/m^3 for those sectors (82 FR 29182).[1] OSHA stated in the proposal that it was also considering extending the compliance dates in the January 9, 2017, final rule by a year for the construction and shipyard standards. OSHA reasoned that this potential extension would give affected employers additional time to come into compliance with the final rule's requirements, which could be warranted by the uncertainty created by the proposal. OSHA also stated in the proposal that it would not enforce the construction and shipyard standards without further notice while the rulemaking was underway.[2]

On May 7, 2018, OSHA issued a direct final rule (DFR) adopting a number of clarifying amendments to the general industry beryllium standard to address the application of that standard to materials containing trace amounts of beryllium (83 FR 19936). The DFR amended the text of the general industry standard to clarify OSHA's intent with respect to certain terms in the standard, including the definition of beryllium work area, the definition of emergency, and the meaning of the terms dermal contact and beryllium contamination. The DFR also clarified OSHA's intent with respect to provisions for disposal and recycling and with respect to provisions that the agency intended to apply only where skin can be exposed to materials containing at least 0.1 percent beryllium by weight. The DFR became effective on July 6, 2018, because OSHA did not receive significant adverse comment in response to the DFR (see 83 FR 1045).

On December 11, 2018, OSHA published another NPRM to modify several of the general industry beryllium standard's definitions, along with the provisions for methods of compliance, personal protective clothing and equipment, hygiene areas and practices,

[1] For a full discussion of the events leading to the proposed rule, see the preamble to the 2017 NPRM (82 FR at 29185–88).

[2] Subsequently, in March 2018, OSHA stated that it would begin enforcing the PEL and STEL on May 11, 2018 (see Memorandum for Regional Administrators, Delay of Enforcement of the Beryllium Standards under 29 CFR 1910.1024, 29 CFR 1915.1024, and 29 CFR 1926.1124, Mar. 2, 2018, available at *https://www.osha.gov/laws-regs/standardinterpretations/2018-03-02*).

housekeeping, medical surveillance, communication of hazards, and recordkeeping (83 FR 63746). OSHA reasoned in part that the proposed modifications would provide clarification and simplify or improve compliance. OSHA recently finalized this proposal in a final rule published on July 14, 2020 (85 FR 42582).

On September 30, 2019, OSHA issued a final rule in which the agency declined to revoke the ancillary provisions of the construction and shipyards standards as proposed in the June 27, 2017 NPRM (84 FR 51377). Based on comments received and the record as a whole, the agency determined that there is not complete overlap in protections between the beryllium standards' ancillary provisions and existing standards applicable to these sectors. Thus, revoking all of the ancillary provisions and leaving only the PEL and STEL would be inconsistent with OSHA's statutory mandate to protect workers from the demonstrated significant risks of material impairment of health resulting from exposure to beryllium and beryllium compounds. However, after careful review, OSHA determined that some revisions to the construction and shipyards standards were appropriate. To give the agency time to finalize a new proposal with these more limited changes to the construction and shipyards standards, the final rule delayed the compliance dates for all ancillary provisions of these standards until September 30, 2020. The final rule did not impact the PEL or STEL, which OSHA has been enforcing since May 11, 2018.

On October 8, 2019, OSHA published the proposal being finalized here (84 FR 53902). In the NPRM, the agency proposed several revisions to the ancillary provisions of the construction and shipyard standards to more appropriately tailor the standards to these industries, to align certain provisions with recent changes to the general industry standard, and to clarify OSHA's intent with respect to materials containing trace amounts of beryllium. The NPRM proposed revisions to the paragraphs for definitions, methods of compliance, respiratory protection, personal protective clothing and equipment, hygiene areas and practices, housekeeping, medical surveillance, hazard communication, and recordkeeping. In developing its proposal, OSHA considered relevant comments received in response to the June 2017 construction and shipyards proposal, as well as general industry stakeholder input that led to the 2018 general industry DFR. In addition, OSHA proposed some revisions to align with changes proposed in the December 12, 2018 general industry NPRM (83 FR 39351).

OSHA consulted with the Advisory Committee on Construction Safety & Health (ACCSH) regarding this proposal on September 9, 2019. ACCSH recommended that OSHA proceed with the proposal to ''revise the beryllium standard for construction to ensure that the ancillary provisions are tailored to the construction industry and align with the general industry standard, where appropriate,'' and unanimously recommended that OSHA do so as soon as possible (see Document ID OSHA–2018–0012–0125, Tr. 62–67).

OSHA requested comments on the proposed changes and provided stakeholders 30 days to submit comments. In addition, OSHA held a public hearing on the proposal on December 3, 2019, where the agency heard testimony from several stakeholders (see Document ID 2222; 2223). Participants who filed notices of intention to appear at the hearing were permitted to submit additional evidence and data relevant to the proceeding for a 44-day period following the hearing. That period ended on January 16, 2020. The record remained open for an additional 15 days, until January 31, 2020, for the submission of final briefs, arguments, and summations. OSHA received twenty-five timely comments during this rulemaking by the close of the last post hearing comment period of January 31, 2020.

OSHA estimates that these changes will lead to total annualized cost savings of $2.5 million at a 3 percent discount rate over 10 years; at a discount rate of 7 percent over 10 years, the annualized cost savings would be $2.6 million. OSHA has determined that these changes will maintain safety and health protections for workers, while facilitating compliance with the standards and yielding some cost savings.

This rule is not an Executive Order (E.O.) 13771 regulatory action because this rule is not significant under E.O. 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule not a ''major rule,'' as defined by 5 U.S.C. 804(2).

II. Pertinent Legal Authority

The purpose of the Occupational Safety and Health Act of 1970 (''the OSH Act'' or ''the Act''), 29 U.S.C. 651 *et seq.,* is to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. 29 U.S.C. 651(b). To achieve this goal, Congress authorized the Secretary of Labor to promulgate occupational safety and health standards pursuant to notice and comment rulemaking. See 29 U.S.C. 655(b). An occupational safety or health standard is a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment. 29 U.S.C. 652(8).

The Act also authorizes the Secretary to ''modify'' or ''revoke'' any occupational safety or health standard, 29 U.S.C. 655(b), and under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* regulatory agencies generally may revise their rules if the changes are supported by a reasoned analysis, see *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983). ''While the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard, and accordingly, it may be easier for an agency to justify a deregulatory action, the direction in which an agency chooses to move does not alter the standard of judicial review established by law.'' Id. at 43.

The Act provides that in promulgating health standards dealing with toxic materials or harmful physical agents, such as the beryllium standards, the Secretary must set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. 29 U.S.C. 665(b)(5). The Supreme Court has held that before the Secretary can promulgate any permanent health or safety standard, he must make a threshold finding that significant risk is present and that such risk can be eliminated or lessened by a change in practices. See *Indus. Union Dept., AFL–CIO* v. *Am. Petroleum Inst.,* 448 U.S. 607, 641–42 (1980) (plurality opinion) (''*Benzene*''). OSHA need not make additional findings on risk for this proposal because OSHA previously determined that the beryllium standards address a significant risk, see 82 FR 2545–52, and reaffirmed that finding in the rule finalizing the 2017 shipyards and construction proposal, the final rule published September 30, 2019. See *Pub. Citizen Health Research Grp.* v. *Tyson,* 796 F.2d 1479, 1502 n.16 (D.C. Cir. 1986) (rejecting the argument that

OSHA must ''find that each and every aspect of its standard eliminates a significant risk'').

OSHA standards must also be both technologically and economically feasible. See *United Steelworkers* v. *Marshall,* 647 F.2d 1189, 1248 (D.C. Cir. 1980) (''*Lead I*''). The Supreme Court has defined feasibility as ''capable of being done.'' *Am. Textile Mfrs. Inst.* v. *Donovan,* 452 U.S. 490, 509–10 (1981) (''*Cotton Dust*''). The courts have further clarified that a standard is technologically feasible if OSHA proves a reasonable possibility, ''within the limits of the best available evidence, . . . that the typical firm will be able to develop and install engineering and work practice controls that can meet the [standard] in most of its operations.'' *Lead I,* 647 F.2d at 1272. With respect to economic feasibility, the courts have held that ''a standard is feasible if it does not threaten massive dislocation to or imperil the existence of the industry.'' Id. at 1265 (internal quotation marks and citations omitted).

OSHA exercises significant discretion in carrying out its responsibilities under the Act. Indeed, a number of terms of the statute give OSHA wide discretion to devise means to achieve the Congressionally-mandated goal of ensuring worker safety and health. See *Lead I,* 647 F.2d at 1230. Thus, where OSHA has chosen some measures to address a significant risk over other measures, those challenging the OSHA standard must ''identify evidence that their proposals would be feasible and generate more than a de minimis benefit to worker health.'' *N. Am.'s Bldg. Trades Unions* v. *OSHA,* 878 F.3d 271, 282 (D.C. Cir. 2017).

Although OSHA is required to set standards ''on the basis of the best available evidence,'' 29 U.S.C. 655(b)(5), its determinations are ''conclusive'' if supported by ''substantial evidence in the record considered as a whole,'' 29 U.S.C. 655(f). Similarly, as the Supreme Court noted in *Benzene,* OSHA must look to ''a body of reputable scientific thought'' in making determinations, but a reviewing court must ''give OSHA some leeway where its findings must be made on the frontiers of scientific knowledge.'' *Benzene,* 448 U.S. at 656. When there is disputed scientific evidence in the record, OSHA must review the evidence on both sides and ''reasonably resolve'' the dispute. *Tyson,* 796 F.2d at 1500. The ''possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence.'' *N. Am.'s Bldg. Trades Unions,* 878 F.3d at 291 (quoting *Cotton Dust,* 452 U.S. at 523) (alterations omitted). As the D.C. Circuit has noted, where ''OSHA has the expertise we lack and it has exercised that expertise by carefully reviewing the scientific data,'' a dispute within the scientific community is not occasion for the reviewing court to take sides about which view is correct. *Tyson,* 796 F.2d at 1500.

Finally, because section 6(b)(5) of the Act explicitly requires OSHA to set health standards that eliminate risk ''to the extent feasible,'' OSHA uses feasibility analysis rather than cost-benefit analysis to make standards-setting decisions dealing with toxic materials or harmful physical agents (29 U.S.C. 655(b)(5)). An OSHA standard in this area must be technologically and economically feasible—and also cost effective, which means that the protective measures it requires are the least costly of the available alternatives that achieve the same level of protection—but OSHA cannot choose an alternative that provides a lower level of protection for workers' health simply because it is less costly. See *Int'l Union, UAW* v. *OSHA,* 37 F.3d 665, 668 (D.C. Cir. 1994); see also *Cotton Dust,* 452 U.S. at 514 n.32. In *Cotton Dust,* the Court explained that Congress itself defined the basic relationship between costs and benefits, by placing the ''benefit'' of worker health above all other considerations save those making attainment of this ''benefit'' unachievable. The court further stated that any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in section 6(b)(5). *Cotton Dust,* 452 U.S. at 509. Thus, while OSHA estimates the costs and benefits of its proposed and final rules, partly in accordance with Executive Orders 12866 and 13771, these calculations do not form the basis for the agency's regulatory decisions.

III. Summary and Explanation of the Final Rule

The following discussion summarizes and explains the changes OSHA proposed to the beryllium standards for construction and shipyards, discusses the comments received on the proposal, and explains OSHA's determination with respect to each proposed change.

The 2017 final rule promulgated three standards designed to protect workers from the serious health effects caused by occupational exposure to beryllium and beryllium compounds (see 82 FR 2470 (Jan. 9, 2017)). Each of the three standards, which cover general industry (29 CFR 1910.1024), construction (29 CFR 1926.1124), and shipyards (29 CFR 1915.1024), contains a comprehensive set of protections, consisting of the exposure limits in paragraph (c) and a number of ancillary provisions, typical of OSHA health standards, in paragraphs (d) through (n) (see 82 FR at 2476). The ancillary provisions encompass requirements for exposure assessment, competent person (construction) or regulated areas (shipyards), methods of compliance, respiratory protection, personal protective clothing and equipment, hygiene, housekeeping, medical surveillance and medical removal, communication of hazards, and recordkeeping (29 CFR 1915.1024(d)–(n); 29 CFR 1926.1124(d)–(n)).

Since the publication of the 2017 final rule, OSHA has sought to revise the beryllium standards in a number of separate rulemakings. Those bearing on this proposal include (1) the June 27, 2017, construction and shipyards proposal (82 FR at 29182); (2) the May 7, 2018, general industry direct final rule (DFR) (83 FR at 19936); (3) the December 11, 2018, general industry proposal (83 FR at 63746), (4) the October 8, 2019, construction and shipyards proposal (84 FR at 53902); and (5) the (July 14, 2020) general industry final rule (85 FR 42582) (see Section I, Background, above for more details). In light of the comments OSHA received on these rulemakings and the evidence in the record, OSHA is revising several paragraphs of the beryllium standards for construction and shipyards.

OSHA has determined that, taken together, the limited exposures in the construction and shipyards industries and the partial overlap between the beryllium standards and other OSHA standards make revisions to both the construction and shipyards beryllium standards appropriate. The rationales for these revisions fall into three categories. First, OSHA is removing or modifying some provisions which—although appropriate in the general industry context—may be unnecessary or require revision to appropriately protect employees in the construction and shipyards industries. As will be explained further, operations with beryllium exposure in the construction and shipyards industries are significantly less varied and employees are exposed to materials with significantly lower content beryllium than in the general industry sector. In addition, employees in these industries receive the protections of several other OSHA standards, as the agency explained in the June 27, 2017, construction and shipyards proposal, in the final rule published on September

30, 2019, and in the subsequent construction and shipyards proposal published on October 8, 2019.

Second, OSHA is revising some provisions of the construction and shipyard standards to avoid inconsistencies with the clarifying changes the agency has made in the (July 14, 2020) general industry final rule. OSHA is aligning these standards to the extent possible because the agency believes that, where there is no substantive difference among industries with respect to a particular provision, applying similar requirements across industries aids both compliance and enforcement. Conversely, applying different requirements to identical situations may lead to confusion. While most of the changes in the July 14, 2020, final rule were designed specifically for general industry, OSHA is aligning changes to paragraph (b), medical definitions; paragraph (k), medical surveillance; and paragraph (n), recordkeeping, because the rationale underlying these changes applies equally in the construction and shipyards contexts.

Third, OSHA is revising certain paragraphs of the construction and shipyard standards to address the application of provisions related to dermal contact to materials containing beryllium in trace quantities. In the general industry DFR, OSHA clarified that provisions triggered by dermal contact with beryllium or beryllium contamination would apply only for dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight (83 FR at 19939). OSHA's rationale regarding this final set of proposed changes dates back to the agency's August 7, 2015, beryllium NPRM (which led to the 2017 final rule) (80 FR at 47565). There, OSHA proposed to exempt materials containing less than 0.1 percent beryllium by weight on the premise that workers exposed only to beryllium as a trace contaminant are not exposed at levels of concern (80 FR at 47775). However, the agency noted evidence of high airborne exposures in construction and shipyard sectors, in particular during blasting operations and cleanup of spent media (80 FR at 47733). Therefore, OSHA proposed for comment several regulatory alternatives, including an alternative that would expand the scope of the proposed standard to include all operations in general industry where beryllium exists only as a trace contaminant (80 FR at 47730) and an alternative that would expand the scope to include employers in the shipyard and maritime sectors (80 FR at 47777).

In the 2017 final rule, after considering stakeholders' comments, OSHA decided to apply the exemption for materials containing less than 0.1 percent beryllium by weight only where the employer has objective data demonstrating that employee exposure to airborne beryllium will remain below the action level of 0.1 μg/m^3, measured as an 8-hour TWA, under any foreseeable conditions (82 FR at 2643). OSHA noted that the action level exception ensured that workers with airborne exposures of concern were covered by the standard. OSHA agreed with the many commenters and public hearing testimony expressing concern that hazardous exposures to beryllium can occur with materials containing trace amounts of beryllium. While the agency acknowledged concerns expressed by the Abrasive Blasting Manufacturing Alliance (ABMA) and the Edison Electric Institute that processing materials with trace amounts of beryllium may not necessarily produce significant exposures to beryllium, evidence in the record showed significant exposures in some operations using materials with trace amounts of beryllium. OSHA explicitly identified abrasive blasting as one such operation. The agency determined that preventing airborne exposures at or above the action level, even to trace amounts of beryllium, reduces the risk of beryllium-related health effects to workers (82 FR at 2643; see also 82 FR at 2552).

While adopting this limited exemption for trace materials, OSHA also adopted the regulatory alternative expanding the scope of the rule to include both construction and shipyards, but recognized that these sectors had limited operations that generated airborne beryllium exposures of concern and issued separate standards for these sectors. Nonetheless, OSHA applied similar ancillary requirements across the general industry, construction, and shipyards beryllium standards. At the same time, the agency acknowledged that different approaches may be warranted for some provisions in construction and shipyards than for general industry due to the nature of the materials and work processes typically used in those industries (82 FR at 2690). Specifically, exposures to beryllium in construction and shipyards are limited to only a few operations, primarily abrasive blasting in construction and shipyards and some welding operations in shipyards (see Document ID 2042, FEA Chapter III, pp. 103–11 and Table III–8e). While the high airborne exposures during the blasting operation can expose workers to beryllium in excess of the PEL, the blasting materials contain only trace amounts of beryllium (materials such as coal slag normally contain approximately 11 μg/g or 0.0001 percent) (Document ID 2042, Chapter IV, Technological Feasibility, Table IV.69). Furthermore, the rulemaking record contains evidence of beryllium exposure only during limited welding operations in shipyards (only 4 of 127 sample results showed detectable levels of airborne beryllium) (Document ID 2042, Chapter IV, Technological Feasibility, p. IV–580).

As the regulatory history suggests, OSHA intended to protect employees working with trace beryllium when those employees experience significant airborne exposures. OSHA did not intend for provisions aimed at protecting workers from the effects of dermal contact to apply in the case of materials containing only trace amounts of beryllium in the absence of significant airborne beryllium exposure. For this reason, OSHA clarified in the general industry DFR that provisions triggered by dermal contact with beryllium or beryllium contamination would apply only for dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight (83 FR at 19939). In construction and shipyards, where beryllium exposure occurs almost exclusively from materials that contain beryllium in concentrations less than or equal to 0.1 percent by weight, OSHA proposed to remove provisions triggered by dermal contact or beryllium contamination entirely, except for certain provisions the agency deemed important to limit airborne exposure (through re-entrainment of beryllium-containing dust from PPE or other surfaces) to those workers who have significant airborne exposures (see, *e.g.,* 84 FR at 53913). Additionally, although limited welding operations in shipyards may include base materials or fume containing more than 0.1 percent beryllium by weight, OSHA has reason to believe that skin or surface contamination is not an exposure source of concern in these operations (84 FR at 53906).

Based on the foregoing, OSHA proposed and is now finalizing revisions to the following paragraphs of the beryllium standards for construction and shipyards: Paragraph (b), definitions; paragraph (f), methods of compliance; paragraph (g), respiratory protection; paragraph (h), personal protective clothing and equipment; paragraph (i), hygiene areas and

practices; paragraph (j), housekeeping; paragraph (k), medical surveillance; paragraph (m), communication of hazards; and paragraph (n), recordkeeping. OSHA is finalizing the standards as proposed, except for minor modifications to the following paragraphs: (1) Paragraph (b), specifically, by amending the definition of *CBD diagnostic center* and removing the definition of *high efficiency particulate air (HEPA) filter;* (2) paragraph (f)(1), the written exposure control plan; (3) paragraph (h), personal protective clothing and equipment; and (4) paragraph (k), medical surveillance.

OSHA notes that in response to the October 8, 2019 NPRM, several industry commenters responded that OSHA's proposed changes to simplify and better tailor the construction and shipyards standards would not go far enough, and that none of the beryllium standards' ancillary provisions are necessary (see, *e.g.,* Document ID 2203, p. 1–2, 11; 2199, p. 3; 2205, p. 2; 2206, pp. 10–13; 2209, pp. 1–2; 2241, pp. 3–4). For example, the Abrasive Blasting Manufacturing Alliance (ABMA) claimed that ''[t]here is no evidence that the pre-existing standards governing abrasive blasting are insufficient to protect employees, and there is no evidence that exposure to the trace amounts of naturally occurring beryllium in abrasive blasting (or welding) has resulted in any material impairment of health to employees in all of the many years this work has been performed'' (Document ID 2206, p. 11).

Comments suggesting that OSHA entirely eliminate the ancillary provisions of the construction and shipyards standards are beyond the scope of this rulemaking and were already addressed in the September 30, 2019, final rule (84 FR 51377). OSHA did not propose in this rulemaking to remove the standards' ancillary provisions in their entirety, and in fact, explained in the NPRM that the September 2019 final rule established that removing the ancillary provisions in their entirety would not sufficiently protect workers in these industries from airborne exposure to beryllium (84 FR at 51390–97).

After reviewing the comments and evidence in the record, OSHA determined that beryllium construction and shipyards standards consisting only of the TWA PEL and STEL would not be sufficiently protective (84 FR at 51390–91). Other OSHA standards do contain some requirements that overlap with, or duplicate, the requirements of the beryllium standards for construction and shipyards. In particular, as explained below in the Summary and Explanation for the removal of paragraph (i), OSHA has determined that other OSHA standards overlap with the previous hygiene requirements of the construction and shipyards standards. However, for most ancillary provisions, there is only partial overlap, and for the remainder, there is no overlap at all. Thus, in the September 30, 2019 final rule, OSHA determined not to adopt its proposal to remove all ancillary provisions from the construction and beryllium standards (84 FR at 51390–91). In that final rule, OSHA also reaffirmed its finding that beryllium exposure presents a significant risk of material health impairment to workers in the construction and shipyards sectors (84 FR at 51388–90). Commenters to the October 8, 2019, proposal have provided no new information indicating that protections are unnecessary in these sectors, and OSHA finds that the ancillary provisions that it is retaining in this final rule are necessary and appropriate to protect workers in the construction and shipyards industries.

The remainder of this summary and explanation provides detail on the changes OSHA is finalizing to the beryllium standards for construction and shipyards, including the agency's review of the evidence in the record and the reasoning for its determinations.

Paragraph (b) Definitions

Paragraph (b) of the beryllium standards for construction and shipyards specifies the definitions of terms used in the beryllium regulatory text. This final rule modifies several definitions of the 2017 standards: *CBD diagnostic center, chronic beryllium disease (CBD),* and *confirmed positive;* adds a definition of *beryllium sensitization;* and eliminates the definitions of *emergency* and *high-efficiency particulate air (HEPA) filter.* The revised definitions include several changes from previous paragraph (b) that OSHA proposed in the October 2019 NPRM, and all of the changes apply to both the construction and shipyards standards. A discussion of each definition affected by OSHA's proposed changes to paragraph (b), comments and testimony received on the proposal, and the final version of each revised definition follows.

OSHA proposed to modify the definitions of *CBD diagnostic center, chronic beryllium disease (CBD),* and *confirmed positive* and add a definition of *beryllium sensitization* to align these definitions in the construction and shipyards standards with changes the agency had already proposed to the beryllium standard for general industry. OSHA proposed these modifications for the general industry standard in December 2018 to clarify the meaning of the terms used in that standard (83 FR at 63747). OSHA provided a sixty-day comment period for the general industry proposal, which closed on February 11, 2019. OSHA's rationale for including these definitions applies equally in the construction and shipyards contexts. Therefore, as discussed in the NPRM, in addition to the comments received during this rulemaking OSHA has considered the comments that were submitted in response to the proposed changes to definitions in the general industry standard along with comments received during this rulemaking on the proposed definitions in determining whether to finalize the proposed definitions in the construction and shipyards standards. The comments to the general industry proposal can be found in Docket OSHA–2018–0003 at *http://regulations.gov.* In addition, OSHA proposed to remove references to the term *emergency* throughout the construction and shipyards standards, including the definition in paragraph (b).

Beryllium Sensitization

This final rule defines the term *beryllium sensitization* as a response in the immune system of a specific individual who has been exposed to beryllium. The definition also states that there are no associated physical or clinical symptoms and no illnesses or disability with beryllium sensitization alone, but the response that occurs through beryllium sensitization can enable the immune system to recognize and react to beryllium. It further states that while not every beryllium-sensitized person will develop CBD, beryllium sensitization is essential for development of CBD. The agency is adding this definition to clarify other provisions in the standard, such as the definitions of *chronic beryllium disease (CBD)* and *confirmed positive,* as well as the provisions for medical surveillance in paragraph (k) and hazard communication in paragraph (m).

As also explained in the 2020 beryllium final rule for general industry (85 FR 42582), this definition of *beryllium sensitization* is identical to the definition proposed in the 2018 NPRM for general industry and the 2019 NPRM for construction and shipyards, and is consistent with information provided in the 2017 final beryllium rule (82 FR at 2470). In the preamble to the 2017 final rule, OSHA found that individuals sensitized through either the dermal or inhalation exposure pathways respond to beryllium through

the formation of a beryllium-protein complex, which then binds to T-cells stimulating a beryllium-specific immune response (82 FR at 2494). The formation of the T-cell-beryllium-protein complex that results in beryllium sensitization rarely manifests in any outward symptoms (such as coughing or wheezing); most who are sensitized show no symptoms at all (see 82 FR at 2492, 2527). Once an individual has been sensitized, any subsequent beryllium exposures via inhalation can progress to serious lung disease through the formation of granulomas and fibrosis (see 82 FR at 2491–98). Since the pathogenesis of CBD involves a beryllium-specific, cell-mediated immune response, CBD cannot occur in the absence of sensitization (82 FR at 2492; Document ID 1355). Therefore, this definition's explanation that beryllium sensitization is essential for development of CBD is consistent with the agency's findings in the 2017 final rule (82 FR at 2470).

Several commenters expressed support for the proposed inclusion of a definition of *beryllium sensitization* in OSHA's beryllium standards, including National Jewish Health (NJH) (Document ID 2211, p. 3; 2243 p. 1; OSHA–2018–0003–0022, p. 2), the United Steelworkers (USW) (Document ID 2222, Tr. 24–25; 2242, p. 2; OSHA–2018–0003–0033, p. 1), and Materion Brush (Materion) (Document ID 2237, p. 4; OSHA–2018–0003–0038, p. 8). For example, USW stated that the proposed definition of sensitization is clear and accurate, and is necessary because the beryllium standard includes many provisions related to the recognition of and appropriate response to beryllium sensitization among beryllium-exposed workers (Document ID OSHA–2018–0003–0033, p. 1). The agency also received supportive comments in response to the beryllium general industry NPRM, which proposed an identical definition of beryllium sensitization, from the U.S. Department of Defense (DOD) (OSHA–2018–0003–0029, p. 1), and Edison Electric Institute (Document ID OSHA–2018–0003–0031, p. 2).

Some commenters expressed concerns regarding OSHA's proposed definition of *beryllium sensitization*.[3] First, NJH stated that OSHA's definition is ''at odds with'' the definition of sensitization included in the guidelines of the American Thoracic Society (ATS), which, in 2014, published a Statement on Beryllium (ATS Statement) that included the following definition: ''Beryllium sensitization is a response in the immune system of an individual who has been exposed to beryllium. A diagnosis of [beryllium sensitization] can be based on two abnormal blood BeLPTs, one abnormal and one borderline blood BeLPT, three borderline BeLPTs, or one abnormal bronchoalveolar lavage (BAL) BeLPT. Beryllium sensitization is essential for development of CBD'' (Document ID 2243, p. 2; OSHA–2018–0003–0027 p. 1; OSHA–2018–0003–0022, p. 2; OSHA–2018–0003–0364, pp. 1, 44).[4] The American College of Occupational and Environmental Medicine (ACOEM) similarly stated that the definition of beryllium sensitization ''has always been two abnormal, one abnormal and one borderline, or three borderline LPT results,'' which it characterized as consistent with the research literature and with how the term ''beryllium sensitization'' is used in clinical practice and medical surveillance. In contrast, it said, OSHA's less precise proposed definition for beryllium sensitization could–together with its use of the term ''confirmed positive'' (see discussion below)–create confusion in clinical practice (Document ID 2213, p. 2). In response to OSHA's general industry NPRM, the National Supplemental Screening Program (NSSP) and NJH also recommended that OSHA's definition of *beryllium sensitization* should include text based on the ATS Statement on Beryllium (Document IDs OSHA–2018–0003–0027, p. 1; OSHA–2018–0003–0022, p. 2).

NJH proposed that OSHA should modify its definition of *beryllium sensitization* to the following: ''Beryllium sensitization is the result of a beryllium specific cell-mediated immune response of an individual who has been exposed to beryllium. A diagnosis of beryllium sensitization can be based on two abnormal blood BeLPTs, one abnormal and one borderline blood BeLPT, or one abnormal bronchoalveolar lavage (BAL) BeLPT. Three borderline BeLPTs may also indicate sensitization'' (Document ID 2211, p. 3; 2243, p.2). NJH believes that its proposed definition would be more consistent with ATS' definition and would not preclude follow-up examinations of sensitized workers for CBD under workers' compensation coverage.

Materion disagreed with NJH's argument, stating that OSHA's definition of *beryllium sensitization* and its complementary definition of *confirmed positive* (discussed later) ''align well with the ATS definitions,'' and also stated that the definitions in the beryllium standards ''should exist to best serve the understanding of employers and employees, not the medical community'' (Document ID 2237, p. 3).

OSHA has considered the comments submitted by NJH, ACOEM, Materion, and NSSP, and has concluded that the proposed definition of *beryllium sensitization,* when properly read in the context of the standards and in combination with the definition of *confirmed positive,* does not contradict the definitions used by ATS or other organizations, and is not likely to create confusion in clinical practice. The agency is providing a definition of *beryllium sensitization* to give stakeholders, such as employers and employees, a general understanding of what beryllium sensitization is and its relationship to CBD.

The definition of *confirmed positive* explains how the results of BeLPT testing should be interpreted in the context of the standard's provisions that benefit beryllium-exposed workers, specifically, medical surveillance and medical removal protection. The *confirmed positive* definition establishes that these benefits should be extended to workers who have a pattern of BeLPT results, obtained in a three-year period, consistent with the NJH's recommended definition of *beryllium sensitization.*

In their comments on the general industry standard, NSSP objected to the statement in the definition that no physical or clinical symptoms, illness,

[3] Comments from the U.S. House of Representatives Committee on Education and Labor (CEL) stated that decoupling the term *beryllium sensitization* from OSHA's definition of *confirmed positive* (discussed later in this Summary and Explanation) would have consequences for workers who leave employment already sensitized to beryllium because their medical records would only state ''confirmed positive,'' rather than ''beryllium sensitized'' (Document ID 2208, pp. 4–5). OSHA addresses CEL's comments in the Summary and Explanation of the definition of *confirmed positive.*

[4] NJH also stated that in order for a medical condition to be covered under Worker's Compensation, it needs to meet the statutory language requirements. NJH expressed concern that the statement that there is ''no illness or disability with beryllium sensitization alone'' in OSHA's proposed definition could preclude workers with beryllium sensitization from obtaining Workers' Compensation coverage and medical follow up in some states, including clinical evaluation for CBD once they leave employment (Document ID 2243, pp. 2–3). At the hearing, NJH further explained that, in light of how diagnoses of pleural plaque have affected the individuals' ability to obtain benefits for lung cancer or mesothelioma, OSHA's definition could adversely affect workers' ability to obtain benefits for CBD in the future by prematurely triggering the statute of limitations for such claims. (Document ID 2222, Tr. 39–41).

OSHA intends for the definition of confirmed positive to serve only as a trigger for certain provisions of the beryllium standard. How OSHA defines this phrase for purposes of the beryllium standard in no way limits healthcare professionals' ability or incentive to diagnose beryllium sensitization.

or disability are associated with beryllium sensitization alone, but did not explain the reason for their concern (Document ID OSHA–2018–0003–0027, p. 1). Materion supported the agency's inclusion of this information in the definition, stating that ''employees deserve to understand that beryllium sensitization does not involve symptoms . . .'' (Document ID OSHA–2018–0003–0038, p. 5). USW also specifically supported the accuracy of this section of OSHA's proposed definition of beryllium sensitization (Document ID OSHA–2018–0003–0033, p. 1).

As explained in the Summary and Explanation for paragraph (b) of the July 14, 2020, final rule revising the general industry standard (85 FR 42582), OSHA decided to retain the statement that there is no illness or disability with beryllium sensitization in the definition of *beryllium sensitization* because it is important that employers and employees understand the asymptomatic nature of beryllium sensitization and the need for specialized testing such as the BeLPT. The statement is consistent with OSHA's discussion of beryllium sensitization in the 2017 final rule (82 FR at 2492–99). As OSHA discussed in the 2017 final rule, sensitization through dermal contact has sometimes been associated with skin granulomas, contact dermatitis, and skin irritation, but these reactions are rare and those sensitized through dermal exposure to beryllium typically do not exhibit any outward signs or symptoms (see 82 FR 2488, 2491–92, 2527). OSHA determined that while beryllium sensitization rarely leads to any outward signs or symptoms, beryllium sensitization is an adverse health effect because it is a change to the immune system that leads to risk of developing CBD (82 FR at 2498–99). The agency believes that the asymptomatic nature of beryllium sensitization, especially in the lung, should be conveyed to employers and employees to emphasize why specialized testing such as the BeLPT should be provided to workers who may have no symptoms of illness associated with beryllium exposure. For these reasons, OSHA is retaining the statement ''[t]here are no associated physical or clinical symptoms and no illness or disability with beryllium sensitization alone'' in the definition of *beryllium sensitization.*

As discussed in greater detail in the beryllium final rule for general industry (85 FR 42582), the State of Washington Department of Labor and Industries, Division of Occupational Safety and Health (DOSH), commented that OSHA's proposed definition of beryllium sensitization places unnecessary emphasis on the role that beryllium sensitization plays in the development of CBD. According to DOSH, ''[t]his language may cause confusion with proper diagnosis of CBD and application of the rule requirements for workers who have developed CBD without a confirmed beryllium sensitization'' (Document ID OSHA–2018–0003–0023, p. 1). However, other commenters, including NJH, NSSP, and USW, supported including the statement that beryllium sensitization is necessary for the development of CBD in OSHA's definition of beryllium sensitization (Document ID OSHA–2018–0003–0022, p. 2; OSHA–2018–0003–0027, p. 1; OSHA–2018–0003–0033, p. 1).

Following consideration of DOSH's comment, OSHA has determined that this information should remain in the definition of *beryllium sensitization* (as well as the definition of *chronic beryllium disease,* discussed later). OSHA believes that an understanding of the relationship between beryllium sensitization and CBD is essential to workers' and employers' understanding of the beryllium standard. By including the role that sensitization plays in the development of CBD in the definition of beryllium sensitization, OSHA intends to make a number of things clear to workers and employers: That beryllium sensitization, although not itself a disease, is nevertheless an adverse health effect that presents a risk for developing CBD and thus should be prevented; the need to identify beryllium sensitization through regular medical screening; and why workers who are confirmed positive should be offered specialized medical evaluation and medical removal protection. OSHA notes that DOSH does not dispute the factual accuracy of OSHA's statement regarding the role beryllium sensitization plays in the development of CBD, which the agency established in the Health Effects section of the 2017 final standard (82 FR at 2495–96).

OSHA believes that emphasizing the role that beryllium sensitization plays in the development of CBD provides employers and employees with important context for understanding the beryllium standard. At the same time, the agency acknowledges that employees may be diagnosed with CBD in the absence of a confirmed positive BeLPT, and the beryllium standard allows for such a diagnosis. In the preamble to the general industry final rule, OSHA provides additional discussion of the provisions that allow for referral to a CBD diagnostic center and diagnosis with CBD in the absence of a confirmed positive blood BeLPT result (85 FR 42598).

Thus, following consideration of the record of comments on OSHA's proposed definition of *beryllium sensitization* (which includes the comments and response detailed in the beryllium general industry final rule, 85 FR 42596), OSHA is finalizing the definition as proposed in the 2019 NPRM. The addition of this definition for beryllium sensitization does not change employer obligations under paragraphs (k) and (m) and therefore maintains employee protections under the construction and shipyards standards for beryllium.

CBD Diagnostic Center

This final rule defines a *CBD diagnostic center* to mean a medical diagnostic center that has a pulmonologist or pulmonary specialist on staff and on-site facilities to perform a clinical evaluation for the presence of CBD. The revised definition also states that a CBD diagnostic center must have the capacity to perform pulmonary function testing (as outlined by the American Thoracic Society), bronchoalveolar lavage (BAL), and transbronchial biopsy. In the revised definition, a CBD diagnostic center must have the capacity to transfer the BAL samples to a laboratory for appropriate diagnostic testing within 24 hours and the pulmonologist or pulmonary specialist must be able to interpret the biopsy pathology and the BAL diagnostic test results. This definition is identical to the definition of *CBD diagnostic center* that OSHA proposed in the 2019 NPRM.

The revised definition of *CBD diagnostic center* differs from the former definition in a number of ways. First, whereas the 2017 final rule's definition specified only that a CBD diagnostic center must have a pulmonary specialist, OSHA is adding the term ''pulmonologist'' to clarify that either type of specialist is qualified to perform a clinical evaluation for the presence of CBD. Additionally, the 2017 definition required that a CBD diagnostic center have an on-site pulmonary specialist. The revised definition states that the CBD diagnostic center must simply have a pulmonologist or pulmonary specialist on staff. This clarifies OSHA's intent that a pulmonary specialist must be available to the CBD diagnostic center, but need not necessarily be on site at all times.

In their comments on the proposed changes to the definition of *CBD diagnostic center,* NJH and ATS recommended that a pulmonologist,

occupational medicine specialist, or physician with expertise in beryllium disease conduct the clinical evaluation for CBD, and that a pulmonologist should be on staff or available to perform the bronchoscopy (Document ID 2211, pp. 3–4; OSHA–2018–0003–0022, p. 2; OSHA–2018–0003–0021, p. 2). According to NJH, clinics that regularly evaluate patients for CBD have physicians with experience in occupational medicine conduct the clinical evaluation for CBD, in conjunction with a pulmonologist who performs a bronchoscopy (Document ID 2211, pp. 3–4; OSHA–2018–0003–0022, pp. 2–3).

OSHA notes that, although the agency is requiring facilities to have a pulmonologist or pulmonary specialist on staff who is able to interpret the biopsy pathology and the BAL diagnostic test results, OSHA does not intend that all aspects of clinical evaluation for CBD must be performed by a pulmonologist or pulmonary specialist. In the preamble to the 2017 final rule, OSHA explained that the agency was defining a *CBD diagnostic center* as a facility with a pulmonary specialist ''on-site'' specifically to indicate that the specialist need not personally perform the BeLPT testing (82 FR at 2645). Moreover, paragraph (k)(7), which sets out the substantive requirements for the evaluation at the CBD diagnostic center, refers to recommendations of the ''examining physician,'' not necessarily the pulmonologist or pulmonary specialist.

Paragraph (b), in turn, defines *physician or other licensed health care professional (PLHCP)* as an individual licensed to provide some or all of the services required by paragraph (k). As such, some parts of the evaluation, such as lung function tests, might be performed by a certified medical professional other than a pulmonologist or pulmonary specialist. The arrangement that NJH describes as typical for clinics treating CBD patients, in that physicians with experience in occupational health conduct the clinical evaluation for CBD in conjunction with a pulmonologist who performs a bronchoscopy, is consistent with OSHA's intent for the definition of *CBD diagnostic center* and other provisions of the standard related to CBD diagnosis. Therefore, OSHA has determined that it is not necessary to revise the definition of *CBD diagnostic center* to require that the clinical evaluation for CBD be conducted by a pulmonologist, occupational medicine specialist, or physician with expertise in beryllium disease.

An additional change to the definition of *CBD diagnostic center* clarifies that the diagnostic center must have the capacity to perform pulmonary function testing (according to ATS criteria), bronchoalveolar lavage (BAL), and transbronchial biopsy. OSHA has determined that the former definition—which stated that the evaluation at the diagnostic center ''must include'' these tests—could have been misinterpreted to mean that the examining physician was required to perform each of these tests during every clinical evaluation at a CBD diagnostic center. The agency is not dictating which tests an evaluation at a CBD diagnostic center should include, but ensuring that CBD diagnostic centers have the capacity to perform these tests, which are commonly needed to diagnose CBD. Therefore, the agency is revising the definition to clarify that the CBD diagnostic center must simply have the ability to perform each of these tests when deemed appropriate. These changes clarify the definition of *CBD diagnostic center,* and OSHA expects they will maintain safety and health protections for workers.

NJH expressed concern that the proposed definition does not specify the tests to be performed at the CBD diagnostic center, but only that the CBD diagnostic center have the capacity to conduct the tests (Document ID 2222, Tr. 70–72). NJH commented that by specifying the required capacities of a CBD diagnostic center, rather than the contents of a CBD evaluation, OSHA's change to the definition may indicate that the clinical evaluation for CBD need not include certain aspects of a CBD evaluation. NJH, the Association of Occupational and Environmental Clinics (AOEC), and ATS recommended that, at minimum, examinations should include full pulmonary function testing (including lung volumes, spirometry and diffusion capacity for carbon monoxide), chest imaging, and cardiopulmonary exercise testing, and may also include bronchoscopy in some cases (Document ID 2211, p. 4; OSHA–2018–0003–0022, p. 3; OSHA–2018–0003–0028, p. 2; OSHA–2018–0003–0021, pp. 1–2). NJH recommended that OSHA require ATS recommendations for diagnostic evaluation, which the NJH stated include the BeLPT, pulmonary function testing and chest imaging; and in some cases bronchoscopy (Document ID 2211, p. 4; OSHA–2018–0003 0022, p. 3). In their comments on the general industry NPRM, Materion supported OSHA's intent to specify the required capacities of a CBD diagnostic center, rather than the contents of a CBD evaluation, in the definition of CBD diagnostic center (Document ID OSHA–2018–0003–0038, pp. 16–17).

OSHA believes that the concerns expressed by NJH are already covered by the standard, as discussed more thoroughly in the Summary and Explanation for paragraph (k), Medical Surveillance, in this final rule. First, paragraph (k)(3) sets the requirements for contents of an examination. For the initial and periodic medical examinations, OSHA already requires under (k)(3) that employees be offered: A physical exam with emphasis on the respiratory system and skin rashes; pulmonary function tests, performed in accordance with established guidelines by ATS, including forced vital capacity (FVC) and forced expiratory volume in one second (FEV_1); a BeLPT or equivalent test; a low dose computed tomography (LDCT) scan, if recommended by the PLHCP; and any other test deemed appropriate by the PLHCP. OSHA believes this information should be available to the CBD diagnostic center upon request.

Second, paragraph (k)(7)—which establishes the substantive requirements for the evaluation at the CBD diagnostic center—also provides the examining physician at the CBD diagnostic center flexibility to determine which additional tests are appropriate. As explained below in the Summary and Explanation of paragraph (k)(7), OSHA is adding a provision (paragraph (k)(7)(ii)) to make clear that the employer must offer any tests that the examining physician at the CBD diagnostic center deems appropriate. The definition of *CBD diagnostic center* in paragraph (b) does not alter this requirement. In light of paragraph (k), the revised definition of CBD diagnostic center cannot reasonably be read to limit the types of tests available to the employee (see the summary and explanation for paragraph (k)(7) for a full discussion of this topic). Thus, after considering these comments, OSHA has decided to retain the proposed change to the definition of *CBD diagnostic center.*

Chronic Beryllium Disease (CBD)

OSHA is also amending the definition of *chronic beryllium disease (CBD).* For the purposes of this standard, the agency is using the term *chronic beryllium disease* or *CBD* to mean a chronic granulomatous lung disease caused by inhalation of beryllium by an individual who is beryllium sensitized.

OSHA is finalizing the definition as proposed. It includes several changes to the 2017 final rule's definition of

chronic beryllium disease, which was ''a chronic lung disease associated with exposure to airborne beryllium'' (82 FR at 2645–46). The revisions serve to differentiate CBD from other respiratory diseases associated with beryllium exposure (*e.g.,* lung cancer) and to make clear that beryllium sensitization and the presence of beryllium in the lung are essential in the development of CBD (see 82 FR at 2492).

First, OSHA is adding the term ''granulomatous'' to the definition. ''Granulomatous'' is meant to indicate an infiltration of inflammatory cells (*e.g.,* T-cells) leading to the focal collection of cells, and eventual creation of nodules in the lung (Ohshimo et al., 2017, Document ID 2171, p. 2; Williams and Williams, Document ID 2228, pp. 727–30; ATS, Document ID 0364). The formation of the type of lung granuloma specific to a beryllium immune response can only occur in those with CBD (82 FR at 2492–502). Next, OSHA is removing the phrase ''associated with airborne exposure to beryllium'' and replacing it with ''caused by inhalation of airborne beryllium.'' This change is more consistent with the findings in the 2017 final rule that beryllium is the causative agent for CBD and that CBD only occurs after inhalation of beryllium (82 FR at 2513). Finally, OSHA is clarifying that CBD is caused by inhalation of airborne beryllium ''by an individual who is beryllium sensitized.'' Along with the revised definition of beryllium sensitization discussed above, this revision emphasizes to employers and employees the role that beryllium sensitization plays in the development of CBD.

NJH, USW, and Materion agreed that OSHA's definition of CBD should be clarified (Document ID 2211, p. 4; 2222, Tr. 50–51; Document ID OSHA–2018–0003–0038, p. 17; Document ID OSHA–2018–0003–0033, p. 5). Materion supported the changes that OSHA proposed, which it characterized as a necessary clarification to ensure the definition provided is specific to chronic beryllium disease (Document ID 2237, pp. 4–5; OSHA–2018–0003–0038, p. 17). USW similarly supported the proposed definition, stating that it clarifies the previous definition which ''could be read to apply to any chronic lung disease caused by beryllium, including lung cancer'' (Document ID OSHA–2018–00003–0033, p. 5). These comments reinforce OSHA's determination that adding the term ''granulomatous'' to the definition will better distinguish CBD from other occupationally associated chronic pulmonary diseases. As OSHA explained in the preamble to the 2017 final rule, the formation of the type of lung granuloma specific to a beryllium immune response can only occur in those with CBD (82 FR at 2492–502).

Several commenters expressed concern that the proposed definition of *chronic beryllium disease* does not provide sufficient information to guide the diagnosis of CBD, or that aspects of OSHA's proposed definition of CBD could complicate the diagnosis of CBD. Comments expressing such concern from NJH, ACOEM, ATS, DOSH, and NSSP are discussed in detail below. OSHA notes that the standard's definition of *chronic beryllium disease* is not intended to provide criteria for the diagnosis of CBD. The agency's intent is to provide readers who may have little or no familiarity with CBD with a general understanding of the term, not to provide diagnostic criteria for healthcare professionals. This is evident from the broadly written 2017 final rule definition of chronic beryllium disease: ''a chronic lung disease associated with exposure to airborne beryllium'' (82 FR at 2645–46).

Due to differences in individual cases and circumstances, medical specialists may need to apply somewhat different testing regimens and/or diagnostic criteria to different individuals they evaluate for CBD. Furthermore, the diagnostic tools and criteria available to medical specialists may change over time. As discussed in the summary and explanation for paragraph (k)(7), OSHA believes that the physician at the CBD diagnostic center should have the latitude to use any tests he or she deems appropriate for the purpose of diagnosing or otherwise evaluating CBD in a patient, and has revised paragraph (k)(7) to make this clear. Therefore, OSHA has determined that it is neither necessary nor appropriate to specify diagnostic criteria in the beryllium standard's definition of *chronic beryllium disease.* Instead, OSHA has decided to retain a definition that provides the reader with a general understanding of the term.

NJH and ATS commented that OSHA should adopt a definition of *chronic beryllium disease* based on the previously-mentioned 2014 ATS document on diagnosis and management of beryllium sensitization and CBD (Document ID 2211, p. 4; 2222, Tr. 50; OSHA–2018–0003–0021, p. 5). NJH suggested the following definition: ''Chronic beryllium disease (CBD) is a granulomatous inflammatory response in the lungs of an individual who is beryllium sensitized'' (Document ID 2211, p. 4).[5] In the beryllium informal hearing, they appeared to object to the term ''granulomatous inflammation'' and to prefer the term ''granuloma inflammatory process'' (Document ID 2222, Tr. 50). NJH stated that OSHA should adopt a definition based on the ATS beryllium statement ''that says, 'Chronic beryllium disease is a granuloma inflammatory process,' and note that this is different than granulomatous inflammation or granulomas. . . . chronic beryllium disease is a granulomatous inflammatory process in the lungs of an individual who is beryllium sensitized'' (Document ID 2222, Tr. 50). NJH further stated that their proposed definition ''allows for some flexibility'' in diagnosing CBD (Document ID 2222, Tr. 50). OSHA notes that the ATS statement primarily discusses CBD as a granulomatous inflammatory response in the lungs (Document ID 0364).

As discussed above, OSHA has determined that it is neither necessary nor appropriate to provide diagnostic criteria in the beryllium standard's definition of *chronic beryllium disease.* Instead, OSHA has decided to retain a definition that provides the reader with a general understanding of the term. OSHA believes that the definition the agency proposed—a chronic granulomatous lung disease caused by inhalation of airborne beryllium by an individual who is beryllium-sensitized—adequately conveys that CBD is granulomatous in nature, and that it is not necessary for the agency's purposes to further specify that it is an inflammatory process. OSHA has therefore decided not to adopt the definition that NJH suggested.

ACOEM objected to the inclusion of the term ''granulomatous'' in the definition of *chronic beryllium disease* (Document ID 2213, p. 3). ACOEM contended that CBD does not always include the presence of granulomas and the lung pathology is more consistent with ''mononuclear cell interstitial infiltrates.'' According to ACOEM, it is established in the medical literature that the lung pathology found in CBD does not always include granulomas; lung biopsies may not detect granulomas, either due to practical limitations of the

[5] In their comments on the general industry NPRM, NJH previously suggested that the agency define *chronic beryllium disease* as a disease ''characterized by evidence of granulomatous lung inflammation in an individual who is sensitized to beryllium.'' According to NJH, this definition would allow for diagnosis based on different combinations of clinical evaluation results as detailed in the ATS Statement (Document ID OSHA–2018–0003–0022, p. 3). OSHA's response to NJH's new suggested definition also pertains to this previously suggested definition.

test or because the patient's stage of disease is too early (*i.e.,* the cells of the immune system that form granulomas have accumulated in the lungs, but have not yet formed into clusters) (Document ID 2213, p.3). ACOEM expressed concern that, if OSHA's [a]ddition of the term ''granulomatous'' to the definition excludes cases where granulomas are not present, it ''may result in some workers being unnecessarily excluded from appropriate medical care under the OSHA rule, and may affect their ability to receive workers' compensation, due to the overly narrow definition'' (Document ID 2213 p. 3). ACOEM further noted that the presence of beryllium sensitization ''lends specificity to the diagnosis''; therefore, it is not necessary to use the term ''granulomatous'' for the sake of specificity in the definition.

OSHA disagrees with ACOEM's contention that including the term ''granulomatous'' in the agency's definition of *chronic beryllium disease* would be inaccurate or overly narrow, and could thereby prevent workers from obtaining appropriate medical care or benefits for CBD. To begin with, OSHA's definitions in paragraph (b) of the standard are intended only to clarify the meaning of terms that appear in the standard. The definition of *chronic beryllium disease* is written with the goal of providing readers of the standard, who may have little or no familiarity with CBD, with a general understanding of the term. The definition does not provide diagnostic criteria for healthcare professionals to follow when diagnosing and addressing CBD.

Moreover, ACOEM's concerns are unfounded because including the term ''granulomatous'' does not exclude cases of CBD where granulomas have not yet formed or are not detected by lung pathology. OSHA agrees with ACOEM that CBD includes mononuclear cell infiltrates and can be diagnosed in the absence of lung pathology findings of granulomas in the lung. As described in the Health Effects section of the 2017 final rule, CBD is a pathological continuum which results from lung exposure to beryllium. The continuum consists of an asymptomatic early response with the recruitment of inflammatory T-cells and other mononuclear cells through to the formation of granulomas and frank, chronic disease (82 FR at 2491–2502). However, the term ''granulomatous'' does not refer only to the presence of granulomas; the term ''granulomatous'' inflammation is described in the literature as beginning with chronic inflammation predominated by mononuclear phagocyte cells leading to the eventual aggregation of these cells into focal lesions called granulomas (ATS, Document ID 0364; Ohshimo et al., 2017, Document ID 2171, p. 2; Williams and Williams, 1983, Document ID 2198). OSHA finds that adding the term ''granulomatous'' to the definition of CBD, contrary to the concerns raised by ACOEM, does not imply that CBD cannot be diagnosed where granulomas have not yet formed or are not detected by lung pathology.

ACOEM also noted that ''the presence of beryllium sensitization (as measured in BeLPT using either blood or lung cells) lends specificity to the diagnosis,'' which makes including the term ''granulomatous'' unnecessary (Document ID 2213, p. 3). OSHA disagrees. First, including the term ''granulomatous'' is consistent with the ATS statement ''the diagnosis of CBD is based on the demonstration of both BeS and granulomatous inflammation on lung biopsy.'' (Document ID 0364, p. e35, e43–e45, e55). Based on the ATS statement, NJH also recommended a definition of chronic beryllium disease that included a reference to ''granulomatous inflammation'' (Document ID 2211, p. 4).

Second, as noted in the summary and explanation section for the 2020 general industry beryllium final rule (85 FR 42598), OSHA acknowledges that it may not always be possible to identify a worker for beryllium sensitization using the BeLPT as part of a diagnosis of CBD because the BeLPT can yield false-negative results in some individuals (see Document ID 0399). This means some individuals may actually be sensitized to beryllium even though they have a negative BeLPT result; therefore, there is value to adding the term ''granulomatous'' to lend further specificity. An examining physician should have the latitude to diagnose CBD even in the absence of a ''confirmed positive'' pattern of BeLPT results 85 FR 42598), for example, in the presence of lung inflammation. The latitude and flexibility provided under these standards affords physicians the discretion to diagnose CBD in patients that may not have the classic hallmarks of sensitization or CBD (*e.g.* positive BeLPT or granuloma), but have a work history of exposure to beryllium and an undiagnosed health issue. However, OSHA emphasizes that the definition of *chronic beryllium disease* is to inform the general reader of this preamble and final rule, and is not intended to guide physician diagnosis of CBD.

In their comments on the 2018 general industry NPRM, ATS recommended including diagnostic criteria in the definition, such as confirmation of an immune response to beryllium and granulomatous lung inflammation using lung biopsy, and that the definition emphasize the various approaches which may be used ''[d]epending on the clinical setting, feasibility of certain diagnostic tests, and degree of diagnostic certainty needed'' (Document ID OSHA–2018–0003–0021, p. 5). ATS also expressed concern that OSHA's proposed changes to the definition of *chronic beryllium disease* could create confusion in the diagnosis of CBD because, ''[w]hile beryllium sensitization is essential to the development of CBD, demonstrating beryllium sensitization, as well as granulomatous lung disease on lung pathology, can be challenging in certain settings'' (Document ID 0021, p. 5). DOSH stated that the proposed definition ''emphasizes beryllium sensitization as a factor in chronic beryllium disease in a manner that may be misleading'' and emphasized that individuals may be diagnosed with CBD without a confirmed positive BeLPT result. DOSH advocated that the definition of *chronic beryllium disease* ''ensure employers and medical providers are given a clear expectation of how beryllium conditions are properly identified'' (Document ID OSHA–2018–0003–0023, p. 2).

Although OSHA agrees with ATS and DOSH that diagnosing CBD does not always require confirmation of beryllium sensitization, the agency does not believe that references to sensitization should be excluded from the definition of *chronic beryllium disease.* OSHA first notes that neither DOSH nor ATS contend that OSHA's definition is inaccurate. Furthermore, as OSHA explained previously in its discussion of the *beryllium sensitization* definition, the agency believes that a correct understanding of the relationship between beryllium sensitization and CBD is key to workers' and employers' understanding of many provisions of the beryllium standard. By stating the role that sensitization plays in the development of CBD in the standard's definition of *chronic beryllium disease,* OSHA intends to convey clearly to the regulated community why protecting workers from becoming beryllium-sensitized is key to the prevention of CBD and why workers who are confirmed positive for beryllium sensitization should be offered both a clinical evaluation for CBD and medical removal protection.

OSHA acknowledges that it is not always necessary to identify a worker as confirmed positive for beryllium sensitization using the BeLPT as part of

a diagnosis of CBD and that the BeLPT can yield false-negative results in some individuals. For this reason, an examining physician should have the latitude to diagnose CBD even in the absence of a ''confirmed positive'' pattern of BeLPT results. As explained in the summary and explanation of paragraph (k)(7) of the beryllium final rule (2017), that provision gives the examining physician this latitude (82 FR at 2704, 2709). Because the substantive provisions of the standard leave the examining physician discretion in diagnosing CBD, OSHA does not agree that acknowledging the role of beryllium sensitization in the development of CBD will result in diagnostic confusion. As stated above, the agency does not intend for the definition to be used for diagnostic criteria, but rather to add clarity to the standard and provide readers who may have little or no familiarity with CBD with a general understanding of the term.

NSSP recommended the following addition to OSHA's proposed definition of *chronic beryllium disease:* ''The presence of interstitial mononuclear cell (T cell) infiltrates (lymphocytosis) is characteristic of chronic beryllium disease'' (Document ID 0027, pp. 3–4). NSSP argued that the presence of these infiltrates on lung biopsy indicates the presence of chronic beryllium disease, and should therefore be included in the standard's definition (Document ID 0027, p. 4). OSHA disagrees. The agency believes that the term ''granulomatous'' sufficiently addresses the presence of T-cell infiltrates, which occur at an early stage in the development of granulomas (82 FR at 2492–2502). As discussed previously, OSHA's intent in defining *chronic beryllium disease* is to provide the reader a general understanding of what CBD is, rather than provide a technical definition for diagnostic use. The suggested addition is not necessary to describe the nature of CBD in general terms. With the addition of the term ''granulomatous,'' the definition is sufficiently specific for OSHA's purposes in the context of paragraph (b).

In summary, for the purposes of this standard OSHA is defining *chronic beryllium disease* as a chronic granulomatous lung disease caused by inhalation of airborne beryllium by an individual who is beryllium sensitized. This definition is identical to the definition of *chronic beryllium disease* OSHA proposed in 2019 and includes only minor changes from the definition included in the 2017 final standard. OSHA is providing this definition to enhance stakeholders' general understanding of the beryllium standard; it is neither intended nor suitable to provide guidance to medical professionals on the diagnosis of CBD. OSHA expects these changes to the 2017 definition of *chronic beryllium disease* will clarify the standard, and will therefore maintain safety and health protections for workers. After considering these comments and after reviewing the record as a whole (which includes the comments and responses detailed in the July 14, 2020, general industry final rule (82 FR 42602)), OSHA has decided to amend the definition of *chronic beryllium disease (CBD)* as proposed.

Confirmed Positive

This final rule defines *confirmed positive* to mean (1) the person tested has had two abnormal BeLPT test results, an abnormal and a borderline test result, or three borderline test results, obtained within a three-year period; or (2) the result of a more reliable and accurate test indicating a person has been identified as having beryllium sensitization. The revised definition includes several changes to the 2017 definition of *confirmed positive* and one change from the definition of *confirmed positive* that OSHA proposed in the 2019 NPRM.

First, the agency is removing the phrase ''beryllium sensitization'' from the first sentence of the definition, which previously stated that a person is confirmed positive if that person has beryllium sensitization, as indicated by two abnormal BeLPT test results, an abnormal and a borderline test result, or three borderline test results. OSHA intends that the term *confirmed positive* act only as a trigger for requirements in the standards, such as continued medical monitoring and surveillance for the purposes of these standards, and not as a general-purpose definition of *beryllium sensitization.* By removing the phrase ''beryllium sensitization'' from the first sentence of the definition, the agency hopes to avoid confusion resulting from scientific disagreements over whether certain test results, such as three borderlines, necessarily prove that sensitization has occurred. For purposes of the beryllium standards, any worker with the BeLPT test results specified in the definition of *confirmed positive* should be offered an evaluation for CBD with continued medical surveillance as well as the option of medical removal protection, even though some small percentage of workers who are confirmed positive by this definition may not in fact be sensitized to beryllium, as is the case for any diagnostic test (Middleton, et. al., 2008, Document ID 0480, p. 4).[6]

Both USW and Materion supported this proposed revision. USW supported removing the phrase beryllium sensitization because, ''[w]hile it is true that a confirmed positive result of BeLPT testing currently leads to a diagnosis of sensitization, linking the two in the same definition could lead to unintended hardships for beryllium workers'' (Document ID 2242, p. 3). At the December 3, 2019 public hearing, USW also explained that a finding of beryllium sensitization could, in some states, trigger a statute of limitations under laws governing claims for compensation for other adverse health effects (Document ID 2222, Tr. 24–25). According to USW, ''the word 'sensitized' is more likely to trigger a statute-of-repose deadline for filing a tort suit than the words 'confirmed positive,'" and should that happen, ''the worker would not be able to receive adequate compensation if they later developed chronic beryllium disease'' (Document ID 2242, p. 3). Materion commented that ''OSHA's separation of beryllium sensitization from confirmed positive can increase the number of employees eligible to accept further medical testing by institutions such as NJH or to seek OSHA's medical removal option,'' as well as the number of employees ''who may choose to be medically monitored on a more routine basis at institutions such as NJH'' (Document ID 2237, p. 4).

In its comments on the general industry NPRM, USW also commented that the former definition of *confirmed positive* had acted ''as a de facto definition of sensitization'' and that removing the phrase ''beryllium sensitization'' from this portion of the definition ensures that a finding of confirmed positive will trigger medical surveillance and medical removal protection, ''without an intermediate stop at a finding of sensitization'' (Document ID OSHA–2018–0003–0033, p. 5). Similarly, Materion commented in their response to the general industry

[6] In the preamble to the 2017 final rule, OSHA found that three borderline BeLPT results recognize a change in a person's immune system with respect to beryllium exposure based on Middleton et al.'s 2011 finding that three borderline BeLPT results have a positive predictive value (PPV) of over 90 percent (82 FR at 2501), and therefore the agency included three borderline results in the criteria for confirmed positive (82 FR at 2646). While Materion contests the findings of the Middleton et al study (2011) regarding three borderline BeLPTs, Materion was generally supportive of removing sensitization from the definition, stating that the agency ''wisely splits[s] the definition of beryllium sensitization, which is a medical determinant, from confirmed positive, which is a testing regimen outcome'' (Document ID 2237, pp. 3–4).

NPRM that the revised definition allows individuals with three borderline BeLPT results to obtain the protections of the standard, including evaluation for CBD and medical removal protection, without necessarily being ''declared sensitized'' (Document ID OSHA–2018–0003–0038, p. 18). Materion further asserted that the change enhances employee protection by increasing the number of persons eligible to go on to further testing (Document ID OSHA–2018–0003–0038, p. 19).

Several commenters disagreed with OSHA's proposal to remove the phrase ''beryllium sensitization'' from the definition of *confirmed positive.* NSSP generally expressed disagreement with OSHA's proposal to remove ''beryllium sensitization'' from the first part of the *confirmed positive* definition, but did not state the reasons for its concern (Document ID OSHA–2018–0003–0027, p. 3).

Several commenters expressed concern that OSHA's proposed revision would create confusion. NJH stated that removal of ''beryllium sensitization'' would cause confusion as to what the term ''confirmed positive'' refers, and stated that workers need to understand that, if they are confirmed positive, they have a specific T-cell mediated response to beryllium that can result in development of CBD (Document ID 2222, Tr. 64; 2211, p. 5). ACOEM commented that ''[s]eparating the definition of 'confirmed positive' from the definition of beryllium sensitization is confusing, unnecessary, and contradicts the accepted terminology and definitions employed in the fields of immunology, beryllium medical research, and clinical practice . . .'' ACOEM further stated that, ''[i]n clinical practice, [the change] will add significant confusion, to the detriment of workers and patients,'' because ''[t]he medical community is not accustomed to diagnosing a patient's medical condition as 'confirmed positive,' '' and instead refers to patients as being ''beryllium sensitized'' based on ''the presence of confirmed positive BeLPTs.'' [7] (Document ID 2213, p. 2).

ATS and AOEC also expressed concern that, because the medically-accepted interpretation of BeLPT testing results is that they indicate beryllium sensitization, removing the phrase ''beryllium sensitization'' from the definition of *confirmed positive* may cause confusion about the condition to which *confirmed positive* refers (Document ID OSHA–2018–0003–0021, p. 3; OSHA–2018–0003–0028, p. 2). CEL cited to, and expressed support for, ATS' and AOEC's comments regarding this change, and also expressed concern that, after a worker leaves employment, their medical record might only state that they were ''confirmed positive,'' rather than ''beryllium sensitized,'' which could create confusion for medical personnel who may later evaluate or treat the worker (Document ID 2208, p. 5).

Commenters also expressed concern that removing ''beryllium sensitization'' from the definition could negatively affect workers' ability to obtain workplace protections and other benefits. NJH stated that removing ''beryllium sensitized'' from the definition of *confirmed positive,* in conjunction with OSHA's proposal to place a time constraint on confirmation testing results in the definition (discussed below), might reduce workers' ability to obtain medical testing and workplace protections that are required by the rule (Document ID 2243, p. 3). NJH also opposed the revised definition in their comments on the 2018 general industry NPRM, asserting that the removal of the phrase ''beryllium sensitized'' could prevent individuals who meet the definition of being confirmed positive from being identified as sensitized (Document ID OSHA–2018–0003–0022, p. 4). ATS also stated (without explanation) that removing the term ''beryllium sensitization'' from the definition of *confirmed positive* would reduce worker protections (Document ID OSHA–2018–0003–0021, p. 3).

Additionally, NJH, ATS, and CEL expressed concern that removing ''beryllium sensitization'' from the definition of *confirmed positive* would adversely affect workers' ability to obtain workers compensation benefits. NJH commented that the proposed change, in conjunction with OSHA's proposal to place a time constraint on confirmation testing results (discussed below), would prevent individuals from being diagnosed with beryllium sensitization, which is medically compensable under workers' compensation programs in many states (Document ID 2243, p. 3). CEL cited to ATS's stated concern that removing the phrase ''beryllium sensitization'' would reduce workers' right to file for worker's compensation (Document ID 2208, p. 5 (citing 0021, p. 3)).

Commenters also expressed concern that the proposed revision of the *confirmed positive* definition was inconsistent with other parts of the standard. CEL and ACOEM claimed that the change would create an inconsistency with the definition of *Chronic Beryllium Disease (CBD),* which defines CBD as ''a chronic granulomatous lung disease caused by inhalation of airborne beryllium by an individual *who is beryllium-sensitized*'' (emphasis added) (Document ID 2208, p. 5; 2213, p. 2). CEL also expressed concern that ''the definition of beryllium sensitized no longer refers to the definition of 'confirmed positive,' which defines the criteria for being determined beryllium sensitized.'' Additionally, CEL noted that, paragraph (k)(5)(i)(A) of the rule, which articulates the necessary contents of the written medical report given to the employee under the standard's medical surveillance requirements, ''equates 'beryllium sensitization' with an employee's status as 'confirmed positive' which is consistent with the original 2017 standards, but not consistent with the decoupling of these terms in the current proposal'' (Document ID 2208, p. 5).

Following consideration of the concerns raised by these organizations, OSHA disagrees that removing the phrase ''beryllium sensitization'' from the first sentence of the definition of *confirmed positive* will create confusion, reduce worker protections, or conflict with other aspects of the regulatory text. The provisions of the standards intended to benefit workers who may be sensitized (specifically, evaluation at a CBD diagnostic center and medical removal protection) are available to all workers who meet the definition of *confirmed positive.* Therefore, removing the term ''beryllium sensitized'' from the first sentence of the definition will not change the access to these benefits for any workers. By removing the term ''beryllium sensitized'' from the first sentence of the definition, OSHA seeks to ensure that workers with three borderline BeLPT results (or other patterns of test results that some PLHCPs may consider ambiguous) will receive the benefits of the standard regardless of whether their PLHCP views their results as firm evidence of

[7] ACOEM also stated that the proposed change would create confusion by creating ''misalignment with existing legislation, including the Energy Employee Occupational Illness Compensation Program Act (1999) and the U.S. Department of Energy's beryllium rule (Document ID 2213, p. 2). To the extent that ACOEM suggests that OSHA is obliged to adopt definitions that match those used in other statutes of federal regulations for the same or similar terms, ACOEM is mistaken. OSHA has discretion to adopt appropriate definitions for the terms in its beryllium standards, including the definition of confirmed positive, which serves as a trigger for certain provisions of the beryllium standards. As explained further below, OSHA does not agree that the definition of *confirmed positive* that it is adopting in this rule will result in confusion.

sensitization.[8] Furthermore, OSHA disagrees that removing the reference to ''beryllium sensitized'' will lead to confusion about what the BeLPT results are supposed to indicate because the second sentence of the definition of *confirmed positive* makes clear that a worker who has been diagnosed with beryllium sensitization would also meet the definition of *confirmed positive:* ''It [*i.e.,* confirmed positive] also means the result of a more reliable and accurate test indicating a person has been identified as having beryllium sensitization.''

OSHA also disagrees with the commenters' concern that the proposed definition will create inconsistencies within the standard. CEL's concern that removing the term ''beryllium sensitized'' from the first sentence of *confirmed positive* will create an inconsistency with paragraph (k)(5)(i)(A) because that provision ''equates 'beryllium sensitization' with an employee's status as 'confirmed positive' is misplaced. Paragraph (k)(5)(i)(A), which is not being changed in this final rule, requires that the licensed physician's written medical report for the employee include any detected medical condition, such as CBD or beryllium sensitization (*i.e.,* the employee is confirmed positive, as defined in paragraph (b) of the standard), that may place the employee at increased risk from further airborne exposure. As explained above, the purpose of the agency's definition of *confirmed positive* is to establish the test results that trigger the benefits in the standards aimed at protecting potentially beryllium-sensitized individuals (specifically, an evaluation for CBD with continued medical surveillance, and the option of medical removal protection). The phrasing of the *confirmed positive* definition does not affect the relevant detectable medical conditions that physicians are instructed to include in their written reports under paragraph (k)(5)(i)(A). The reference to *confirmed positive* in paragraph (k)(5)(i)(A) is intended to signal that, where a physician has identified a worker as having beryllium sensitization, that individual also satisfies the definition of *confirmed positive.*

Nor does removing the reference to ''beryllium sensitized'' from the definition of *confirmed positive* create an inconsistency with the standards' definitions of *chronic beryllium disease* or *beryllium sensitization.* As discussed above, the definition of *confirmed positive* explains the test results that, in the context of these beryllium standards, triggers the benefits intended to protect individuals who may be beryllium-sensitized. Such results include both employees who are identified as having beryllium sensitization, and employees who have three borderline BeLPT results (or other patterns of test results that some PLHCPs may consider ambiguous) but may not be affirmatively identified by the physician as beryllium-sensitized. The definitions of *beryllium sensitization* and *chronic beryllium disease (CBD)* are informational definitions that do not trigger any specific protections in the standards, and are solely included to help readers generally understand those terms. The definition of *chronic beryllium disease (CBD)* clarifies that individuals that have CBD have beryllium sensitization, and the definition of *beryllium sensitization* explains that ''[w]hile not every beryllium-sensitized person will develop CBD, beryllium sensitization is essential for development of CBD.'' OSHA finds no conflict between these definitions and the definition of *confirmed positive.*

An additional change to the definition of *confirmed positive* provides that the findings of two abnormal, one abnormal and one borderline, or three borderline results need to occur from BeLPTs conducted within a three-year period. This change in the definition of *confirmed positive* differs from the proposal and is based on comments submitted to the record following publication of the 2018 NPRM for general industry and the 2019 NPRM for construction and shipyards.

The 2017 final rule did not specify a time limit within which the BeLPT tests that contribute toward a finding of ''confirmed positive'' must occur. After publication of the 2017 final rule, stakeholders suggested to OSHA that the definition of *confirmed positive* could be interpreted as meaning that findings of two abnormal, one abnormal and one borderline, or three borderline results over any time period, even as long as 10 years, would result in the employee being confirmed positive and automatically referred to a CBD diagnostic center for evaluation. As discussed in the preamble to the 2017 standard, clinical evaluation for CBD involves bronchoalveolar lavage and biopsy (82 FR at 2497) which, like all invasive medical procedures, carry risks of infection and other complications.[9] Given such risks, and the possibility that some repeat abnormal or borderline results obtained over a long period of time could be false positives, it was not the agency's intent that workers with rarely recurring abnormal or borderline BeLPT results should necessarily proceed to evaluation at a CBD diagnostic center unless recommended to do so by their examining physician. At the same time, OSHA notes that under paragraph (k)(5)(iii), the licensed physician performing the BeLPT testing retains the discretion to refer an employee to a CBD diagnostic center if the licensed physician deems it appropriate, regardless of the BeLPT result.

In the 2019 NPRM, OSHA proposed that any combination of test results specified in the definition of *confirmed positive* must result from the tests conducted in one cycle of testing, including the initial BeLPT and the follow-up retesting offered within 30 days of an abnormal or borderline result (paragraph (k)(3)(ii)(E)). As outlined in proposed paragraph (k)(3)(ii)(E), an employee would be offered a follow-up BeLPT within 30 days if the initial test result is anything other than normal, unless the employee had been confirmed positive (*e.g.,* if the initial BeLPT was performed on a split sample and showed two abnormal results). Thus, for example, if an employee's initial test result was abnormal, and the result of the follow-up testing offered to confirm the initial test result was abnormal or borderline, the employee would be confirmed positive. Alternatively, if the result of the follow-up testing offered to confirm the initial abnormal test result was normal, the employee would not be confirmed positive. Any additional abnormal or borderline results obtained from the next required BeLPT for that employee (typically, two years later) would not identify that employee as confirmed positive under the proposed modification to *confirmed positive.*

[8] OSHA is also unpersuaded by the comments expressing concern that OSHA's revision of the definition of *confirmed positive* in the beryllium standards would affect workers' ability to obtain workers compensation benefits. ATS's comment did not explain how the definition of confirmed positive in the beryllium standard could affect worker's compensation claims, but at least one other commenter questioned the ATS's assertion (see Document ID 0038, p. 19). NJH expressed concern that the change would prevent individuals from being diagnosed with beryllium sensitization, which would trigger their eligibility for benefits under some states' workers compensation programs (Document ID 2243, p. 3). OSHA intends for the definition of confirmed positive in paragraph (b) to serve only as a trigger for certain provisions of the beryllium standards. How OSHA defines this phrase for purposes of the beryllium standards in no way limits healthcare professionals' ability or incentive to diagnose beryllium sensitization.

[9] Bronchoalveolar lavage is a method of ''washing'' the lungs with fluid inserted via a flexible fiberoptic instrument known as a bronchoscope, removing the fluid and analyzing the content for the inclusion of immune cells reactive to beryllium exposure (82 FR at 2497).

OSHA requested comments on the appropriateness of this proposed time period.

Several stakeholders, including Materion, NJH, ACOEM, AFL–CIO, CEL, and USW, submitted comments regarding OSHA's proposal to require that the test results specified in the agency's definition of confirmed positive must occur within a single testing cycle. OSHA also received comments from Materion, NJH, ATS, DOSH, NSSP, USW, and AOEC on this proposed revision in the 2018 NPRM for general industry.

Commenters focused on several aspects of the proposed timing. First, many of the comments focused on the logistics of OSHA's proposed change. NJH, ACOEM, AFL–CIO, USW, ATS, DOSH, AOEC, and NSSP all indicated that requiring results with a 30-day testing cycle could create logistical challenges, for example due to repeat testing requirements or for businesses in remote areas with access to limited healthcare facilities (Document ID 2211, pp. 5–7; 2213, pp. 2–3; 2244, pp. 17–18; OSHA–2018–0003–0033, p. 5; OSHA–2018–0003–0022, p. 4; OSHA–2018–0003–0021, p. 4; OSHA–2018–0003–0024, p. 1; OSHA–2018–0003–0027, p. 3). Materion agreed with these commenters that ''the 30 day initial testing period may not allow enough time to complete retesting of workers due to issues beyond the control of the employer or employee'' (Document ID 2237, p. 5).[10]

In this final rule and preamble, OSHA clarifies that it did not intend that the initial and follow-up tests had to be completed and interpreted within 30 days. OSHA intended that the test results used to determine if a worker is confirmed positive be obtained during one cycle of testing (*i.e.,* an initial or periodic examination), including follow-up testing conducted within 30 days of an abnormal or borderline result.

Secondly, stakeholders commented on the appropriateness of limiting the use of the BeLPT from one test cycle in determining if a worker is confirmed positive. Commenters from public health organizations raised concerns that limiting test results to one test cycle would affect the ability to identify workers who should be referred for a CBD evaluation and receive other protections under the standard. NJH stated that OSHA's proposal to place a time constraint on confirmation testing results would reduce workers' ability to obtain medical testing and workplace protections that are required by the rule.[11] NJH proposed the following definition be used: ''Confirmed positive means the person tested has beryllium sensitization as demonstrated by two abnormal BeLPT test results, an abnormal and a borderline test result, three borderline test results or the result of a more reliable and accurate test for sensitization'' (Document ID 2243, p. 3).

Other public health organizations, including ACOEM, DOSH, ATS, NSSP, AOEC, and CEL, agreed with NJH that workers who are sensitized to beryllium may show varying test results over time, and restricting the time period for determining ''confirmed positive'' status to 30 days would cause sensitized individuals to go undetected (Document ID 2213, pp. 2–3; 2208, pp. 3–4; OSHA–2018–0003–0023, p. 2; OSHA–2018–0003–0021, p. 2; OSHA–2018–0003–0027, p. 3; OSHA–2018–0003–0028, p. 2). ACOEM commented that the 30-day cycle would exclude workers who might have confirmatory tests several years after the initial first positive result, and stated that there is potential for confirmatory results could take up to 10 years to occur. ACOEM also stated that ''[t]here is no justification or need for a restrictive time limit for the occurrence of confirmatory tests,'' but if OSHA determined that a time limit was needed as a practical matter, ACOEM stated that at least three years should be permitted for repeat testing to identify confirmed positive results (Document ID 2213, p. 2).

ATS and AOEC recommended that results from tests performed up to at least three years after the initial abnormal or borderline test result should be used to determine whether the person is confirmed positive for beryllium sensitization (Document ID OSHA–2018–0003–0021, p. 2; OSHA–2018–0003–0028, p. 2). ATS stated that a timeframe of at least three years, which encompasses two rounds of regularly scheduled testing required biennially by the beryllium standard, would adequately address its concerns regarding logistical feasibility, would improve diagnostic accuracy, and would help ensure that sensitized workers are identified (Document ID OSHA–2018–0003–0021, p. 4). The ATS Statement on beryllium sensitization recommends a three-year testing cycle to confirm beryllium sensitization (Document ID 0364, p. e35). AOEC agreed that consideration of BeLPT test results obtained during a time period of at least three years ''will increase the potential that workers are accurately diagnosed with beryllium sensitization [and] will receive the necessary care'' (Document ID OSHA–2018–0003–0028 p. 2). NABTU noted that the Department of Energy's (DOE) Building Trades Screening Program also uses a three year testing cycle to confirm workers positive for sensitization (Document ID 2236, p. 2). CEL also commented that ''OSHA should significantly lengthen the period allowed between initial and confirmatory testing and develop a testing protocol that is both practicable and based on science'' (Document ID 2208, p. 4).

The approaches recommended by the ATS and the AOEC are similar to the approach used by NJH in providing medical surveillance consultation to workforces that use beryllium. NJH stated that, if an individual's BeLPT results are abnormal and normal on their initial round of BeLPT testing, they will usually request another BeLPT within a month. If the result of that test is normal, they do not request further testing until the next regularly scheduled BeLPT. If the result of the next regularly scheduled BeLPT comes back abnormal, they refer the worker for clinical evaluation even though the tests are separated by the two-year testing cycle (Document ID OSHA–2018–0003–0022, p. 5).

NJH submitted new, unpublished evidence to the record supporting the appropriateness of extending the test period to at least three years (Document ID 2243, p. 5). NJH's unpublished data was collected from patients that were ultimately diagnosed with CBD by either NJH or Oak Ridge Associated Universities (ORAU). The data (as reported in Tables 1 and 2 below) shows the timeframe from the initial abnormal BeLPT to the second abnormal BeLPT that is required to trigger a clinical evaluation for CBD (Document ID 2243, p. 5).

[10] In their comments on the 2018 general industry NPRM, Materion supported the proposed definition of *confirmed positive,* stating that a 30-day allowance for follow-up testing after a first abnormal or borderline BeLPT result is appropriate to ensure that testing is completed in a timely manner (Document ID OSHA–2018–0003–0038, p. 17).

[11] As discussed above, NJH expressed concern that OSHA's proposed definition of confirmed positive could prevent individuals from being diagnosed with beryllium sensitization, and thereby prevent them from receiving workers' compensation benefits (Document ID 2243, p. 3). OSHA intends the definition of confirmed positive to serve only as a trigger for certain provisions of the beryllium standards. How OSHA defines this phrase for purposes of the beryllium standards in no way limits healthcare professionals' ability or incentive to diagnose beryllium sensitization.

TABLE 1—NJH DAYS TO CONFIRMED POSITIVE

Number of days	Number confirmed	Percent confirmed
30	44	23
60	93	48
90	122	63
120	136	70
150	144	74
180	155	80
1 year	169	87
2 years	181	93
3 years	186	96
> 3 years ...	194	100

TABLE 2—ORAU DAYS TO CONFIRMED POSITIVE

Number of days	Number confirmed	Percent confirmed
30	42	17
60	107	44
90	126	52
120	139	58
150	147	61
180	148	61
1 year	182	76
2 years	201	83
3 years	206	85
> 3 years ...	241	100

Tables 1 & 2 adapted from Document ID 2243, p. 5.

As indicated by the evidence in Tables 1 and 2, many workers who develop CBD have abnormal or borderline results that do not immediately repeat upon retesting. To the contrary, many CBD patients have a series of tests which alternate between normal and abnormal. BeLPT data from Table 1, based on NJH's extensive experience, show that the BeLPT does not yield consistently abnormal results among CBD patients. Of 194 patients diagnosed with CBD at NJH, the length of time between abnormal results ranged from 14 days to 5.8 years, with a 95th percentile of 2.9 years. In this group, 150 patients (or 77 percent) would not have been evaluated for CBD if two abnormal BeLPT results were required to occur within a 30-day testing cycle (Document ID 2243, p. 5; OSHA–2018–0003–0022, p. 5). Similar findings are shown in Table 2 (BeLPT data from ORAU, also submitted by NJH (Document ID 2238, p. 5)). Data from Table 2 indicates that 83 percent (199 patients) of individuals who went on to develop CBD would not have been evaluated for CBD if two abnormal BeLPT results were required to occur within a 30-day testing cycle (Document ID 2243, p. 5).

Although the information NJH submitted to the record is unpublished, their findings are consistent with published studies. Kreiss et al. (1997) reported that nine individuals had initial abnormal BeLPT results followed by two normal tests; six of those individuals were re-tested approximately one year later and four were confirmed positive for beryllium sensitization based on abnormal BeLPT results (Document ID 1360, pp. 610–12). These findings suggest a high rate of false-negative results and are consistent with results reported in a study by Stange et al. (2004). That study found an average false-positive rate of 1.09 percent, and a false-negative rate of 27.7 percent for the BeLPT (Document ID 1402, p. 459).

Stakeholders provided similar comments, in response to OSHA's proposed definition of *confirmed positive* in the 2018 general industry NPRM, which was identical to the revised definition of *confirmed positive* proposed in the 2019 NPRM for construction and shipyards. For example, NSSP cited ORAU data (the same data submitted by NJH and shown in Table 2) from healthcare providers to demonstrate that a 30-day testing cycle is insufficient to properly identify sensitized workers. NSSP noted that, in over 20 years of conducting BeLPTs in worker populations, ORAU observed approximate median times of 45 days (range of 3 days to 16 years) between first and second abnormal tests, 1.5 years (range of 30 days to 11 years) for the abnormal/borderline test combination and 1 year (range of 30 days to 11 years) for three borderlines (Document ID OSHA–2018–0003–0027, p. 3). Under the proposed 30-day requirement, the NSSP stated that the majority of workers who have been identified as sensitized in the past would not meet the proposed definition of confirmed positive (Document ID OSHA–2018–0003–0027, p. 3).

Following consideration of the comments and of the new evidence submitted to the record following the proposal, OSHA is convinced that some workers who are ultimately found to be sensitized to beryllium or diagnosed with CBD may have alternating abnormal and normal BeLPT results, and that the time period for abnormal or borderline results to repeat can be months or years. OSHA is also convinced that requiring two abnormal, an abnormal and borderline, or three borderline results to occur in one cycle of an initial or periodic exam before an employee can be confirmed positive could result in beryllium sensitization or CBD going undetected in many employees. This is demonstrated by the unpublished data submitted by NJH showing that a substantial percentage of individuals with CBD (77 percent) may not have been referred for further testing based on results obtained within a 30-day cycle of testing and is confirmed by the data from ORAU that NSSP presented in response to the 2018 general industry NPRM (85 FR42605). Therefore, OSHA finds that its proposed change would have the unintended and unacceptable consequence of reducing employee protections because some employees who are sensitized or have CBD would be deprived of the benefits available through the standard, such as a timely evaluation at a CBD diagnostic center. In addition, requiring that results be obtained in one test cycle is not consistent with the approaches currently applied or supported by the medical community.

For these reasons, OSHA is revising the definition of *confirmed positive* to specify that the findings of two abnormal, one abnormal and one borderline, or three borderline results must be obtained from BeLPTs conducted within a three-year period. OSHA agrees with the ATS and the AOEC that a three-year period will facilitate the identification of sensitized workers enrolled in medical surveillance (see Document ID OSHA–2018–0003–0022, p. 5; OSHA–2018–0003–0028, p. 2; Document ID 0364, p. e35). In addition, this approach is consistent with the practices and recommendations from the public health community, including NJH and DOE, which provides beryllium-related medical surveillance consultation. OSHA believes that allowing a worker to be confirmed positive based on BeLPT results obtained over a three-year time period strikes a reasonable balance that would allow a timely evaluation for CBD, while at the same time, maintaining OSHA's original intent that a confirmed positive finding not be based on results obtained over an indefinite time period.

OSHA emphasizes that this revision does not modify the requirements of paragraph (k)(3)(ii)(E). Under that paragraph, if the results of the BeLPT are other than normal, a follow-up BeLPT must be offered within 30 days of receiving the results, unless the employee has been confirmed positive. Only other than normal BeLPT results must be followed up within 30 days of the same test cycle (*i.e.,* an initial or periodic medical examination).

As an example, an employee who receives a borderline result during one periodic examination conducted in 2020 would be retested within 30 days, and if the follow-up test is normal, testing would stop. That employee would be offered another BeLPT at the next

periodic examination conducted in 2022. However, if the result of the 2022 test is borderline, the employee would be retested within 30 days of that test result receipt, and if the follow-up test is borderline, the employee would be confirmed positive because of receiving three borderline tests within three years. A three-year period for the employee to be confirmed positive would ensure sufficient time for such follow-up tests that may need to be conducted over two cycles of medical examinations.

In their comments on the 2018 NPRM for general industry, the U.S. Department of Defense (DOD) recommended changing the term ''confirmed positive'' to another term such as ''confirmed non-negative,'' ''confirmed finding of concern,'' or ''pattern of concern.'' According to the DOD, the term ''confirmed positive'' typically ''implies an initial positive test that was repeated with another test or another, more sensitive test, which confirms the initial positive test result'' (Document ID OSHA–2018–0003–0029, p. 2). As OSHA explained in the general industry final rule Summary and Explanation (85 FR 42606), however, the CBD literature, commonly treats individuals as confirmed positive for sensitization through sequentially conducted BeLPTs (see, for example, the ATS Statement on Diagnosis and Management of Beryllium Sensitivity and Chronic Beryllium Disease, ATS 2014, Document ID 0364, p. e41; see also Document ID 1543, 0603, 0398, 1403, 1449). Additionally, OSHA again emphasizes that terms defined in the beryllium standards are defined only for purposes of the standard and are not intended as diagnostic, scientific, or all-purpose definitions. OSHA believes that its definition of *confirmed positive* clearly indicates what that term means for purposes of the beryllium standards and therefore disagrees with DOD's concern that the term may cause confusion. Accordingly, OSHA is retaining the term ''confirmed positive'' in this final standard.

Emergency

Finally, OSHA proposed to remove references to the term *emergency* throughout the construction and shipyards standards, including the definition in paragraph (b). The agency explained that, unlike in general industry, the construction and shipyards industries—where exposure to beryllium is almost exclusively limited to trace quantities from abrasive blasting and welding operations—do not have emergencies in which exposures to beryllium will differ from the normal conditions of work. Specifically, OSHA reasoned that an uncontrolled release of airborne beryllium in these industries (such as a release resulting from a failure of the blasting control equipment, a spill of the abrasive blasting media, or failure of the ventilation system for welding operations) would occur only during the performance of routine tasks already associated with the airborne release of beryllium; that is, during abrasive blasting or welding processes. The agency explained that it anticipates employees working in the immediate vicinity of an uncontrolled release of airborne beryllium in these contexts would already be protected from exposure by the standards' existing requirements for respiratory protection (paragraph (g)), medical surveillance (paragraph (k)), and hazard communication (paragraph (m)) due to their existing exposure to airborne beryllium (84 FR at 53909; see also id. at 53912, 53918–20).

Accordingly, OSHA preliminarily determined that no requirements should be triggered for emergencies in construction and shipyards and proposed to remove references to emergencies in provisions related to respiratory protection (paragraph (g)), medical surveillance (paragraph (k)), and hazard communication (paragraph (m)). The agency also preliminarily determined that without these provisions it would be unnecessary to define the term *emergency* in paragraph (b) (84 FR 53909).

Some commenters objected to the proposed removal of provisions relating to emergencies. Specifically, these commenters took issue with OSHA's determination that an uncontrolled release of beryllium in the construction and shipyards industries would not create exposures that differ from normal operations. For a full discussion of these comments and the agency's response, see the summary and explanation for paragraph (g). In short, the agency is not persuaded that the types of uncontrolled releases that necessitated emergency provisions in the general industry standard are present in the construction and shipyards industries. Accordingly, OSHA is finalizing its proposal to remove all references to ''emergency'' or ''emergencies'' throughout the construction and shipyards standards. Because those terms no longer appear in the standards' requirements, OSHA is also finalizing its proposal to remove the definition of the term ''emergency'' from paragraph (b).

This final rule makes one additional revision to paragraph (b) in both standards. As explained in the Summary and Explanation for paragraph (j), OSHA is removing the reference to HEPA-filtered vacuuming in the housekeeping requirements of revised paragraphs (j)(1) and (2). In the NPRM, OSHA neglected to remove the definition for *high-efficiency particulate air (HEPA) filter* in paragraph (b), despite the fact that there are no longer any provisions in either standard that reference HEPA-filters. OSHA has removed this definition in this final rule. This change has no substantive effect on any requirements in the standards and OSHA considers this a technical correction.

Paragraph (f) Methods of Compliance

Paragraph (f) of the beryllium standards for construction and shipyards requires employers to implement methods for reducing employee exposure to beryllium through a detailed written exposure control plan, engineering and work practice controls, and a prohibition on rotating employees to achieve compliance with the PEL. In the 2017 final rule, OSHA determined that written plans would ''be instrumental in ensuring that employers comprehensively and consistently protect their employees'' (82 FR at 2668). OSHA also concluded that requiring reliance on engineering and work practice controls, rather than on respirator use, is consistent with good industrial hygiene practice and with OSHA's traditional approach to health standards (82 FR at 2672).

While extending these provisions to the construction and shipyards industry in the 2017 final rule, OSHA acknowledged that exposures to beryllium in these industries are limited primarily to a few operations, abrasive blasting in construction and shipyards and some welding operations in shipyards (82 FR at 2637–38). With respect to abrasive blasting, while the extremely high exposures to airborne particulate during the blasting operation can expose workers to beryllium in excess of the PEL, the blasting materials contain only trace amounts of beryllium (materials such as coal slag normally contain approximately 0.11 µg/g or 0.00001%) (see 2017 FEA, Document ID 2042, p. IV–632, Table IV.69; 82 FR at 2638). Moreover, OSHA had evidence of beryllium exposure during only limited welding operations in shipyards (only 4 of 127 sample results showed detectable levels of airborne beryllium) (see 2017 FEA, Document ID 2042, p. IV–580). Nonetheless, OSHA applied the same requirements to these industries as to general industry, where the operations with beryllium exposure are significantly more varied and employees

are exposed to materials with significantly higher beryllium content.

In the 2019 NPRM, OSHA proposed to revise the requirements in paragraph (f) in light of the very narrow set of affected operations and the limited extent of beryllium exposure in the construction and shipyards industries. OSHA explained that some provisions in paragraph (f)—although appropriate in the general industry context—may be unnecessary to protect employees in the construction and shipyards industries (84 FR at 53909–10). Likewise, OSHA preliminarily determined that provisions relating solely to dermal contact with beryllium should not apply in the construction and shipyards industries, where exposures primarily involve materials containing only trace amounts of beryllium (84 FR at 53909) or, in the case of welding, where OSHA believes the process and materials do not present a dermal contact risk (see 84 FR at 53906). Accordingly, OSHA proposed several revisions to both paragraph (f)(1) (Written exposure control plan) and (2) (Engineering and work practice controls) in the construction and shipyards standards.

For both the construction and shipyards beryllium standards, paragraph (f)(1) in this final rule requires the employer to establish, implement, and maintain a written exposure control plan that includes: a list of operations and job titles reasonably expected to involve exposure to beryllium; a list of engineering controls, work practices, and respiratory protection required by paragraph (f)(2); and a list of personal protective clothing and equipment required by paragraph (h) (see paragraphs (f)(1)(i)(A), (B) and (C), respectively). For the construction standard, the written plan must also include procedures to restrict access to work areas where exposures to beryllium could reasonably be expected to exceed the TWA PEL or STEL (paragraph (f)(1)(i)(D)). Both the construction (paragraph (f)(1)(i)(E)) and shipyards (paragraph (f)(1)(i)(D)) standards require the employer to include procedures to ensure the integrity of each containment used to minimize exposures to employees outside of containments (such as tarps or structures used to keep sandblasting debris within an enclosed area during abrasive blasting operations). Paragraphs (f)(1)(ii) and (iii) further provide requirements for maintaining, reviewing, and evaluating the written exposure control plan and providing access to the plan to each employee who is, or can reasonably be expected to be, exposed to airborne beryllium. In the construction standard, the written exposure control plan must be implemented by a competent person, as defined by paragraph (b) (paragraph (e)(2)).

Paragraph (f)(1) in this final rule contains several changes from the prior standards, as proposed in the December 2019 NPRM. First, OSHA proposed to revise paragraph (f)(1)(i)(A) by removing the words ''airborne'' and ''or dermal contact with'' as qualifiers for exposure to beryllium, so as to require simply a list of operations and job titles reasonably expected to involve exposure to beryllium. Second, OSHA proposed to revoke paragraphs (f)(1)(i)(B) and (C), which required additional lists of operations and job titles involving exposure at or above the action level and above the TWA PEL or STEL, respectively. OSHA reasoned that, given the small number of operations with beryllium exposure in construction and shipyards, the list of operations and job titles in these categories would be the same as those required by paragraph (f)(1)(i)(A). As such, any additional lists would be unnecessary and redundant (84 FR at 53910–11).

OSHA also proposed to revoke the requirements that the employer include in the written exposure control plan procedures for minimizing cross-contamination (paragraph (f)(1)(i)(D)) and procedures for minimizing the migration of beryllium within or to locations outside the workplace (paragraph (f)(1)(i)(E)) (84 FR at 53910). OSHA explained that the original intent of these requirements was to ensure that workers not involved in beryllium-related operations would not be unintentionally exposed to beryllium in excess of the PEL. With respect to the construction standard, OSHA reasoned that the requirement to include procedures in the written exposure control plan to restrict access to work areas where exposures to beryllium could reasonably be expected to exceed the TWA PEL or STEL (formerly paragraph (f)(i)(E), renumbered as (f)(i)(D)), along with the requirement that these procedures be implemented by a competent person (paragraph (e)(2)), would be sufficient to control cross-contamination and migration of beryllium from abrasive blasting operations. For the shipyard standard, OSHA retained requirements for regulated areas (paragraph (e)), which require that employers designate areas where exposures to beryllium could exceed the PELs and limit access to authorized employees. To further limit cross-contamination and migration, OSHA proposed to add a new paragraph in both the construction ((f)(1)(i)(E)) and shipyards ((f)(1)(i)(D)) standards to require that the written exposure control plan include procedures to ensure the integrity of each containment used to minimize exposures to employees outside the containment (such as tarps or structures used to keep sandblasting debris within an enclosed area during abrasive blasting operations).

OSHA next proposed to remove the requirement that the employer include in the written exposure control plan procedures for removing, laundering, storing, cleaning, repairing, and disposing of beryllium-contaminated personal protective clothing and equipment, including respirators (paragraph (f)(1)(i)(H)), because the agency had also proposed to remove several requirements pertaining to such procedures (84 FR at 53911). Specifically, OSHA proposed to remove the requirements that the employer ensure that: Beryllium-contaminated PPE is stored and kept separate from street clothes and that storage facilities prevent cross-contamination as specified in the written exposure control plan (paragraph (h)(2)(iii)); beryllium-contaminated PPE is only removed from the workplace by employees who are authorized to do so for the purpose of laundering, cleaning, maintaining, or disposing of such PPE (paragraph (h)(2)(iv)); PPE removed from the workplace for laundering, cleaning, maintenance, or disposal be placed in closed, impermeable bags or containers and labeled appropriately (paragraph (h)(2)(v)); and any person or business entity who launders, cleans or repairs PPE required by the standards be informed, in writing, of the potentially harmful effects of beryllium and of the need to handle the PPE in accordance with OSHA's beryllium standards (paragraph (h)(3)(iii)). With the proposed removal of those paragraphs, the remaining requirements that would relate to paragraph (f)(1)(i)(H) include paragraphs (h)(2)(i) and (ii), pertaining to removal of PPE; paragraph (h)(3)(i), pertaining to cleaning and maintenance of PPE; and paragraph (h)(3)(ii), pertaining to methods of removing beryllium from PPE. In light of the proposed removal of several of the requirements for removing, laundering, storing, cleaning, repairing, and disposing of beryllium-contaminated PPE, OSHA stated that it believed it unnecessary to include such procedures in the written plan (84 FR at 53911).

Finally, as with paragraph (f)(1)(i)(A), OSHA proposed to revise paragraph (f)(1)(ii)(B) to refer simply to ''exposure to'' rather than ''airborne exposure to or dermal contact with'' beryllium (84 FR

at 53911).[12] OSHA's proposal to revise this paragraph, which previously required the employer to review, evaluate, and update the written exposure control plan, as necessary, when notified that an employee shows signs or symptoms associated with airborne exposure to or dermal contact with beryllium, is consistent with other paragraphs where the agency is simplifying the language in a similar manner (*e.g.,* paragraphs (k)(3)(ii)(A) and (k)(4)(i), Medical surveillance) and is not intended to alter the meaning of the provision. OSHA received a number of comments on its proposed revisions to paragraph (f). These comments and OSHA's final determinations are discussed below.

Comments on the Nature and Extent of Beryllium Exposure in the Construction and Shipyards Industries

A primary issue raised by several commenters, both with respect to the proposed changes to paragraph (f) and to the rest of the proposal, involved whether OSHA has appropriately characterized the jobs and operations in the construction and shipyards industries that present beryllium exposures of concern. On the one hand, the National Electrical Contractors Association (NECA), the National Demolition Association (NDA), and the Construction Industry Safety Coalition (CISC) argued that a written exposure control plan is unnecessary in the construction industry in light of the limited operations that create exposures of concern. Specifically, NECA contended that beryllium exposure in construction is limited to abrasive blasting, and therefore ''promulgating a rule that would require all employers to document and implement a written exposure control plan for beryllium creates additional and undue burdens on employers and employees in the construction industry'' (Document ID 2209, p. 1). CISC and NDA both stated that, in order to create a written exposure control plan, construction employers ''will be required to assess all workplace exposures, jobs, tasks, and work to be performed to determine whether beryllium is present in trace amounts'' (Document ID 2203, p. 16; 2205, p. 2). According to CISC, this is a particular problem in the construction industry because of the ''range of exposures that could exist as a result of naturally occurring beryllium or airborne exposures of beryllium from aggregate or other components of construction material containing trace amounts of beryllium'' (Document ID 2203, p. 2). Like NECA, CISC argued that it would be inappropriate to require employers to engage in the ''daunting task'' of analyzing beryllium exposures on their worksites, given that OSHA has not identified exposures of concern in construction outside of abrasive blasting with certain media (Document ID 2203, p. 16). NDA echoed CISC, asserting that this would be an ''unnecessary burden'' and ''inappropriate'' in the construction industry (Document ID 2203, p. 2).

CISC suggested that, instead of including a written exposure control plan provision in the beryllium standard for construction, OSHA should consider adding new requirements to paragraph (f) of the ventilation standard for construction (29 CFR 1926.57) that set forth additional protective measures to be used when abrasive blasting with media containing <0.1 percent by weight of beryllium. These new provisions, CISC stated, could include the requirements of written exposure control plans, regulated areas, specified PPE, and other provisions to protect workers in and around such abrasive blasting (Document ID 2203, p. 16). While industry representatives NECA, NDA, and CISC argued that OSHA's approach to the written exposure control plan is too broad, other commenters representing unions and public health organizations argued that the proposal is too narrow. Specifically, these commenters took issue with OSHA's focus on abrasive blasters and welders. Several commenters suggested potential exposure sources apart from abrasive blasting and welding operations and argued that some of these exposures could involve beryllium in greater than trace amounts. For example, NJH contended that there are ''other operations, jobs and tasks that can generate beryllium exposure in the construction and shipyard sectors, not limited to abrasive blasting and welding'' (Document ID 2211, p. 7). NJH cited studies involving demolition operations at an Army site in Ohio (*https://www.lrb.usace.army.mil/Missions/HTRW/FUSRAP/Luckey-Site*); construction trades workers exposed to beryllium in DOE facilities (Welch et al., 2004 & 2013); workers performing clean-up of beryllium-using sites (Sackett et al., 2004); workers grinding beryllium-composite tools (Kreiss et al., 1993); and workers resurfacing copper-beryllium tools (Mikulski et al, 2011) (Document ID 2211, p. 7) (see detailed discussion of studies later in this section). NJH also noted, anecdotally, that it has diagnosed CBD in contract construction workers who worked in primary beryllium and beryllium manufacturing facilities (Document ID 2211, p. 7).

AFL–CIO similarly indicated that construction workers such as laborers, welders, carpenters, surveyors, and electricians involved in demolition, renovation, maintenance, repair, and construction projects performed in general industry sites where beryllium was previously used, as well as those who may use non-sparking tools, could be exposed to beryllium (Document ID 2210, p. 5; 2239, p. 1). ACOEM likewise argued that workers in the construction industry can be exposed from decommissioning and demolition work (Document ID 2213, p. 3). Some members of Congress also identified the maintenance of non-sparking tools and working with unspecified beryllium alloys in high-tech naval vessels as activities that expose workers to materials containing beryllium above trace levels (Document ID 2208, p. 6).

Relying largely on studies performed at Department of Energy nuclear weapon sites (some of the same studies cited by NJH), NABTU commented that workers performing maintenance, renovation, repair, and demolition in beryllium processing facilities may be exposed to residual beryllium in ventilation systems, floors, insulation materials, and in floor crevices (Document ID 2202, p. 2; 2240, p. 3). Referencing OSHA's decision in the 2017 final rule to apply the construction standard to all occupational exposures to beryllium, rather than limiting the requirements to abrasive blasting operations, NABTU contended that OSHA's proposal departs from the agency's prior conclusions without explaining this supposed departure. According to NABTU, OSHA has abandoned its position that the construction standard should ''cover all occupational exposures to beryllium'' and instead ''decided only to address the 'primary' means of exposure'' (Document ID 2240, pp. 2–5).

In addition to potential exposures from existing operations, USW contended that the proposed revisions to the construction and shipyard standards fail to account for ''all future operations'' that might use beryllium. By tailoring the standards to the specific exposures in abrasive blasting and

[12] In the Amendments to Standards section of the NPRM (84 FR at 53951–54), which identifies precisely how the proposal would amend the Code of Federal Regulations, OSHA inadvertently failed to remove the word ''airborne'' as a qualifier for ''exposure'' in paragraph (f)(1)(ii)(B) of both standards. However, the summary and explanation of paragraph (f) clearly identified OSHA's intent to remove both ''airborne'' and ''dermal contact with'' from the provision and leave simply ''exposure to beryllium'' (see 84 FR at 53911). The only commenter to address the change referred to the correct language (NJH, Document ID 2211, p. 9). Accordingly, OSHA considers this a harmless error and has corrected the appropriate language in the Amendments to Standards section of this final rule.

welding operations, USW contends that OSHA is making a ''dangerous assumption'' that it makes ''in no other health standard'' (Document ID 2212, p. 2). According to USW: ''If a new chemical product is synthesized from 1,3-butadiene, the 1,3-butadiene standard will apply in its entirety. If arsenic finds a new use in semiconductors, the employer will be expected to comply with the entire arsenic standard. . . . However, under the OSHA proposal, if metallic beryllium, a beryllium alloy, ceramic or other compound is someday used on a construction site or in a shipyard, exposed workers will lack important protections enjoyed by their counterparts in general industry'' (Document ID 2212, p. 2). USW echoed NABTU's assertion that OSHA's proposal neglects workers beyond abrasive blasters and welders and concluded that ''[o]nly by including all the general industry protections in the shipyard and construction standards can OSHA fulfill [its] mandate'' to protect all workers (Document ID 2212, p. 4).

Those commenters who participated in the public hearing also raised these concerns in their testimony. Specifically, both NJH and USW again identified potential exposures from beryllium-containing non-sparking tools (Document ID 2222, Tr. 17–19, 48) and NJH discussed their organization's past diagnoses of CBD in contract construction workers in the primary beryllium and manufacturing industries (Document ID 2222, Tr. 48). USW again expressed concern about possible future applications of beryllium-containing materials in construction and shipyard work (Document ID 2222, Tr. 17–19). NABTU and AFL–CIO both reiterated their position that construction workers are exposed through activities other than abrasive blasting, particularly demolition, renovation, cleanup, and similar work in facilities that make and use beryllium-containing alloys (Document ID 2222, Tr. 84, 114–15). NABTU concluded that construction workers operating in facilities that use beryllium ''are not only potentially exposed to beryllium, but also, they will have dermal exposure to dust and debris that can contain beryllium at greater than trace amounts'' (Document ID 2222, Tr. 84–85).

On the whole, these commenters contend that, because there are work processes other than abrasive blasting and welding that could expose construction and shipyard workers to beryllium, OSHA should not remove or modify provisions of the beryllium standards—such as the written exposure control plan requirements—to tailor the standards to abrasive blasting and welding operations.

After reviewing all of these comments and the record as a whole, OSHA has determined that the record continues to lack sufficient data for the agency to characterize the nature, locations, or extent of beryllium exposure in application groups in current-day construction and shipyards sectors other than abrasive blasting and certain welding operations. Further, although OSHA continues to recognize the possibility of exposures beyond abrasive blasting and welding, the agency has reason to believe concerns regarding construction workers' dermal exposure to more than trace beryllium at general industry sites, although potentially justified in the past, likely do not reflect current exposures in these contexts.

As a result, OSHA finds that it is appropriate to follow through with its proposal to tailor certain provisions of the beryllium standards for construction and shipyards—including the written exposure control plan requirements—to those operations for which the agency has data. At the same time, OSHA disagrees with NECA, NDA, and CISC that the agency should strictly limit application of the beryllium standards to abrasive blasting and welding operations. Accordingly, both standards will continue to cover all occupational exposures to beryllium in these industries that meet the requirements of paragraph (a). OSHA's reasoning and the agency's response to each of the comments received on these topics is explained below.

OSHA's Analysis of the Record With Respect to Beryllium Exposures in the Construction and Shipyards Sectors

In the 2017 final rule, OSHA based its assessment of applications involving beryllium exposure, including its determination that abrasive blasting and welding are the only known sources of beryllium exposure in construction and shipyards, on the best evidence available in the record. This included a comprehensive review of the industrial hygiene literature; National Institute for Occupational Safety and Health (NIOSH) Health Hazard Evaluations and case studies of beryllium exposure; site visits conducted by an OSHA contractor (Eastern Research Group (ERG)); inspection data from OSHA's Integrated Management Information System (IMIS) and OSHA's Information System (OIS); and information submitted to the rulemaking docket in response to the notice of proposed rulemaking and informal public hearings, such as a comprehensive data set submitted by the Navy of beryllium sampling in a wide variety of operations (see 82 FR at 2583; 2017 FEA, Document ID 2042, pp. IV–17 to IV–22; Document ID 0144, 0145).

This review also included comments and testimony on potential exposure from sources other than abrasive blasting and welding (82 FR 2636–40). At the time, several commenters identified many of the same jobs and operations as those identified in this rulemaking. NIOSH commented that construction workers may be exposed to beryllium when demolishing buildings or building equipment, based on a study of workers demolishing oil-fired boilers (Document ID 1671, Attachment 1, pp. 5, 15; 1671, Attachment 21). At the initial public hearing in 2016, NJH testified that numerous studies had documented beryllium exposure, sensitization, and CBD in construction workers performing demolition and decommissioning and among workers who use non-sparking tools (Document ID 1756, Tr. 98). USW also testified that workers in the maritime industry use and may sharpen or grind beryllium-containing non-sparking tools and that shipyards might use beryllium for other tasks in the future. USW further stated that beryllium is a high-tech material and that exposure from beryllium containing alloys cannot be ruled out in high-tech operations such as aircraft carrier or submarine production (Document ID 1756, Tr. 270).

After reviewing the record, OSHA determined in the 2017 final rule that it did not have sufficient data on beryllium exposures in the construction and shipyard industries to characterize exposures in application groups other than abrasive blasting with beryllium-containing slags and certain welding operations in shipyards, and that it could not develop exposure profiles for construction and shipyard workers engaged in activities involving non-sparking tools, demolition of beryllium-contaminated buildings or equipment, or work with beryllium-containing alloys (82 FR at 2639). Even so, OSHA acknowledged USW's concerns about future beryllium use and found ''that there is potential for exposure to beryllium in construction and shipyards operations other than abrasive blasting.'' OSHA concluded that workers engaged in any such operations are exposed to the same hazard of developing CBD and other beryllium related disease (82 FR at 2639). Thus, OSHA chose to cover all occupational exposures to beryllium in those industries in order to ensure that the standards are broadly effective and address all potentially harmful beryllium exposures (82 FR at 2639).

While extending comprehensive beryllium standards to construction and shipyards and broadly aligning the ancillary provisions across the three sectors, OSHA also identified evidence in the record demonstrating meaningful distinctions between the sectors, and therefore promulgated different requirements for some ancillary provisions. For example, OSHA included requirements pertaining to beryllium work areas (BWAs) [13] in the standard for general industry but did not include such requirements in the standards for construction and shipyards. OSHA explained that commenters such as Newport News Shipbuilding (NNS) (Document ID 1657) and NIOSH (Document ID 1725, p. 30; 1755, Tr. 21) had brought to its attention difficulties in establishing and maintaining BWAs in an operation such as abrasive blasting (82 FR at 2660–61). NNS specifically highlighted the difficulty of such a requirement where beryllium is encountered in trace concentrations (82 FR at 2661; Document ID 1657, pp. 1–2).

Recognizing that the known exposures in construction and shipyards are to trace beryllium, and further recognizing the difficulties involved in establishing and maintaining BWA requirements in that context, OSHA decided not to require employers in construction and shipyards to establish and maintain BWAs (82 FR 2660–61). In this way, OSHA differentiated the construction and shipyards standards from the general industry standard and tailored portions of the former to the particular exposures in abrasive blasting operations. OSHA thereby made the standards more workable to implement in those sectors while maintaining an overall framework of protections broadly similar to those in general industry.

After publication of the 2017 final rule, on May 7, 2018, OSHA published a direct final rule (DFR) to clarify certain provisions of the beryllium standard for general industry as they related to materials containing trace amounts of beryllium (84 FR 19936). Specifically, the DFR clarified that provisions triggered by dermal contact with beryllium or beryllium contamination would apply only for dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight (83 FR at 19939). OSHA made clear that the agency only intended to regulate contact with trace beryllium to the extent that it caused airborne exposures of concern (83 FR at 19938).

In the 2019 NPRM, OSHA sought to more fully tailor the construction and shipyards standards to the known exposures in these sectors; that is, to abrasive blasting and welding operations. OSHA recognized that, in applying some provisions developed for general industry into the construction and shipyards standards in the 2017 final rule, the agency may have not fully accounted for the trace levels of beryllium in these operations. At the same time, the agency remained open to considering additional sources of exposure. In the NPRM and multiple times at the public hearing, OSHA requested information and data on any additional application groups (industries, occupations, processes, etc.) with potential exposure to beryllium in the construction and shipyards sectors beyond abrasive blasters and welders (84 FR at 53922; Document ID 2222, Tr. 33–35; 44–45; 75–76; 95–96; 125–26).

Although a number of commenters responded to OSHA's request, as outlined above, their comments in many cases relied on anecdotal or unverifiable assertions about additional exposure sources. For example, NABTU and AFL–CIO listed several jobs that they contend could involve exposure to beryllium, but provided nothing documenting current exposures in these operations. Likewise, NJH indicated anecdotally that they had diagnosed beryllium sensitization and CBD in contractors who had performed work at a primary beryllium facility, but due to the restrictions under the Health Insurance Portability and Accountability Act (HIPAA), they did not disclose any further information about these cases (Document ID 2238, p. 1; 2222, Tr. 65). Such information provides little on which the agency can rely to evaluate these suggested exposure sources.

While commenters did provide some evidence in the form of studies, OSHA believes the studies referenced have limited value in analyzing current exposures to workers in these industries. NABTU (Document ID 2240), AFL–CIO (Document ID 2239, 2244), and NJH (Document ID 2211, 2238) cited a number of studies that they contend demonstrate workers in the construction trades are at risk of exposure to beryllium in greater than trace quantities through work at general industry sites that process or previously processed beryllium. Several of these studies examined beryllium sensitization and CBD among construction trades workers and others who had worked at DOE nuclear weapons facilities. Two studies involved exposures at private facilities. Of the studies submitted, OSHA had previously reviewed Kreiss et al. (1993) and Stange et al. (2001) in the Health Effects section of the preamble to the 2017 final rule (82 FR 2506; 2510).

Kreiss et al. (1993) conducted a screening of current and former workers at a plant that manufactured beryllium ceramics between 1958 and 1975, and then transitioned to metalizing circuitry onto beryllium ceramics produced elsewhere (Kreiss et al. (1993), ''Beryllium Disease Screening in the Ceramics Industry'' (Document ID 1478)). Five hundred and five of the plant's then-current and retired workers who had not previously been diagnosed with CBD or sarcoidosis participated, including 377 current and 128 former workers. Workers' airborne beryllium exposure was not estimated in this survey, and potential for skin contact with beryllium was not explicitly discussed. Surveillance for CBD was conducted on this population in 1989–1990 (Document ID 1478, p. 270).

Kreiss et al. (1993) reported nine newly identified cases of CBD (Document ID 1478, p. 257). The individuals diagnosed with CBD had begun work at the facility between September 1946 and June 1983, with most (7 of 9) hired between 1956 and 1973 (Document ID 1478, Table 2, p. 270). Two cases (11.1 percent) of newly diagnosed CBD occurred among 18 workers who performed ventilation maintenance (Document ID 1478, Table 7, p. 273).[14] However, the authors noted that all workers with CBD who reported work in ventilation maintenance had also reported work in dry pressing and/or process development, job categories which also had particularly high prevalence of CBD (15.8 percent and 13.6 percent, respectively) (Document ID 1478, p. 272; Table 7, p. 273). Moreover, the authors stated that ''persons who had worked at dusty tasks in which [beryllium] exposures were harder to control or unlikely to be monitored, such as dry pressing and

[13] As originally promulgated, the beryllium standard for general industry required employers to establish a beryllium work area in any area that (1) contains a process or operation that can release beryllium, and (2) where employees are, or can reasonably be expected to be, exposed to airborne beryllium at any level or where there is the potential for dermal contact with beryllium (82 FR at 2736). BWAs must be demarcated by signs or other methods that establish and inform each employee of the boundaries of the area (29 CFR 1910.1024(e)(2)). Through the May 7, 2018 DFR, OSHA later revised the definition of a BWA so that the requirements apply only where the process or operation involves material containing at least 0.1 percent beryllium by weight (83 FR at 19938).

[14] The authors did not provide detail on this ventilation maintenance activity and it is unclear whether such work represents a typical construction activity or a routine general industry maintenance activity.

beryllia process development/engineering, had beryllium disease rates between 11 percent and 16 percent,'' rates that ''are higher than those described historically in other beryllium industries'' (Document ID 1478, p. 273). The authors also noted one case of CBD in an employee who had begun employment eight years after beryllium production ended (a ''dust disturber'' case) who recalled regularly dry-sweeping for a period of 6 months in 1983 in an area that was later shown to be contaminated by beryllium dust and had no other known source of beryllium exposure (Document ID 1478, p. 271). NJH cited Kreiss et al. (1993) as evidence that cleanup workers and tool grinders at general industry sites can face risk from beryllium exposures (Document ID 2211, p. 7).

Virji et al. (2019) published a study of short-term workers employed at a primary beryllium manufacturing facility that processed beryllium salts, beryllium metal and alloys, and beryllium oxide (Virji et al. (2019), ''Associations of Metrics of Peak Inhalation Exposure and Skin Exposure Indices with Beryllium Sensitization at a Beryllium Manufacturing Facility'' (Document ID 2239)). This study examined a group of 264 short-term workers who were hired after January 1, 1994, and who participated in testing for beryllium sensitization in 1999. The authors used exposure data such as personal full-shift exposure sampling, task and area exposure measurements, and glove measurements to create qualitative and quantitative peak inhalation metrics and skin exposure indices (Document ID 2239, pp. 858–9). The authors reported that their data represent ''historical workplace conditions, before the implementation of a redesigned comprehensive prevention program'' which included measures to reduce both inhalation and skin exposure through improvements in engineering controls and use of personal protective equipment and clothing; improved housekeeping; measures to minimize migration of beryllium from work areas; and improved health and safety and work practice training, beginning in 2000 (Document ID 2239, pp. 863, 866).

Twenty-six of the study participants (9.8 percent) were beryllium-sensitized, of whom six were also diagnosed with CBD. The authors noted that maintenance work was associated with the highest rate of beryllium sensitization (0.154 per person-year of work in the maintenance category, which had 52.1 person-years of work in total) (Document ID 2239, Table 4, p. 865). The authors found that peak inhalation metrics, indices, and other evidence of skin exposure, and use of material containing beryllium salts were significantly associated with beryllium sensitization (Document ID 2239, p. 865). It was not possible to distinguish the effects of skin exposure from inhalation exposure because these exposures tended to occur together (Document ID 2239, p. 867). The authors concluded that multiple beryllium exposure pathways and types were associated with sensitization and that efforts to prevent beryllium sensitization should focus on controlling airborne beryllium exposures with particular attention to exposure peaks; process characteristics (the likelihood of upset conditions, which can lead to high short-term exposures); and minimizing skin exposure to beryllium particles, in particular, eliminating skin contact with beryllium salts (Document ID 2239, p. 867).

NABTU and AFL–CIO referenced Virji et al. (2019) in support of their objection to OSHA's proposed removal of dermal protections in the construction and shipyard standards (Document ID 2239, p. 2; 2240, pp. 5–6). NABTU noted that some workers at the beryllium producing facility who were not directly involved in beryllium-related operations nevertheless became sensitized to beryllium; that maintenance work (including shutdown maintenance, as is performed by contract construction workers) was associated with the highest rates of beryllium sensitization; and that the study authors found a strong association between dermal exposure and beryllium sensitization (Document ID 2240, pp. 5–6). NABTU concluded that Virji et al.'s study ''lends further support to the need to ensure workers handle their clothing and other personal protective equipment in ways that minimize the potential that either they, their family members or others who may handle the PPE are incidentally exposed.'' Furthermore, ''despite the importance of the required procedures to restrict access to work areas where exposures may exceed the PEL and the presence of a competent person—provisions NABTU fully supports—those protections do not adequately compensate for the potential that beryllium will migrate into other work areas'' (Document ID 2240, pp. 5–6). AFL–CIO also commented that Virji et al. showed the importance of controlling skin exposure to beryllium in order to prevent beryllium sensitization (Document ID 2239, p. 2).

Several of the studies cited by NABTU, AFL–CIO, and NJH examined beryllium sensitization and CBD among construction trades workers and others who had worked at DOE nuclear weapons facilities, including Stange et al. (2001), Sackett et al. (2004), Welch et al. (2004), and Welch et al. (2013). The commenters cited these studies as evidence that construction trades people can be exposed to greater than trace amounts of beryllium while conducting cleanup, demolition, and deconstruction activities in buildings where beryllium was previously released and accumulated in settled dust.

Stange et al. (2001) examined the prevalence of beryllium sensitization and CBD by job category among 5,713 individuals tested in the Rocky Flats Beryllium Health Surveillance Program, which offered surveillance for any current or former employee who believed they may have been exposed to beryllium at the Rocky Flats Environmental Technology Site (Stange, et al. (2001), ''Beryllium sensitization and chronic beryllium disease at a former nuclear weapons facility'' (Document ID 1403)).[15] Eighty-one cases of CBD and an additional 154 cases of beryllium sensitization were identified among workers for whom job and location (building) histories could be verified (Document ID 1403, p. 408). The prevalence of beryllium sensitization was found to be highest among beryllium machinists (11.4 percent) and health physics technicians (11.9 percent) (Document ID 1403, Table III, p. 410). Cases were also identified among custodial employees (5.64 percent) and other job titles that were thought to have only minimal potential for exposure to beryllium (Document ID 1403, pp. 405, 410). AFL–CIO and NJH have referenced Stange et al.'s (2001) findings as evidence that construction work at beryllium-using facilities can involve risk from beryllium exposures (Document ID 2244, p. 3; 0155, p. 3).

Sackett et al. (2004) examined BeLPT results and medical evaluations of 2,221 workers employed at a nuclear weapons facility during decontamination and decommissioning (Sackett et al. (2004), ''Beryllium medical surveillance at a former nuclear weapons facility during cleanup operations'' (Document ID 1811, Att. 13)). Workers' airborne beryllium exposure was not estimated in the study, and potential for skin contact with beryllium was not explicitly discussed. The authors found

[15] In 1991, the Beryllium Health Surveillance Program (BHSP) was established at the Rocky Flats Nuclear Weapons Facility to offer BeLPT screening to current and former employees who may have been exposed to beryllium (Stange et al. (1996), Document ID 0206).

19 cases of beryllium sensitization. Of eight sensitized individuals who underwent full clinical evaluation for CBD, two were diagnosed with CBD. Seven beryllium-sensitized workers were hired after the start of decontamination and decommissioning (Document ID 1811, Att. 13, p. 953). AFL–CIO, quoting a previously submitted comment from the Colorado School of Public Health (Document ID 2136), stated that Sackett et al.'s study showed ''that beryllium can cause harm to workers during this process [of decontamination and decommissioning], even when workers have been provided, certified, and trained in the appropriate use of PPE'' (Document ID 2244, p. 9). NJH similarly commented that this study demonstrates the potential for exposure during cleanup of beryllium-using sites (Document ID 2211, p. 7).

Welch et al. (2004) presented BeLPT surveillance results among construction trades workers who had formerly been employed at three DOE sites where beryllium was present (Hanford Nuclear Reservation in Richland, Washington; the Oak Ridge Reservation in Oak Ridge, Tennessee; and the Savannah River Site in Aiken, South Carolina) (Welch et al. (2004), ''Screening for Beryllium Disease Among Construction Trade Workers at Department of Energy Nuclear Sites'' (Document ID 1815, Attachment 58, p. 207)). Beryllium at these sites had been present in fuel fabrication and R&D (Hanford); from nuclear waste disposal, an antimony-beryllium source rod reactor failure, copper-beryllium tools, chipping of beryllium in glove-box operations, and possible beryllium machining (Savannah River Site); and from assembly and disassembly of nuclear weapons and machining, grinding, and forming of beryllium compounds and alloys (Oak Ridge) (Document ID 1815, Attachment 58, p. 208). The authors examined sensitization among 3842 former workers who completed at least one BeLPT from the screening program's beginning (1996) through September 30, 2002 (Document ID 1815, Attachment 58, pp. 208, 212; Welch et al (2013), Document ID 2238, Attachment 8, p. 1). Workers' airborne beryllium exposure was not estimated in the study, nor were surface concentrations of beryllium reported. Welch et al. noted that their study population was ''quite different'' from previous studies involving concurrently exposed workers in production facilities, ''in that the participants are construction workers, and had to have left construction employment at the site to be eligible. Many had left employment years before the examination took place'' (Document ID 1815, Attachment 58, p. 214). Moreover, approximately 70 percent of the study population (2,759/3,842) had been hired more than 20 years prior to BeLPT testing (Document ID 1815, Attachment 58, Table VI, p. 214), placing the hire date for the majority of the study population prior to September 30, 1982.

The authors found 54 cases of beryllium sensitization (defined as two abnormal BeLPT results) among the 3,842 tested workers (1.4 percent), and further reported finding a 2.2 percent prevalence of possible sensitization (85 former workers with one or more abnormal BeLPT results). Possible cases occurred among machinists (5.6 percent; 6/107), plumbers/steam fitters (4.1 percent; 5/123), millwrights (3.2 percent; 7/214), sheetmetal workers (2.5 percent; 5/199), carpenters (2.0 percent; 7/250), pipefitters (2.0 percent; 14/690), electricians (1.8 percent; 13/707), and laborers (1.2 percent; 7/603) (Document ID 1815, Attachment 58, Table IV, p. 213). Five workers were diagnosed with CBD (Document ID 1815, Attachment 58, p. 215).

Welch et al. (2013) published another study of former construction trades workers who had worked at DOE sites, using BeLPT results from DOE's updated screening program, which had been expanded to 27 sites after the publication of Welch et al (2004) (Welch et al. (2013), ''Beryllium Disease Among Construction Trade Workers at Department of Energy Nuclear Sites'' (Document ID 2238, Attachment 8)). Workers' airborne beryllium exposure was not estimated in the study, nor were surface concentrations of beryllium reported. Welch et al. (2013) did not present information on all study participants' dates of hire or employment, but did report that the mean year of first employment at a DOE site was 1,973 for workers diagnosed with CBD and 1,976 for sensitized workers who were not diagnosed with CBD (Document ID 2238, Attachment 8, Table II, p. 7).

Among 13,810 former construction workers tested as part of the screening program between 1998 and 2010, Welch et al. (2013) identified 189 cases of beryllium sensitization and reported that 28 (0.2 percent) were diagnosed with CBD (of 86 who were medically evaluated) (p. 5). They noted that prevalence of sensitization greater than 2 percent occurred among sheet metal workers (2.4 percent; 19/786), roofers (2.8 percent; 3/108) and boilermakers (2.9 percent: 8/274) (Document ID 2238, Attachment 8, Table IV, p. 8; p. 10).

The authors reported that the 2013 results showed patterns similar to those of the 2004 study in that both the overall rate of beryllium sensitization (1.4 percent) and the prevalence of CBD found among beryllium-sensitized workers were ''lower than those reported in a number of other populations, such as currently exposed workers in production facilities.'' They attributed these findings to the participants' indirect exposure to beryllium via skin contact with beryllium-contaminated surfaces and with inhalation of re-entrained beryllium dust, rather than from working directly with beryllium in operations such as machining (Document ID 2238, Attachment 8, p. 6). The authors emphasized that their surveillance of construction workers had helped DOE personnel to identity and mitigate those exposures which still exist at the facility and helped focus attention on the risk for beryllium exposure among current demolition workers at these facilities (Document ID 2238, Attachment 8, p. 10). NJH and AFL–CIO pointed to the Welch et al.'s findings in both the 2004 and 2013 studies as evidence that construction trades workers doing contract work in beryllium-using industries face a risk from beryllium exposure (Document ID 2211, p. 7; 2244, p. 9).

OSHA has reviewed each of the studies submitted by the commenters. Each of the studies support OSHA's determination that beryllium exposure presents a serious risk of material health impairment to workers. However, OSHA finds that the studies are of limited value in determining current exposures faced by those construction and shipyards workers covered by the beryllium standards for two reasons. First, as acknowledged by NJH (Document ID 2238, p. 1), the studies do not contain relevant exposure data. Such data would be needed to characterize the airborne and/or dermal exposures of workers in those studies, to evaluate with reasonable accuracy the processes and operations where significant beryllium exposures may have led to cases of beryllium sensitization and CBD, and to determine whether those same processes and operations would be likely to contribute to workers' risk in current-day facilities. This was the same reason that OSHA determined in the 2017 final rule that it could not develop exposure profiles for some of these same operations (see 82 FR at 2639).

Perhaps more importantly, OSHA doubts that these studies reflect current conditions in general industry facilities. The studies appear to primarily involve

populations with many members exposed before the 1990s, when the use of the BeLPT in screening for CBD led both DOE and some private firms to adopt and increasingly strengthen beryllium exposure control strategies.[16] The studies evaluating former construction trades workers largely involve populations who were first exposed before DOE and private industry sites—such as those studied by Kreiss et al (1993) and Virji et al. (2019)—began to strengthen exposure controls in the mid-1990s, and long before OSHA issued comprehensive beryllium standards in 2017. As noted above, approximately 70 percent of the study population (2,759/3,842) had been hired more than 20 years prior to BeLPT testing (Document ID 2238, Attachment 8, Table VI, p. 214), placing the hire date for the majority of the study population prior to September 30, 1982.

Importantly, these studies do not account for the effect of OSHA's beryllium standard for general industry (29 CFR 1910.1024), which addresses the primary sources of exposure in these studies—insufficiently controlled beryllium-releasing processes and settled or re-entrained dust containing beryllium—and is designed to drastically reduce beryllium exposures in general industry facilities. To comply with its obligations under the general industry standard, the host employer at a general industry site today will have implemented beryllium work areas or regulated areas around processes that create beryllium exposures of concern (29 CFR 1910.1024(e)), will have instituted engineering controls and work practices to control exposures (29 CFR 1910.1024(f)), and will have implemented housekeeping measures that will prevent the accumulation or re-entrainment of settled dust containing beryllium (29 CFR 1910.1024(j)). These measures, combined with the general industry employer's duty under the hazard communication standard to inform any construction employer entering the area of the potential for hazardous beryllium exposure and the precautionary measures needed to protect employees (29 CFR 1910.1024(m); 29 CFR 1910.1200(e)(2)), are designed to ensure that construction employees entering the general industry site are not exposed to active beryllium-releasing processes or accumulated beryllium in the work area and are able to avoid any remaining risk of beryllium exposure.

In sum, the most that these studies can tell us is that in the past, construction employees at general industry sites with beryllium exposure from poorly controlled processes became sensitized to beryllium and, in some cases, developed CBD. This information supports OSHA's determination that beryllium exposure presents a serious health risk. It does not, however, demonstrate that construction employees who enter a general industry site today—with the engineering and work practice controls, housekeeping, and other requirements of the beryllium general industry standard—will be exposed to and require protection from dermal contact with beryllium in more than trace amounts.

With respect to potential exposure from the dressing or sharpening of beryllium-containing non-sparking tools, NJH (Document ID 2211, p. 7; 2238, p. 2) referred OSHA to two studies by Mikulski et al. that found exposure to beryllium through machining and grinding of copper-beryllium (Cu-Be) 2 percent alloy tools, even when done only occasionally, was associated with increased risks of beryllium sensitization (''Risk of Beryllium Sensitization in a Low-Exposed Former Nuclear Weapons Cohort from the Cold War Era'' (2011a) (Document ID 2238, Attachment 4); ''Prevalence of Beryllium Sensitization Among Department of Defense Conventional Munitions Workers at Low Risk for Exposure. Journal of Occupational and Environmental Medicine'' (2011b) (Document ID 2238, Attachment 5)). These studies reported the results of a DOE program that screened former workers at a nuclear weapons assembly site for beryllium sensitization as part of that agency's Former Worker Program established in 1996. The site in question operated beginning in 1941 as a Load, Assembly and Pack (LAP) facility for the Department of Defense (DOD) conventional munitions operations; from 1949 to mid-1975 it was shared with DOE for production of nuclear weapons; and in 1975 DOE activities ceased at this site (Document ID 2238, Attachment 4, p. 195).

Although OSHA acknowledges the findings of the Mikulski studies, which involved exposures at a DOD facility prior to 1975, comments and hearing testimony received in response to the NPRM suggest that the dressing or sharpening of non-sparking tools is not an exposure source of concern for workers in the construction and shipyards sectors covered by the beryllium standards. At the public hearing, NABTU—which had earlier in the rulemaking process raised concerns about exposure from such tools (Document ID 2202, p. 19)—indicated that they had attempted but were not able to find specific examples of construction trades workers dressing or sharpening non-sparking tools (Document ID 2222, Tr. 88). Likewise, when asked about the prevalence of these tools in construction, the representative from USW stated that he had personally used beryllium-containing non-sparking tools on a few occasions many years ago, but that he could only speculate as to how often they are used today. He further testified that he did not know why one would use these tools over other non-sparking tools that do not contain beryllium (Document ID 2222, Tr. 32–34).

Other commenters raised doubts about the extent of exposure from non-sparking tools. The SCA identified the use of non-sparking tools in shipyards, but noted that these are ''infrequently used, and intermittent'' (Document ID 2204, p. 2). SCA did not identify how often or by whom these tools are dressed or sharpened, which, as the representative from USW recognized (Document ID 2222, Tr. 32), is the process during which beryllium exposure might occur. Materion, while noting that they do not serve the non-sparking tool market, stated that the dressing of non-sparking tools could result in exposure to beryllium above the action level but also noted that the other primary producer of copper beryllium—which does serve that market—has a program through which its customers can return their non-sparking tools for sharpening at no cost (Document ID 2237, p. 3). That exposure from this source is unlikely is supported by exposure data in the record, submitted by the Navy and private shipbuilding establishments, showing that the primary exposure source in shipyards is abrasive blasting with some additional exposures during welding operations (Document ID 0144, p. 3–4; 0145; 1166).[17]

[16] In DOE and in private industry, general awareness of beryllium-related risks at airborne levels lower than the previous OSHA PEL of 2 ug/m^3 was low until the early 1990s, when use of the BeLPT by researchers such as Kreiss et al. brought greater understanding of the need to better control beryllium exposures. By 1993, beryllium had been identified as a significant source of occupational disease risk within the DOE complex, and by 1996, DOE had established an interim Chronic Beryllium Disease Prevention Program rule, which was finalized in 1999 (Document ID 2238, Attachment 8, pp. 1–2).

[17] Some commenters also stated that potential sources of beryllium exposure in these sectors include work at landfills that receive beryllium-containing materials (Document ID 2202, Attachment 1, p. 2); work on high-tech aircraft and submarines (Document ID 2208, p. 6); and work as machinists and surveyors (Document ID 2210, p. 4). OSHA notes that many of these categories would appear to be jobs that are not covered by the

OSHA continues to recognize the possibility that some construction and shipyard workers could be exposed to beryllium through activities other than abrasive blasting and welding. However, the record continues to lack key data about these potential exposures, including how often the exposures occur, who is exposed, the duration of the exposures, the type and extent of exposure, or any controls that may be in place to address them. Without this data, OSHA lacks sufficient information to characterize the nature, locations, or extent of beryllium exposure in application groups other than abrasive blasting with beryllium-containing slags and certain welding operations. Importantly, with respect to commenters' assertion that these additional exposures include a risk solely from dermal contact with more than trace beryllium, either from construction work at general industry sites that handle beryllium or through the use of non-sparking tools, OSHA finds that the record does not demonstrate that this continues to be a concern, for the reasons already discussed.

Therefore, the agency finds that it is appropriate at this time to tailor certain aspects of the final standards—such as the written exposure control plan requirements—to those operations for which the agency has sufficient data to demonstrate worker exposure to beryllium at levels of concern, to properly characterize and evaluate the exposures, and to develop appropriate measures to address them. By ensuring that these provisions of the beryllium standards for construction and shipyards are no more complex or onerous than is needed to protect workers, OSHA believes the final standards will improve compliance and thereby more effectively protect these workers.

At the same time, OSHA disagrees with industry commenters who contend that the protections of the beryllium standards for construction and shipyards should only apply to abrasive blasters and welders. OSHA maintains that all beryllium-exposed workers in construction and shipyards should be afforded protections from beryllium exposure (see 84 FR at 51377) and, to the extent that exposures from sources other than abrasive blasting and welding do occur, the beryllium standards for construction and shipyards continue to provide these protections. Both standards continue to apply to all occupational exposure to beryllium that meets the requirements of paragraph (a). OSHA declines to adopt CISC's suggestion that the agency simply incorporate new requirements into paragraph (f) of the ventilation standard for construction (29 CFR 1926.57), so as to apply them only to abrasive blasters, as this would leave unprotected employees who might be exposed in operations OSHA has not identified or in the future. This is consistent with OSHA's typical approach to substance-specific standards, which generally apply broadly to all occupational exposure to a substance, rather than to particular operations (see, *e.g.,* 29 CFR 1926.1126(a)(1) (Chromium (IV)); 29 CFR 1926.1127(a) (Cadmium); 29 CFR 1910.1028(a)(1) (Benzene); 29 CFR 1910.1053(a) (Respirable Crystalline Silica)). With respect to CISC's assertion that construction employers will have to evaluate every task and material on their worksite to determine whether beryllium is present in trace amounts (Document ID 2203, p. 16), the agency emphasizes that this is not the case. Although the beryllium standard applies to occupational exposure to beryllium in all forms, compounds, and mixtures in the construction industry, paragraph (a)(3) exempts from coverage materials containing less than 0.1 percent beryllium by weight where the employer has objective data demonstrating that employee exposure to beryllium will remain below the action level of 0.1 $\mu g/m^3$, as an 8-hour time weighted average, under any foreseeable conditions. As explained below, apart from certain abrasive blasting media, those materials at the typical construction site that the agency has identified as containing beryllium in trace amounts (*i.e.* rock, soil, concrete, and brick) are not likely to release airborne beryllium above the action level under foreseeable conditions and therefore do not typically trigger the requirements of the standard. Further, for any additional materials containing comparably low levels of beryllium, an employer may rely on objective data that employees will not be exposed above the PEL for total airborne dust to qualify for the exemption under paragraph (a)(3).

OSHA's analysis of its own sampling data demonstrates that exposures from rock, soil, and concrete are highly unlikely to exceed the action level in typical circumstances (see Beryllium Air Samples at Construction Sites: An Analysis of OSHA OIS Sample Results 2012–2018, Document ID 2235). This data shows that, given the low levels of beryllium in rock, soil, and concrete, airborne dust concentrations would have to be extremely high for exposures to even approach the beryllium action level. The same is true for brick, which may contain beryllium in trace amounts comparable to these materials.[18] These dust concentrations would typically exceed the PEL for total airborne dust, or particulates not otherwise classified (PNOC), long before the beryllium action level is reached. In the case of concrete, the level of airborne dust required to reach the beryllium action level would also surpass the PEL for crystalline silica many times over. Thus, the action level would only be reached under extremely dusty conditions—such as those produced during abrasive blasting operations—that would also exceed the PELs for PNOC and crystalline silica.

OSHA considers this data sufficient to demonstrate that exposure to rock, soil, concrete, and brick at the typical construction site will not result in beryllium exposure above the action level under foreseeable conditions. As such, when performing tasks at the typical construction site, exposure to these materials will not trigger the requirements of the beryllium standard. Outside of these materials and certain abrasive blasting media, OSHA is not aware of any other building materials at the typical construction site that contain beryllium. However, for any material containing comparable levels of beryllium, an employer may rely on objective data that exposures in its operations are consistently below the PEL for PNOC to demonstrate that exposure from these materials would not exceed the beryllium action level under foreseeable conditions.

The agency notes that if a construction employer has reason to believe that the materials at its particular worksite contain beryllium at levels significantly above average or that a particular process produces abnormally high levels of dust such that beryllium exposure might foreseeably reach the action level (*e.g.,* where total dust is likely to exceed the PEL for PNOC), that employer would be required to comply with the applicable provisions of the beryllium standard. These circumstances, however, will not

construction or shipyards standards, either because they are likely covered by the general industry standard or because they relate to ''uniquely military equipment, systems, and operations'' (see Executive Order 12196; 29 CFR 1960.2(i)). Regardless, as with the other operations identified, the record lacks data from which OSHA could evaluate exposures in these operations.

[18] The beryllium content of soil and rock averages less than 2 ppm while the beryllium content of concrete is typically less than 1 ppm (Document ID 2235, pp. 2, 6). Some bricks may contain up to 50 percent fly ash, which in turn may contain beryllium in trace amounts (see 2017 FEA, Document ID 2014, pp. IV–651 to IV–652).

be typical of the average construction site.

OSHA also disagrees with commenters such as NABTU (Document ID 2240, p. 2) who suggest that the agency has abandoned its prior position regarding the coverage of the construction and shipyards standards. While OSHA acknowledged in the 2017 final rule the ''potential for exposure'' outside of abrasive blasting and welding and determined that any such exposure should be covered by the beryllium standards for construction and shipyards (a position the agency maintains), OSHA made no finding in the 2017 final rule that workers in the construction industry are currently at risk from dermal contact at general industry sites or from the dressing or sharpening of non-sparking tools. On the contrary, the agency was clear that it lacked data to characterize or quantify exposures from additional sources (82 FR at 2639). The agency's finding in this rulemaking that these particular sources of exposure are likely not a concern in the construction and shipyards sector is not a change from its previous position, as the agency took no position on the issue in the 2017 final rule. Where OSHA did originally include provisions aimed solely at dermal contact in the construction and shipyards standards that it now intends to remove, this was due to the agency borrowing provisions from the general industry standard without appropriately accounting for the trace exposures in abrasive blasting and welding as they pertain to dermal contact.[19] Inclusion of these provisions was not based on a finding by OSHA that the provisions were necessary to address exposures beyond abrasive blasting and welding.

At the same time, some commenters misconstrue the agency's focus on the ''primary'' sources of exposure as the agency ignoring the possibility of different exposures. This is not the case. Rather, OSHA finds that the standards as revised will maintain protections in all likely exposure scenarios while more appropriately addressing the operations from which exposures regularly occur. This approach is consistent with the agency's position in the 2017 final rule, as evidenced by the agency's decision at that time to tailor several provisions of the standards to abrasive blasting operations, as discussed above.

With respect to the USW's assertion that OSHA must consider potential future uses of beryllium that do not currently exist (Document ID 2222, Tr. 18–19), the agency agrees and again emphasizes that the beryllium standards for both construction and shipyards continue to apply to all beryllium exposures, present or future, that meet the requirements of paragraph (a). At the same time, OSHA declines to fashion the standards around hypothetical exposures which the agency cannot quantify or evaluate, rather than around those operations for which it has data. The agency remains free to further revise the standard in the future if new processes or uses of beryllium warrant such a change.

The agency also notes that the inability of stakeholders to provide relevant data on exposures outside of abrasive blasting and welding, suggests that such exposures, if they occur, are rare. As such, acknowledging the possibility of these exposures does not alter OSHA's previous analysis with respect to the economic and technological feasibility of the beryllium standards for construction and shipyards. OSHA has no reason to believe that these rare exposures, if they occur, would mean that compliance with the PEL can no longer be met in most operations most of the time or that the beryllium standards will now imperil the existence of the construction and shipyards industries (see 82 FR at 2583).

In summary, after considering the comments received and the record as a whole, the agency has determined that it is appropriate to tailor certain ancillary provisions of the beryllium standards for construction and shipyards to abrasive blasting and welding operations, the two operations for which it has relevant data. At the same time, the agency maintains its position that the construction and shipyards standards should continue to apply to all occupational exposure to beryllium in these sectors. Based on the record, OSHA has determined that the standards, as revised, continue to address the known exposures of concern in the construction and shipyards sectors, as well as potential exposures outside of abrasive blasting and welding operations, and will not result in reduced protections for workers in these industries. This is true with respect to the proposed revisions to paragraph (f)(1), as well as to other revisions proposed on the basis that the primary beryllium exposures in construction and shipyards take place during abrasive blasting and welding operations. OSHA remains open to revisiting these issues in the future and continues to welcome data and information on additional operations with potential exposure to beryllium in the construction and shipyards sectors.

In addition to the comments regarding exposure to beryllium in contexts other than abrasive blasting and welding, one commenter further challenged the agency's preliminary determination that welding in shipyards is not likely to produce skin exposures of concern. Specifically, USW stated, ''OSHA acknowledges that welding with beryllium-copper rods and wire can expose workers to beryllium, but dismisses the hazards of dermal contact on the grounds that such contact with materials exceeding 0.1 percent is unlikely. However beryllium-copper rods typically contain 2 percent beryllium'' (Document ID 2212, p. 3).

With respect to the limited welding operations in shipyards, OSHA explained in the NPRM that, although these operations may involve base materials or fume containing more than 0.1 percent beryllium by weight, OSHA has reason to believe that skin or surface contamination is not an exposure source of concern. Specifically, a 2007 study by Cole indicated that the beryllium content of beryllium aluminum alloy welding fume samples was lower than expected given the beryllium content of the base metal (84 FR at 53906). One commenter, USW (Document ID 2212), took issue with OSHA's preliminary determination with respect to welding. However, they did not discuss the Cole study, nor provide additional evidence to contradict OSHA's position with respect to skin and surface contamination in this operation.

USW pointed to an information sheet on beryllium copper welding wire and rods published by U.S. Alloy Company that, it claimed, ''warns users against grinding, cutting, or polishing [a] weld without proper protection'' (Document ID 2212, p. 3; Attachment A). According to USW, ''welds are often subjected to the operations the manufacturer warned against, sometimes by workers other than welders, and there is no indication that OSHA considered them'' (Document ID 2212, p. 3). However, the information sheet USW provided nowhere mentions a dermal contact risk from these welding rods. Rather, it states that ''care should be taken to avoid inhaling the welding fumes,'' including ''purging the area by drawing off any of the fumes with smoke eaters and having the operators wear a mask'' (Document 2212, Attachment A). Importantly, the portion to which USW

[19] As has been noted, the agency did specifically tailor some provisions to abrasive blasting; for example, deciding not to extend the beryllium work area requirements of the general industry standard to construction and shipyards. In that case, commenters specifically identified the requirement as unworkable when dealing with materials containing beryllium in trace amounts (see 82 FR at 2661).

refers reads ''[d]ust or fumes generated by machining, grinding, sawing, blasting, polishing, buffing, brazing, soldering, welding or thermal cutting of the casting can produce *airborne contaminants that are hazardous*'' (Document 2212, Attachment A) (emphasis in the original). Rather than demonstrating a dermal contact risk from beryllium copper welding wire and rod, OSHA finds that the lack of any mention of such a risk in the manufacturer's information sheet supports OSHA's finding that such exposures are not a concern in this context.[20]

Comments Specific to Paragraph (f)(1)

In addition to these broader comments about the appropriate application group in the construction and shipyards sectors, OSHA received a number of additional comments specifically addressing the written exposure control plan requirements of paragraph (f)(1). Two stakeholders commented broadly on the importance of written exposure control plans. The AFL–CIO and NABTU stated that written exposure control plans are essential to providing employers with a clear plan for exposure identification and control (Document ID 2210, p. 6; Document ID 2202, p. 5). NABTU emphasized the importance of the written plan's description of engineering controls, work practices, and substitute materials for each task and a description of how employers will protect workers not engaged directly in beryllium-exposed tasks, by limiting access to work areas where beryllium-exposed tasks such as abrasive blasting occur (Document ID 2202, p. 6). Without a written plan, both groups asserted, employers are unlikely to adequately control beryllium exposure (Document ID 2210, p. 6; Document ID 2202, p. 6). NABTU further emphasized that when planning for worker protection during tasks involving beryllium, employers must account for the unique toxicity of beryllium by creating a written exposure control plan specifically addressing beryllium exposures (Document ID 2202, p. 5).

[20] NJH also commented that coal slag may contain more than trace amounts, citing a study by the Center to Protect Workers' Rights (CPWR) that ''found that beryllium was present at a concentration of 4 parts per million (ppm) in coal slag samples analyzed prior to blasting, and measured airborne beryllium concentrations of up to 9.5 μg/m^3 during abrasive blasting tasks, far above trace amounts'' (Document ID 2211, p. 7). OSHA notes that 4 ppm, or 0.0004 percent by weight, is well under the 0.1 percent beryllium by weight that OSHA treats as ''trace'' for the purposes of these standards (82 FR at 2610).

The remainder of this section details the comments received with respect to each proposed revision in paragraph (f)(1) and provides OSHA's final determination.

OSHA's proposed revisions to paragraph (f)(1)(i)(A) received no comment apart from the general concerns discussed above regarding OSHA's assessment of beryllium exposures outside of abrasive blasting and welding. Therefore, OSHA is finalizing its proposal to modify paragraph (f)(1)(i)(A) to refer simply to ''exposure'' rather than ''airborne exposure to or dermal contact with'' by removing the words ''airborne'' and ''or dermal contact with'' as qualifiers for exposure to beryllium. OSHA notes that these changes are consistent with other paragraphs where the agency is simplifying the language in a similar manner (*e.g.,* paragraphs (k)(3)(ii)(A) and (k)(4)(i), Medical surveillance), and is not intended to alter the meaning of the provision.

OSHA is also finalizing its proposal to revoke paragraphs (f)(1)(i)(B) and (C) of both the construction and shipyards standards, which previously required lists of operations and job titles involving exposure above the action level and above the TWA PEL or STEL, respectively. OSHA's proposals to revoke these paragraphs received little comment apart from the general concerns discussed above regarding the potential for exposures in contexts other than abrasive blasting and welding. As discussed there, OSHA has concluded that it is appropriate to tailor certain aspects of the beryllium standards for construction and shipyards to the limited number of operations known to involve beryllium exposure in construction and shipyards. Given the small number of operations with known beryllium exposure in these industries, OSHA maintains that the operations and job titles in these categories would be largely the same as those for which exposure to beryllium is reasonably expected. OSHA therefore believes it sufficient to require that an employer identify those operations and job titles that result in exposure to beryllium in any form and that fall within the scope of the standards, and that any additional lists would be unnecessary and redundant.

With respect to OSHA's proposal to add a new paragraph in both the construction ((f)(1)(i)(E)) and shipyards ((f)(1)(i)(D)) standards to require that the written exposure control plan include procedures used to ensure the integrity of each containment used to minimize exposures to employees outside the containment, no commenter objected to the addition of this requirement, while NJH supported it (Document ID 2211, p. 8). As OSHA explained in the NPRM, this requirement will ensure that any containment used is not compromised such that employees outside of the containment are potentially exposed to beryllium at levels above the TWA PEL or STEL. The need for this requirement is reinforced by comments from USW identifying issues with gaps and leaks from ''make shift containment'' (Document ID 2124, page 10) and noting that beryllium can escape from abrasive blasting containments (Document ID 2222, Tr. 27–28). After considering the comments and the record as a whole, OSHA is finalizing this provision as proposed.

AFL–CIO disagreed with OSHA's proposal to remove paragraphs (f)(1)(i)(D) and (E) of the standards, which required the employer to include in the written exposure control plan procedures for minimizing cross-contamination and migration of beryllium within or to locations outside the workplace. AFL–CIO characterized these provisions as ''essential to reduce cumulative exposure to beryllium for workers in high exposure operations and to protect other workers who do not perform beryllium tasks but would be exposed to beryllium due to the lack of cross contamination and migration minimization procedures'' (Document ID 2210, p. 6).

AFL–CIO also argued that OSHA's proposed requirement for written exposure control plans to include procedures used to ensure the integrity of each containment used to minimize exposures to employees outside of containments would be insufficient to control the migration of beryllium (Document ID 2210, p. 6). AFL–CIO stated that ''OSHA is requiring containments that would create a higher concentration of beryllium dust inside the enclosure [and] relying on the protection of PPE,'' while revising paragraph (f) and paragraphs (h)(2) and (3) to no longer require employers to use specific procedures to ensure that PPE is safely doffed. According to AFL–CIO, this will increase the cumulative exposure risk for abrasive blasters and increase the risk of cross-contamination and migration of beryllium, thereby exposing workers with no respiratory or dermal protection (Document ID 2210, p. 7).

OSHA disagrees, firstly, with AFL–CIO's contention that the proposed requirement for written exposure control plans to include procedures used to ensure the integrity of each containment would lead to increased beryllium exposures to workers inside

the enclosure. This final rule does not require the use of containments, but rather requires that when an employer chooses to use a containment, it is used in such a way that employees outside of the containment are not exposed to beryllium at levels above the TWA PEL or STEL. In other words, this requirement merely ensures that containments, when used, accomplish their intended function. Workers inside the containment continue to receive the protections of the requirements for use of PPE (paragraph (h)(1)) and respiratory protection (paragraph (g)(1)(ii)–(iii)), as well as the requirements that PPE not be removed or cleaned in a manner that releases beryllium into the air (paragraph (h)(2)(ii), (h)(3)(ii)). For this reason, OSHA finds that adding a requirement that the written control plan include such procedures will not lead to increased beryllium exposures to workers inside such containments.

Furthermore, OSHA disagrees with AFL–CIO's position that the previous requirements to document procedures for minimizing cross-contamination and migration in the written exposure control plan are necessary to protect workers in the context of the specific exposures in construction and shipyards sectors. In the general industry context, requirements relating to cross-contamination and migration serve to address concerns about both airborne and dermal exposures (see 82 FR at 2668–69). At the same time, OSHA has explained that it does not intend provisions aimed at protecting workers from the effects of dermal contact to apply in the case of materials containing only trace amounts of beryllium absent significant airborne exposures (84 FR at 53906). OSHA maintains that the primary exposures in construction and shipyards are from abrasive blasting with material containing trace amounts of beryllium and limited welding operations. Moreover, as explained above, while the agency recognizes the potential for other exposure sources in these sectors, the record does not demonstrate that potential exposures involve a risk of dermal contact to beryllium in more than trace amounts.

In the 2017 final rule, OSHA tailored portions of the written exposure control plan requirements in construction and shipyards to the particular exposures in abrasive blasting operations. Specifically, the agency chose not to include in the construction and shipyards standards a requirement that employers keep surfaces as free as practicable of beryllium, as it had done in the general industry standard, finding that such a requirement would be impracticable in abrasive blasting operations (82 FR at 2669). At the same time, the agency applied other provisions, developed for the general industry context, without appropriately accounting for the trace amounts of beryllium in the construction and shipyards sectors. In these sectors, where the record evidence on dermal exposure in modern-day worksites is limited to trace amounts of beryllium and where the agency otherwise has reason to believe dermal contact is not an exposure source of concern, OSHA now finds that it is appropriate to further tailor these provisions to focus on ensuring that workers not involved in beryllium-related operations are not exposed to airborne beryllium in excess of the PELs.

Several provisions of both standards work together to protect workers near abrasive blasting and welding operations from exposures above the PELs. In the construction standard, the written exposure control plan must include procedures to restrict access to work areas where exposures to beryllium could reasonably be expected to exceed the TWA PEL or STEL (renumbered in this final rule as paragraph (f)(1)(i)(D)), and the requirement that these procedures are to be implemented by a competent person (paragraph (e)(2)). In the shipyard standard, requirements for regulated areas (paragraph (e)) require that employers designate areas where exposures to beryllium could exceed the PELs and limit access to authorized employees. OSHA has retained these requirements in this final rule. Further, the housekeeping requirements of both standards (paragraph (j)) require cleaning methods that minimize the likelihood of re-entrainment of beryllium-containing dust when cleaning up dust produced by abrasive blasting operations.

In addition, as discussed above, OSHA is finalizing its proposal to add a new paragraph in both the construction ((f)(1)(i)(E)) and shipyards ((f)(1)(i)(D)) standards to require that the written exposure control plan include procedures used to ensure the integrity of each containment (such as tarps or structures used to keep sandblasting debris within an enclosed area) used to minimize exposures to employees outside the containment. This requirement will further limit airborne exposures for employees outside of the containment where an employer uses a containment. Finally, both standards require the employer to ensure that personal protective clothing and equipment required by the standard is not removed in a manner that disperses beryllium into the air (paragraph (h)(2)(ii)), which will serve to limit migration of beryllium and reduce airborne exposure from re-entrainment.

With respect to the AFL–CIO's assertion that procedures regarding the integrity of containments are insufficient to protect workers, OSHA makes two points. First, comments in the record indicate that containments can be effective in containing dust during abrasive blasting, if appropriate procedures are used to ensure their integrity. As noted by the USW and AFL–CIO, there are times that the abrasive blasting media can compromise the integrity of the containment (Document ID 2124, pp. 10–11, 13; 1756, Tr. 246–49; 2210, p. 6). However, under these circumstances OSHA expects that operations would be suspended to repair the containment. According to the testimony from USW during the public hearing for the 2017 final rule, this practice already takes place in some shipyard operations (Document ID 1756, Tr. 262–63). USW further identified the use of negative pressure with containments as a feasible and effective way to ensure their integrity; a method that is already used in the context of bridge repair (Document ID 1756, Tr. 264).

Second, OSHA reiterates that it does not intend for the added provision on containments alone to protect workers from exposures exceeding the PEL. Rather, the agency intends this added provision to complement the written plan's procedures to restrict access to work areas where exposures to beryllium could reasonably be expected to exceed the TWA PEL or STEL (renumbered as paragraph (f)(1)(i)(D) of the construction standard), the requirement that these procedures are to be implemented by a competent person (paragraph (e)(2) of the construction standard) and requirements for regulated areas (paragraph (e) of the shipyard standard), to ensure that workers not directly involved in beryllium-related operations would not be exposed to beryllium above the PELs.

OSHA has determined that these requirements will adequately ensure that workers in shipyards and construction not directly involved in beryllium-related work will not be exposed to beryllium in excess of the TWA PEL or STEL, and is therefore finalizing its proposal to revoke the requirements that the employer include in the written exposure control plan procedures for minimizing cross-contamination (former paragraph (f)(1)(i)(D)) and procedures for minimizing the migration of beryllium within or to locations outside the

workplace (former paragraph (f)(1)(i)(E)).

The AFL–CIO also disagreed with OSHA's proposal to remove paragraph (f)(1)(i)(H), which in the 2017 rule required employers to document procedures for removing, laundering, storing, cleaning, repairing, and disposing of beryllium-contaminated PPE, from the written exposure control plan. The AFL–CIO argued that these procedures protect workers from further exposing themselves to beryllium when putting on and removing PPE and prevent cross-contamination and migration of beryllium to other areas of the worksite (Document ID 2210, p. 6). NJH similarly argued that procedures should be in the written exposure control plan to identify and minimize beryllium exposures to workers involved in cleaning and maintaining PPE, as well as containments. If exposures are generated in a process, they stated, then PPE to protect the worker is contaminated and should be handled as required in the 2017 final rule (Document ID 2211, p. 9).

OSHA disagrees with the AFL–CIO and NJH that all of the 2017 final rule's requirements for removing, laundering, storing, cleaning, repairing, and disposing of beryllium-contaminated PPE are necessary in the construction and shipyards context. As OSHA explains in the summary and explanation for paragraph (h), Personal Protective Clothing and Equipment, OSHA has determined that it is appropriate to remove certain requirements pertaining to laundering, storing, and disposal of PPE from the construction and shipyard standards. Specifically, OSHA is removing three provisions from paragraphs (h)(2) and (3): The requirement to ensure that each employee stores and keeps beryllium-contaminated PPE separate from street clothing and that storage facilities prevent cross-contamination as specified in the written exposure control plan (paragraph (h)(2)(iii)); to ensure that PPE removed from the workplace for laundering, cleaning, maintenance, or disposal be placed in closed, impermeable bags or containers labeled in accordance with the standards' employee information and training requirements and the Hazard Communication standard (paragraph (h)(2)(v)); and to inform, in writing, any person or business entity who launders, cleans, or repairs PPE required by the standards of the potentially harmful effects of exposure to airborne beryllium and dermal contact with beryllium, and of the need to handle the PPE in accordance with the standards (paragraph (h)(3)(iii)). OSHA is removing paragraph (h)(2)(iii) because it applies only to ''beryllium contaminated'' PPE (*i.e.,* contaminated with beryllium in concentrations greater than or equal to 0.1 percent by weight), and thus would never be triggered by the operations to which OSHA is tailoring these standards and because the sanitation standards applicable to construction and shipyards provide the necessary protections for the storage of PPE (see further discussion below in the summary and explanation for paragraph (i)). OSHA is removing paragraphs (h)(2)(v) and (h)(3)(iii) because they protect downstream handlers of PPE who (to OSHA's knowledge) are not engaged in any tasks that could generate airborne exposures at levels of concern. Accordingly, OSHA has determined these provisions are unnecessary and should be removed.

In light of OSHA's decision to eliminate several of the requirements in paragraph (h), OSHA believes that it is unnecessary to require the employer to document all of the procedures that were previously included in paragraph (f)(1)(i)(H). However, OSHA finds that it is appropriate to retain those requirements of paragraph (f)(1) that pertain to provisions that OSHA has not eliminated. Specifically, the construction and shipyards standards still require the employer to ensure that PPE required by the standard is not removed in a manner that disperses beryllium into the air (paragraph (h)(2)(ii)). Both standards still require the employer to ensure that all reusable personal protective clothing and equipment required by this standard is cleaned, laundered, repaired, and replaced as needed to maintain its effectiveness (paragraph (h)(3)(i)). And, both standards still require the employer to ensure that beryllium is not removed from PPE required by the standard by blowing, shaking or any other means that disperses beryllium into the air (paragraph (h)(3)(ii)). In addition, OSHA has decided to revise former paragraph (h)(2)(iv) (renumbered as (h)(2)(iii)) to require that the employer ensure that no employee with reasonably expected exposure above the TWA PEL or STEL removes personal protective clothing or equipment from the worksite unless it is first cleaned in accordance with paragraph (h)(3) (see the Summary and Explanation for paragraph (h)).

OSHA's 2017 final rule would have required employers in construction and shipyards to include information pertaining to these provisions in their written exposure control plans. For these provisions, OSHA agrees with the aforementioned commenters that paragraph (f)(1) should retain the documentation requirements that were promulgated in the 2017 final rule. Therefore, OSHA is adding a requirement for employers to include, in their written exposure control plans, procedures for removing, cleaning, and maintaining personal protective clothing and equipment in accordance with paragraph (h) of this standard. Specifically, OSHA is finalizing its proposal to remove paragraph (f)(1)(i)(H), and is adding a new paragraph (f)(i)(F) to each standard, instructing employers that their written exposure control plans must include such procedures.

NABTU also expressed its belief that OSHA must retain the standards' procedures for minimizing cross-contamination and migration of beryllium, and urged OSHA to retain paragraph (f)(1)(i)(H) (Document ID 2240, pp. 5–6). In support, NABTU noted that some workers at a beryllium producing facility studied by Virji et al. (2019) who were not directly involved in beryllium-related operations nevertheless became sensitized to beryllium, including some involved in shutdown maintenance, and that the study authors found a strong association between dermal exposure and beryllium sensitization (Document ID 2240, pp. 5–6). As discussed above in this Summary and Explanation for paragraph (f)(1), OSHA does not agree that the Virji study indicates that employees in the construction and shipyards industries are currently exposed to dermal contact with beryllium in greater-than-trace concentrations. OSHA has determined that it is appropriate to tailor these standards to abrasive blasting and welding operations, and preventing cross-contamination and migration of beryllium-containing dust in such operations, where the dust contains only trace amounts of beryllium, is only necessary to prevent beryllium-containing dust from being re-entrained and creating an additional inhalation risk to workers who already have airborne exposure to beryllium at levels of concern (*e.g.,* workers in and around beryllium-releasing operations, rather than workers in distant areas of the worksite or downstream from beryllium-releasing operations).

OSHA received one comment on its proposal to revise paragraph (f)(1)(ii)(B) to refer simply to ''exposure to'' rather than ''airborne exposure to or dermal contact with'' beryllium (84 FR at 53911), consistent with other paragraphs in which OSHA proposed to simplify the language in a similar manner (*e.g.,* paragraph (f)(1)(i)(A), Written exposure control plan;

paragraphs (k)(3)(ii)(A) and (k)(4)(i), Medical surveillance). As revised, the paragraph requires the employer to review and evaluate the effectiveness of each written exposure control plan and update it, as necessary, when notified an employee shows signs or symptoms associated with exposure to beryllium. NJH agreed that the proposed change would simplify the reading of the standard (Document ID 2211, p. 9). Having received no comments opposing this change, OSHA is finalizing this provision as proposed.

NJH also suggested that if OSHA makes this change, the agency should also provide a definition of the term ''exposure'' (Document ID 2211, p. 9). OSHA disagrees. The term ''exposure'' and closely related terms such as ''exposed'' appear in nearly every paragraph of the standard, referring variously to airborne exposure, dermal exposure, or both. OSHA has carefully written the regulatory text and the accompanying summary and explanation to clearly indicate which meaning of exposure is intended in each instance, typically by including a qualifier such as ''airborne'' or ''dermal'' when a specific type of exposure is involved. Because the intended meaning of the term varies somewhat from instance to instance, the agency finds that adding a definition of ''exposure'' to the standard may lead to confusion and misunderstanding regarding many provisions of the standard, and maintains that explaining the agency's meaning in each instance of the term is appropriate. With respect to paragraph (f)(1)(ii)(B), by including no qualifier for the term exposure, OSHA ensures that the provision will be triggered whenever an employee shows signs or symptoms associated with any type of exposure to beryllium.

Paragraph (f)(2) Engineering and Work Practice Controls

Paragraph (f)(2) of this final rule requires employers to use engineering and work practice controls to reduce and maintain employee airborne exposure to beryllium to or below the TWA PEL and STEL, unless they can demonstrate that such controls are not feasible. If an employer demonstrates that it is not feasible to reduce airborne exposure to or below the PELs through engineering and work practice controls, the employer must implement and maintain engineering and work practice controls to reduce airborne exposure to the lowest levels feasible and supplement these controls by using respiratory protection in accordance with paragraph (g) of this standard.

Paragraph (f)(2) of the 2017 construction and shipyards standards also required the implementation of engineering and work practice controls to limit employee airborne exposure to beryllium. However, in addition to the requirement to implement controls where exposures exceed the TWA PEL or STEL, the 2017 standards required employers to implement at least one engineering or work practice control whenever exposures exceeded the action level. Specifically, paragraph (f)(2)(i) of the 2017 standards required that where exposures are, or can reasonably be expected to be, at or above the action level, employers were to implement at least one of the following control measures to reduce airborne exposure: (1) Material and/or process substitution (paragraph (f)(2)(i)(A)); (2) isolation, such as ventilated partial or full enclosures (paragraph (f)(2)(i)(B)); (3) local exhaust ventilation, such as at the points of operation, material handling, and transfer (paragraph (f)(2)(i)(C)); or (4) process control, such as wet methods and automation (paragraph (f)(2)(i)(D)). Paragraph (f)(2)(ii) exempted an employer from this requirement if the employer can establish that the controls are infeasible, or that airborne exposure is below the action level, using no fewer than two representative personal breathing zone samples taken at least seven days apart, for each affected operation. Additionally, if after implementing at least one of the controls required by paragraph (f)(2)(i), airborne exposures still exceeded the PEL or STEL, paragraph (f)(2)(iii) required the employer to implement additional engineering and work practice controls to reduce exposure below these limits. If the employer demonstrated that it is not feasible to reduce exposures below the TWA PEL and STEL through engineering and work practice controls, paragraph (f)(2)(iv) required the employer to implement controls to reduce exposure to the lowest feasible level and supplement the controls through the use of respirator protection in accordance with paragraph (g) of the standard.

In the 2019 NPRM, OSHA proposed two changes to paragraph (f)(2) of the construction and shipyards standards. First, OSHA proposed to remove the requirement that employers implement engineering and work practice controls at the action level and instead to require such controls only for operations where exposures exceed, or can reasonably be expected to exceed, the PEL or STEL. Second, OSHA proposed to combine the remaining provisions of paragraphs (f)(2)(i) through (iv) into a single paragraph (f)(2).

The requirement to implement controls at or above the action level in the 2017 construction and shipyard standards was derived from the general industry standard, which requires that employers implement at least one type of engineering control for each operation in a beryllium work area that releases airborne beryllium, unless the employer can demonstrate that airborne exposure is below the action level or that the controls are infeasible. In the 2017 final rule, OSHA found that the action level was a ''reasonable and administratively convenient benchmark'' when attempting to address significant risk below the PELs while not unnecessarily burdening employers where controls would provide little or no benefit (82 FR at 2674). At the same time, the agency recognized that OSHA health standards usually require engineering controls only where exposures exceed the PELs (82 FR at 2673).

In this rulemaking, OSHA has reconsidered this approach to engineering and work practice controls in the construction and shipyards contexts. Because exposure to beryllium in construction and shipyards is almost exclusively limited to abrasive blasting and welding, OSHA preliminarily determined in the 2019 NPRM that requiring engineering controls where exposures are between the action level and the PEL is not reasonably appropriate for these industries. OSHA reasoned that the technological feasibility analysis for the 2017 final rule showed abrasive blasting with mineral grit typically generates airborne beryllium exceeding the PEL even after implementing engineering controls, thus triggering requirements for respirator use for employees where exposures remain above the PEL (82 FR at 2584). Furthermore, welders in shipyards are already required to use local exhaust ventilation as well as air-line respirators (84 FR at 53910–11). Thus, in the context of abrasive blasting and welding, the previous requirement to implement one engineering control where exposure are between the action level and the PEL will not result in any additional protection to workers. Accordingly, OSHA proposed to require engineering and work practice controls in construction and shipyards only where exposures exceed the TWA PEL or STEL. As acknowledged in the 2017 final rule, this approach is consistent with OSHA's typical approach to health standards (84 FR at 53910).

OSHA received several comments on this proposed change. NABTU stated

generally that OSHA should retain the 2017 standards' protections against airborne exposures in paragraph (f)(2) (Document ID 2240, p. 6) and NJH commented that they ''agree with OSHA that it is important to retain the requirement to implement engineering and work practice controls to achieve compliance with the PEL and STEL'' (Document ID 2211, p. 9). AFL–CIO specifically urged OSHA to retain the requirement to require engineering and work practice controls at the action level, arguing that the construction standard should require the same level of protection as the general industry standard to avoid creating a ''two-tiered protection system'' (Document ID 2210, p. 7). They argued that not requiring engineering controls at the action level ''places any potentially exposed workers between the action level and the PEL at risk . . . by not requiring the hierarchy of controls for these workers'' [21] (Document ID 2210, p. 7). In post-hearing comments, they further argued that ''[t]he hierarchy of controls is the most effective way to reduce exposures by controlling releases at the source, rather than near the worker,'' as the 2017 final rule required wherever beryllium exposures meet or exceed the action level (Document ID 2244, p. 15).

AFL–CIO additionally cited USW's comments on the 2015 beryllium NPRM for the proposition that engineering and work practice controls should be required ''at the earliest, yet feasible time'' (Document ID 2244, p. 15). In the cited comments, USW had argued for requiring engineering or work practice controls for any operation generating airborne beryllium particulate, as USW and Materion had jointly recommended for general industry, noting that such a requirement ''is entirely feasible, and would reduce a risk OSHA has shown to be significant'' (Document ID 1681, p. 11).

OSHA disagrees with AFL–CIO's assertion that triggering controls on the PELs will reduce protection for workers in the construction and shipyards industries. As explained in the 2019 NPRM, OSHA's technological feasibility analysis concluded that workers performing abrasive blasting with mineral grit would typically experience exposures in excess of the TWA PEL even after implementing engineering controls (84 FR at 53910; 82 FR at 2584). Therefore, in the case of abrasive blasting, the requirement to implement at least one engineering or work practice control where exposure meets or exceeds the action level would achieve no further protections than the proposed requirement to implement engineering and work practice controls only when exposure exceeds the PEL. Similarly, in the case of welding, the welding standard for shipyards already requires the use of local exhaust ventilation and air line respirators when welding with beryllium-containing base or filler metals (29 CFR 1915.51(d)(2)(iv)). Therefore, the previous requirement would likewise not provide any further protections for employees exposed to beryllium through welding; work practice controls are already being used regardless of level of exposure.

As explained above in the Summary and Explanation for paragraph (f)(1), OSHA has determined, based on the record, that beryllium exposures in construction and shipyards are limited almost exclusively to abrasive blasting and a limited number of welding operations in shipyards, and that it is appropriate to tailor certain provisions of the beryllium standards to these operations. Because in these operations the requirement to implement engineering and work practice controls where exposures are between the action level and PEL would provide no additional protection to workers, OSHA has determined it is appropriate to remove this requirement from the construction and shipyards standards.

At the same time, OSHA agrees with AFL–CIO and NJH that reliance on the hierarchy of controls remains important for protecting employees in the construction and shipyards sector. That is why the agency has retained a specific requirement in paragraph (f)(2) for construction and shipyard employers to implement engineering and work practice controls where feasible to achieve compliance with the PEL and STEL, as OSHA has required in other health standards. Where it is not feasible to reduce exposures to or below the PELs, paragraph (f)(2) continues to require employers to implement and maintain engineering and work practice controls to reduce airborne exposure to the lowest levels feasible and supplement these controls by using respiratory protection in accordance with paragraph (g) of the standard. This approach is consistent with OSHA's application of the hierarchy of controls to all other standards applicable to construction and shipyards that require the use of engineering controls to minimize toxic dust. For example, the ventilation standard in construction, 29 CFR 1926.57(f)(2)(ii), requires the concentration of respirable dust or fume in the breathing zone of the abrasive blasting operator or any other worker to remain below the levels specified in 29 CFR 1926.55.

After reviewing the comments received and the record as a whole, OSHA is finalizing its proposal to revise paragraph (f)(2) to remove the requirement that employers implement engineering and work practice controls wherever exposures are between the action level and PEL. OSHA received no comments on its additional proposal to combine the remaining provisions of paragraphs (f)(2)(i) through (iv) into a single paragraph (f)(2) and is therefore finalizing paragraph (f)(2) as proposed.

Paragraph (g) Respiratory Protection

Paragraph (g) of this final rule requires the provision and use of respiratory protection under several conditions to protect against exposure to beryllium. Paragraph (g)(1) requires employers to provide respiratory protection at no cost to employees and to ensure that employees utilize such protection in the following circumstances: (i) During periods necessary to install or implement feasible engineering and work practice controls where airborne exposure exceeds, or can reasonably be expected to exceed, the TWA PEL or STEL (paragraph (g)(1)(i)); (ii) during operations, including maintenance and repair activities and non-routine tasks, when engineering and work practice controls are not feasible and airborne exposure exceeds, or can reasonably be expected to exceed, the TWA PEL or STEL (paragraph (g)(1)(ii)); (iii) during operations for which an employer has implemented all feasible engineering and work practice controls when such controls are not sufficient to reduce airborne exposure to or below the TWA PEL or STEL (paragraph (g)(1)(iii)); and (iv) when an employee who is eligible for medical removal under the standard chooses to remain in a job with airborne exposure at or above the action level (paragraph (g)(1)(iv)).

This final rule includes one change from paragraph (g)(1) as promulgated in the 2017 final rule. In the NPRM, OSHA proposed removing previous paragraph (g)(1)(iv), which required the use of respiratory protection during emergencies, from both the construction and shipyards standards.[22] As explained previously in this preamble in the summary and explanation for paragraph (b), OSHA also proposed removing the definition of ''emergency''—defined as ''any uncontrolled release of airborne

[21] The ''hierarchy of controls'' refers to the policy of requiring employers to install and implement all feasible engineering and work practice controls before relying on respirator use to protect employees (see 82 FR at 2476).

[22] As a result, OSHA also proposed to renumber paragraph (g)(1)(v) as (g)(1)(iv) in both standards.

beryllium''—from both standards. OSHA reasoned that any uncontrolled release of airborne beryllium in these industries, such as from the failure of blasting control equipment or a spill of abrasive blasting media, would only occur during the performance of routine tasks—*i.e.,* abrasive blasting and welding—that are already associated with the airborne release of beryllium (84 FR at 53911). During these processes, OSHA anticipates that employees working in the immediate vicinity of an uncontrolled release of airborne beryllium would already be using respiratory protection pursuant to the other provisions in paragraph (g)(1).

Three commenters addressed OSHA's proposal to strike paragraph (g)(1)(iv). In both their pre-hearing comments and at the public hearing, the AFL–CIO argued that OSHA ''makes the faulty assumption'' that all types of worksites and emergencies—*i.e.,* fires, floods, chemical releases—will create the same conditions and warrant the same type of response to beryllium exposure (Document ID 2210, Comments, p. 5; Tr., Document ID 2222, p. 119). They further commented that although workers with the highest beryllium exposures (*i.e.,* abrasive blasters) may use full protective equipment, other workers that do not typically wear such equipment might be exposed in the case of an emergency or even during normal working conditions (Document ID 2210, Comments, p. 5). Finally, they argued that it is important to tailor emergency procedures to the specific type of work environment (Document ID 2210, Comments, p. 5).

North America's Building Trade Unions (NABTU) likewise commented that breaches in abrasive blasting containments could expose workers to beryllium who are not otherwise typically exposed (Tr., Document ID 2222, pp. 86, 91–92; Document ID 2240, pp. 7–8). NABTU conceded that, with respect to abrasive blasters and welders, the only type of emergency it could envision was a breach in the abrasive blasting containment (Tr., Document ID 2222, pp. 102–03). However, in their post-hearing brief, NABTU argued that OSHA's proposal ignores workers who perform shut-down maintenance, decontamination, and clean-up work in beryllium processing facilities (Document ID 2240, pp. 7–8). The union cited records from a primary beryllium facility indicating that the facility had experienced leaks, spills, and evacuations due to events such as fires, which could result in the unexpected release of beryllium. NABTU argued that the removal of emergency provisions in the construction standard would result in different protective measures being applied for general industry and construction employees in these facilities. Finally, NABTU urged the importance of including exposures from emergencies in medical and work histories ''to ensure that pertinent information about potential exposures is not overlooked.''

NJH agreed with OSHA that abrasive blasting and welding operations may not result in emergencies (Document ID 2211, p. 6). However, NJH further stated that, because the uncontrolled release of beryllium can occur at any time during operations such as abrasive blasting, ''all workers should be put in respirators and they should be cleaned and maintained as detailed in the beryllium standard for general industry'' (Document ID 2211, p. 9). NJH also commented that, although they agree the term ''emergency'' can be struck from the standards, any exposure above the PEL should trigger medical surveillance that was previously provided after an emergency—that is, without regard to the requirement in paragraph (k)(1)(i)(B) that employees be exposed above the action level for more than 30 days per year (Document ID 2211, p. 6–7; Tr., Document ID 2222, pp. 56–7).

After considering these comments and the record as a whole, OSHA is finalizing its proposal to eliminate the emergency provision from paragraph (g). With respect to some commenters' concerns that OSHA is overlooking workers or operations outside of abrasive blasters and welders, the agency makes several observations. First, paragraph (g)(1)(ii) requires employees engaged in maintenance, repair activities, and non-routine tasks to wear respiratory protection when engineering and work practice controls are not feasible and airborne exposure exceeds, or can reasonably be expected to exceed, the TWA PEL or STEL. This provision would apply in scenarios such as breached containments or spills that create a risk of airborne exposure. Moreover, paragraph (g)(1)(iii) requires respirator use during operations where feasible engineering and work practice controls are not sufficient to reduce airborne exposure to or below the TWA PEL or STEL. As OSHA has previously noted, any employees who are not abrasive blasters or welders but who are in the vicinity of such operations—such as pot tenders or cleanup workers—are already required to wear respiratory protection because of their proximity to operations known to create airborne beryllium exposures above the TWA PEL or STEL (see 84 FR at 53920).[23]

Second, as with other areas of the proposal, the commenters suggest that OSHA is ignoring construction and shipyards workers in operations outside of abrasive blasting and welding who may be exposed to beryllium. The commenters primarily point to workers who perform construction work at general industry sites that process beryllium and workers who dress non-sparking tools (see, *e.g.,* Document ID 2210, Comments, pp. 4–5; 2240, pp. 7–8). As explained previously in this preamble, OSHA repeatedly requested information and data on application groups outside of abrasive blasting and welding, but no commenters have provided data sufficient for OSHA to draw any conclusions about exposures in these contexts. For the same reason, OSHA lacks any information on potential exposures from ''unexpected releases of a chemical, fires, [or] floods'' in these contexts (see AFL–CIO, Document ID 2210, Comments, p. 5). For the reasons already stated, OSHA had determined that, given this lack of data, it is appropriate to tailor the construction and shipyards beryllium standards to those operations for which the agency has sufficient data to demonstrate worker exposure to beryllium at levels of concern, to properly characterize and evaluate the exposures, and to develop appropriate measures to address them. Moreover, as discussed previously, OSHA expects that beryllium exposures during processes outside of abrasive blasting and welding, if they occur, are rare. Given the rarity of these exposures during normal processes, the agency expects that emergency exposures in these contexts would be exceedingly rare, to the point of not being reasonably foreseeable. For a full discussion of OSHA's reasoning on these points, see the summary and explanation of paragraph (f)(1).

In the operations for which OSHA does have sufficient data (*i.e.,* abrasive blasting and welding operations), the agency has determined that it is unnecessary to trigger respiratory protection requirements on the occurrence of an emergency. As OSHA noted in the NPRM, and as at least one commenter agreed (Document ID 2211,

[23] In the 2017 Final Rule, OSHA found that pot tender and cleanup work are usually remote from the abrasive blasting operation or occur prior to or after the operation is complete (82 FR at 2686–87). As such, OSHA notes that only a subset of these workers (those performing their tasks during and adjacent to the abrasive blasting operation) would potentially be exposed during an event such as a containment rupture.

p. 6), any uncontrolled release of beryllium in these operations will not create exposures that differ from the normal conditions of work and workers should already be protected by the other provisions of paragraph (g). Accordingly, OSHA is finalizing its proposal to remove paragraph (g)(1)(iv) from the beryllium standards for construction and shipyards.[24]

Paragraph (h) Personal Protective Clothing and Equipment

Paragraph (h) of the beryllium standards for the construction and shipyards industries (29 CFR 1926.1124(h) and 1915.1024(h), respectively) provides requirements relating to personal protective clothing and equipment (PPE). Paragraph (h)(1) requires employers to provide and ensure the use of PPE in accordance with the written exposure control plan required under paragraph (f)(1) of this standard and OSHA's Personal Protective and Life Saving Equipment standards for construction (29 CFR part 1926, subpart E) where airborne exposure exceeds, or can reasonably be expected to exceed, the TWA PEL or STEL. Employers are expected to choose the appropriate type of PPE for their employees based on the results of the employer's hazard assessment (82 FR at 2682), and the employer must list in the written exposure control plan the PPE that is required under paragraph (h)(1) (see paragraph (f)(1)(i)(C)). Paragraph (h)(2) governs the removal of PPE,[25] and requires employers to ensure that each employee removes PPE required by this standard at the end of the work shift or at the completion of all tasks involving beryllium, whichever comes first, and that PPE is not removed in a manner that disperses beryllium into the air. Additionally, under the PPE cleaning and replacement provisions in paragraph (h)(3), employers must ensure that all reusable PPE required by the standard is cleaned, laundered, repaired, and replaced as needed to maintain its effectiveness, and that beryllium is not removed from PPE by blowing, shaking or any other means that disperses beryllium into the air.

This rule finalizes the proposed changes to paragraph (h) in the 2019 NPRM, including OSHA's proposal to remove the requirement, formerly designated paragraph (h)(1)(ii), to provide and ensure the use of PPE when there is reasonably expected dermal contact with beryllium (see 84 FR at 53913). As explained in the NPRM, OSHA did not intend for the standards' provisions aimed at protecting workers from the effects of dermal contact with beryllium to apply to operations that involve materials containing only trace amounts of beryllium absent significant airborne exposures (84 FR at 53912 (citing 83 FR at 19938); see also 84 FR at 53905–06). In the construction and shipyards sectors, the operations that cause airborne exposure to beryllium that can exceed the TWA PEL or STEL are either abrasive blasting operations, which involve materials or generate particulate matter containing less than 0.1 percent beryllium by weight, or welding operations in shipyards, where the process and materials do not present a dermal contact risk. OSHA thus proposed to remove the requirement to provide and ensure the use of PPE when there is reasonably expected dermal contact with beryllium because it was not aware of any operations in the construction or shipyard sectors in which dermal contact with beryllium would occur at levels above trace amounts, making such a provision unnecessary.

OSHA received comments challenging the underlying premise that abrasive blasting operations and welding operations in shipyards would not result in dermal contact with beryllium at levels above trace amounts. Specifically, NJH, citing a study indicating that beryllium was ''present at a concentration of 4 parts per million (ppm) in coal slag samples analyzed prior to blasting, and measured airborne beryllium concentrations of up to 9.5 µg/m3 during abrasive blasting tasks,'' questioned OSHA's determination that abrasive blasting operations only contain or produce materials containing trace concentrations of beryllium (Document ID 2211, p. 7). Additionally, USW contested OSHA's statement that skin or surface contamination is not likely to result from welding operations in shipyards, stating that ''beryllium-copper rods typically contain 2 percent beryllium and at least one manufacturer warns users against grinding, cutting or polishing the weld without proper protection,'' and alleging that ''welds are often subjected to the operations the manufacturer warned against, sometimes by workers other than welders'' (Document ID 2212, p. 3; see also Document ID 2222, Tr. 31 (USW stating that it believes that welding rods containing up to 2 percent are sometimes used, but USW does not know how often)). In support, USW pointed to an information sheet on beryllium copper welding wire and rods published by U.S. Alloy Company (Document ID 2212, Attachment A).

OSHA responded to these comments in the summary and explanation section for paragraph (f). In short, NJH's concern is misplaced because the 4 ppm of beryllium documented in the coal slag samples in the study that NJH cited, which would amount to 0.0004 percent by weight, is a trace amount within OSHA's usage of that term (0.1 percent beryllium by weight or less). So too is USW's concern about skin contamination during welding operation. As OSHA explained in the NPRM, the agency's understanding that the amount of beryllium oxide to form on the surface of materials being welded in shipyards is likely far lower than would be expected based solely on the percentage of beryllium in the base metal is based on a study by Cole, 2007 (84 FR at 53906; see Document ID 0885, p. 685). USW's comment does not discuss this study, nor does it offer evidence to undermine the conclusions that OSHA has drawn from it (see above, Summary and Explanation for paragraph (f)(1)). The information sheet from U.S. Alloy Company that USW included with its comment makes no mention of a dermal contact risk from the welding rods used in the operation, and instead warns that action ''should be taken to avoid inhaling the welding fumes'' (Document 2212, Attachment A). OSHA finds that the lack of any mention of a risk of dermal contact with beryllium in the information sheet supports OSHA's determination that dermal exposures are not a concern in welding operations.

OSHA also received several comments expressing concern that, by removing from the standards the provisions that are solely aimed at preventing dermal contact with beryllium (including paragraph (h)(1)(ii)), OSHA would expose workers to a significant risk of harm, and would be abandoning its position in the 2017 final rule that all construction and shipyard industry employees within the scope of the standards need protection against dermal contact with beryllium (Document ID 2210, p. 4, 7; 2212, p. 4;

[24] As to NJH's suggestion that, in light of the removal of emergency triggers in the standards, OSHA should amend paragraph (k) to require medical surveillance for any exposure above the action level or PEL, rather than for those exposed over the action level for 30 days, OSHA addresses this in the summary and explanation of paragraph (k). Likewise, with respect to NABTU's comment that exposures during emergencies should be included in employees' medical and work histories, OSHA addresses this comment in the summary and explanation for paragraph (k)(4). Finally, NJH's comment that all respirators should be cleaned as required in general industry is addressed in the summary and explanation of paragraphs (h).

[25] Paragraph (h)(2) of the construction and shipyards beryllium standards was titled ''Removal and storage.'' As explained below, OSHA is removing the provisions in paragraph (h)(2) that pertain to the storage of PPE. Accordingly, OSHA has revised the title of paragraph (h)(2) to read ''Removal of PPE.''

2239, p. 1; 2240, p. 5; 2244, pp. 8–10; see also Document ID 2222, Tr. 117–18). Relatedly, commenters expressed concern that OSHA's proposed revisions would not sufficiently protect workers who may be exposed to dermal contact with dust, fumes, or mists containing beryllium in greater-than-trace concentrations in operations other than abrasive blasting and welding, such as maintenance, renovation, repair and demolition operations at locations where beryllium operations were performed; maintenance of non-sparking tools; or, in new operations that construction and shipyards employers may undertake in the future (Document ID 2202, p. 2; 2208, pp. 6–7; 2210, pp. 4–5, 7; 2211, pp. 1, 7–8, 10; 2212, pp. 2–4; 2213, pp. 3–4; 2239, pp. 1–2; 2240, pp. 3–5; 2242, pp. 2–3; 2244, p. 13; see also Document ID 2222, Tr. 17–19, 32, 47–48, 84–87, 114–15, 131).

OSHA also fully responded to these comments in the Summary and Explanation for paragraph (f). In short, OSHA has not changed its position on the employees who require protection from dermal contact with beryllium in the construction and shipyards sectors, nor has it changed its position that all employers with operations that fall within the scope of the standards must comply with their terms. OSHA has not changed (or proposed to change) the scope of the standards, which are broadly drawn to cover all occupational exposure to beryllium in all forms, compounds, and mixtures in construction, except those articles and materials specifically exempted. The standards continue to require employers to apply provisions related to dermal contact, through the provision of PPE and other measures, when airborne exposures exceed the TWA PEL or STEL. OSHA's removal of the provisions solely aimed at preventing dermal contact with beryllium without airborne exposures furthers the agency's intent to tailor the construction and shipyards beryllium standards to the specific operations on which it has data documenting significant exposures of concern (*i.e.,* abrasive blasting operations and welding operations in shipyards).

When the agency applied some of the ancillary provisions that it developed for general industry employers into the construction and shipyards standards in the 2017 final rule (such as the provisions triggered on dermal contact with beryllium or beryllium contamination), OSHA did not fully account for the trace levels of beryllium involved in construction and shipyards operations. As OSHA clarified in the 2018 general industry DFR (83 FR at 19938–39), OSHA only intended the provisions triggered by dermal contact with beryllium or beryllium contamination to apply to dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight. The agency did not intend to regulate contact with trace beryllium absent significant airborne exposures. Given that abrasive blasting operations do not involve materials containing beryllium in more than trace concentrations, and the welding operations in shipyards that create airborne exposures of concerns do not pose a risk of skin contamination, OSHA recognized in the 2019 NPRM that the provisions in the construction and shipyards beryllium standards triggered on dermal contact with beryllium or beryllium contamination (such as paragraph (h)(i)(ii)) would never be triggered (see, *e.g.,* 84 FR at 53906, 53913).[26]

The comments received in response to the NPRM have not convinced OSHA otherwise. Although OSHA continues to recognize the possibility that some construction and shipyards workers could be exposed to beryllium through activities other than abrasive blasting and welding, the record still lacks key data about these potential additional sources of exposure, including how often they occur, who is exposed, the duration of the exposures, the type and extent of exposure, or any controls that may be in place to address them. Specifically, as discussed below, OSHA finds that the record lacks evidence that exposures in any construction or shipyards operation would involve a risk of dermal contact with beryllium in greater-than-trace amounts.

As explained more fully in the Summary and Explanation for paragraph (f), a number of commenters responded to OSHA's request for information on any additional application groups (industries, occupations, processes, etc.) with potential exposure to beryllium in the construction and shipyards sectors beyond abrasive blasting and welding operations (see 84 FR at 53922; Document ID 2222, Tr. 33–35; 44–45; 75–76; 95–96; 125–26), but their comments in many cases relied on anecdotal or unverifiable assertions about additional exposure sources. Some commenters submitted studies regarding operations that, in the commenter's view, could expose employees to greater-than-trace concentrations of beryllium at general industry facilities.[27] But the studies do not contain relevant exposure data, nor do they reflect the conditions that employees are likely to encounter at general industry workplaces today. Although some commenters alleged that construction and shipyards workers could be exposed to beryllium in greater-than-trace concentrations during the dressing or sharpening of beryllium-containing non-sparking tools, other comments and hearing testimony more persuasively indicated that the dressing or sharpening of non-sparking tools is not an exposure source of concern for workers in the construction and shipyards sectors covered by the beryllium standards. For example, at the public hearing, a representative from NABTU, indicated that although non-sparking tools are used in the petrochemical industry, NABTU could not find examples of tradespeople dressing and sharpening the tools (Document ID 2222, Tr. 88). Indeed, Materion commented that at least one supplier of beryllium containing non-sparking tools offers tool sharpening as a free service to its customers (Document ID 2237, p. 3).

Accordingly, OSHA is tailoring certain aspects of the final construction and shipyards beryllium standards to the operations for which the agency has sufficient data to demonstrate worker exposure to beryllium at levels of concern, to properly characterize and evaluate the exposures, and to develop appropriate measures to address them (*i.e.,* abrasive blasting operations and limited welding operations in shipyards). Tailoring the construction and shipyards beryllium standards to these operations ensures that the standards are no more complex or onerous than is needed to protect workers, which OSHA believes will improve compliance and thereby better protect workers.

[26] OSHA notes that the term ''beryllium contamination'' is not defined in the construction and shipyards standards. In the DFR for general industry, to clarify OSHA's intent that the standard's requirements aimed at reducing the effect of dermal contact with beryllium should not apply to areas where there are no processes or operations involving materials containing at least 0.1% beryllium by weight, the DFR defined ''beryllium-contaminated or contaminated with beryllium'' and added those terms to certain provisions in the standard. The DFR defined those terms as follows: ''Contaminated with beryllium and beryllium-contaminated mean contaminated with dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight'' (83 FR at 19939).

[27] OSHA also asked AFL–CIO and NABTU at the hearing whether workers needed to be protected against dermal contact with only trace concentrations of beryllium (see Document ID 2222, Tr. 94–95, 121–22). As Materion and CISC pointed out in their post-hearing submissions (Document IDs 2237, p. 1; 2241, p. 8), neither party directly responded to OSHA's question.

Removing the provisions triggered on dermal contact with beryllium (such as former paragraph (h)(1)(ii)) reflects OSHA's intent to regulate contact with trace beryllium only when it causes airborne exposures of concern. OSHA acknowledged in the 2017 final rule that there is ''potential for exposure'' in operations other than abrasive blasting and welding (and fashioned the scope of the standards accordingly), but never determined that workers in the construction industry are currently at risk of dermal contact with greater-than-trace amounts of beryllium when working at general industry worksites, or when dressing or sharpening non-sparking tools. Where OSHA did originally include provisions aimed solely at dermal contact in the construction and shipyards standards that it now intends to remove, including paragraph (h)(i)(ii), it was due to the agency borrowing provisions from the general industry standard without appropriately accounting for the trace exposures in abrasive blasting and welding as they pertain to dermal contact. Inclusion of these provisions was not based on a finding by OSHA that the provisions were necessary to address exposures beyond abrasive blasting and welding. OSHA finds that the standards as revised will maintain protections in all likely exposure scenarios while more appropriately addressing the operations from which exposures regularly occur.

Multiple commenters also expressed concern that OSHA's proposed removal of the provisions that target dermal contact with beryllium would result in insufficient protection for employees who work near, or in support of, abrasive blasting operations, such as pot tenders and clean-up helpers (see Document ID 2210, p. 4; 2211, p. 8; 2239, p. 3). Particularly, AFL–CIO commented that previously-submitted evidence in the record indicates that ''bystander'' workers are not typically protected against exposure to beryllium to the same extent as workers directly involved in abrasive blasting operations, and claimed that OSHA has ''proposed to revoke protections that would protect against an increased risk of cumulative inhalation and skin exposures even when there are significant airborne exposures, especially among those working near operations with significant airborne exposures'' (Document ID 2210, p. 4 (citing Document IDs 2118, 2129, and 2135); see also Document ID 2222, Tr. 117–18, 122–23). AFL–CIO also claimed that ''[r]espirators and other PPE do nothing to address bystander exposure and leave wide variability in the times they are worn'' (Document ID 2239, p. 3). USW also commented at the hearing that ''even though the blasters, the people who were actually engaged in an operation may be well protected, there may be bystanders who may be exposed to things that escape from containment or that are left over after the containment's removed'' (Document ID 2222, Tr. 45).

OSHA has always intended for the construction and shipyards beryllium standards to protect workers who support, or are bystanders to, abrasive blasting operations, and OSHA's beryllium standards protect such workers through various mechanisms, including the requirement for such workers to wear PPE when they have reasonably expected airborne exposure to beryllium. When the agency promulgated the standards in 2017, OSHA concluded that ''pot tenders/helpers, and cleanup workers have the potential for significant airborne beryllium exposure during abrasive blasting operations and during cleanup of spent abrasive material'' and thus ''require protection under the beryllium standards'' (82 FR at 2638). Additionally, OSHA determined in the 2019 final rule that, despite partial overlap between the requirements of the beryllium standards and other existing OSHA standards, OSHA could not revoke paragraph (h) in its entirety because ''[s]ome workers exposed to beryllium in construction and shipyards, such as abrasive blasting helpers, would not be fully protected if OSHA revoked the requirements for PPE in their entirety.'' 84 FR 51394. OSHA has not wavered from its position that abrasive blasting support and bystander workers must be protected against potential airborne exposure to beryllium.

Paragraph (h)(1) requires employers to provide and to ensure the use of PPE for abrasive blasting support workers and other bystanders when those employees are reasonably expected to have airborne exposure to beryllium at levels above the TWA PEL or STEL. Whether or not such workers have tended to wear PPE with the same consistency as abrasive blasting operators, these standards expressly require such workers to use appropriate PPE whenever they have reasonable expected airborne exposure to beryllium above the TWA PEL or STEL. This protects abrasive blasting support workers and bystanders from the incremental additional beryllium load caused by re-entrainment of trace beryllium where there is already significant airborne exposure, while maintaining OSHA's intent that dermal contact with trace beryllium alone did not require protections (84 FR at 53912 (citing 83 FR at 19938); see also 84 FR at 53905–06).

As further discussed below, and in the Summary and Explanation for paragraph (f), such workers are also protected from exposure to airborne beryllium by several other provisions, including the PPE removal and cleaning provisions, the requirements to include certain procedures in the written exposure control plan (paragraph (f)(1)), and the housekeeping requirements in paragraph (j). AFL–CIO is thus incorrect that the revised beryllium standards do not protect abrasive blasting support workers and bystanders when there are significant airborne exposures.

This rule also finalizes OSHA's proposed modifications to paragraphs (h)(2) and (3) of the standards, with two exceptions in paragraph (h)(2). In the NPRM, OSHA proposed to revise the language of several provisions in paragraphs (h)(2) and (3) (see 84 FR at 53913–14). First, OSHA proposed to revise paragraph (h)(2)(i) so that it requires each employee to remove PPE required by the standards at the end of the work shift or, at the completion of all tasks involving beryllium, whichever comes first. To do this, OSHA proposed to remove the qualifier indicating that workers should remove ''beryllium contaminated'' PPE, and instead add language indicating that workers should remove PPE ''required by this standard.'' OSHA also proposed removing the phrase requiring PPE to be removed when it becomes ''visibly contaminated with beryllium.'' OSHA considers a surface to be contaminated with beryllium when it has been contaminated with dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight, and OSHA explained that removing the ''beryllium contaminated'' and ''visibly contaminated with beryllium'' language reflects the agency's understanding that the data-supported operations that create exposures at levels of concern in these industries (abrasive blasting and some welding in shipyards) will not create a beryllium-contaminated surface.

OSHA explained in the NPRM, however, that where employees working with materials containing trace concentrations of beryllium nonetheless have the potential for airborne exposure above the TWA PEL or STEL, and would thus still be required to use PPE under paragraph (h)(1), they would likely be working in highly dusty environments that could accumulate large amounts of dust on their PPE (84

FR at 53913). In those situations, the proposed paragraph (h)(2)(i) would require employees to remove their PPE at the end of the work shift or when all tasks involving beryllium have completed, whichever comes first to prevent the dust on the PPE from being re-entrained into the air and contributing to the airborne exposure of workers who already are, or can reasonably be expected to be, exposed above the TWA PEL or STEL.

For the same reason, OSHA also proposed in the NPRM to replace the qualifier in paragraph (h)(2)(ii) that PPE be ''beryllium contaminated,'' and instead add language clarifying that the provision applies to PPE ''required by the standard.'' The resulting proposed paragraph (h)(2)(ii) would require employers to ensure that PPE required by the standard is not removed in a manner that disperses beryllium into the air, which can be accomplished by cleaning the PPE prior to removal or carefully removing the PPE so as not to disturb the dust.

OSHA also proposed to remove the language from paragraph (h)(2)(ii) requiring employers to ensure that employees remove PPE in accordance with the written exposure control plan to reflect OSHA's simultaneous proposal to remove from paragraph (f) the requirement to include procedures for doffing, laundering, storing, cleaning, repairing, and disposing of beryllium-contaminated PPE in the written exposure control plan. However, as discussed in the Summary and Explanation for paragraph (f), OSHA has determined that written exposure control plans should continue to include procedures for those PPE requirements that OSHA did not propose to remove. Accordingly, OSHA is including in paragraph (f) a requirement that the written exposure control plan include procedures for removal, cleaning, and maintenance of PPE in accordance with paragraph (h) (see paragraph (f)(1)(i)(F)). Having retained these procedures in the written exposure control plan, OSHA is not finalizing its proposal to remove the reference to the written exposure control plan from paragraph (h)(2)(ii).

For paragraph (h)(3), OSHA also proposed to add language to clarify that the requirement that employers ensure that beryllium is not removed from PPE by blowing, shaking or any other means that disperses beryllium into the air applies to PPE that is ''required by the standard.'' OSHA explained in the NPRM that the proposed revision would assure employers that, if dust containing only trace amounts of beryllium migrates to the PPE of employees who are not reasonably expected to have airborne exposure to beryllium above the TWA PEL or STEL, the beryllium standards permit that PPE to be removed and cleaned in a manner that disperses that dust into the air. The proposed revision is thus consistent with the agency's goal of protecting employees who already have reasonably expected airborne exposure to beryllium at levels of concern from inhaling re-entrained beryllium-containing dust.

In addition to these proposed revisions to paragraphs (h)(2) and (3), OSHA proposed to remove four provisions from paragraphs (h)(2) and (3): The requirement to ensure that each employee stores and keeps beryllium-contaminated PPE separate from street clothing and that storage facilities prevent cross-contamination as specified in the written exposure control plan (paragraph (h)(2)(iii)); to ensure that beryllium-contaminated PPE is only removed from the workplace by employees who are authorized to do so for the purpose of laundering, cleaning, maintaining, or disposing of such PPE (paragraph (h)(2)(iv)); to ensure that PPE removed from the workplace for laundering, cleaning, maintenance, or disposal be placed in closed, impermeable bags or containers labeled in accordance with the standards' employee information and training requirements and the Hazard Communication standard (paragraph (h)(2)(v)); and, to inform, in writing, any person or business entity who launders, cleans, or repairs PPE required by the standards of the potentially harmful effects of exposure to airborne beryllium and dermal contact with beryllium, and of the need to handle the PPE in accordance with the standards (paragraph (h)(3)(iii)). OSHA proposed to remove paragraphs (h)(2)(iii) and (iv), which apply only to ''beryllium-contaminated'' PPE, because, as explained above, OSHA has defined ''beryllium-contaminated'' as contaminated with dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight (see 83 FR at 19939), and the data-supported operations that produce beryllium exposures of concern in the construction and shipyards industries (abrasive blasting and some welding in shipyards) will not produce such ''beryllium-contaminated'' PPE. As for the requirements in paragraphs (h)(2)(v) and (h)(3)(iii), which were included to protect individuals who handle beryllium-contaminated items after operations involving beryllium have been completed (82 FR at 2683), OSHA preliminarily determined in the NPRM that it is unnecessary to protect such downstream handlers of PPE in this context. Given the operations to which these standards are tailored, downstream handlers of PPE could only come in contact with dust that contains beryllium in trace concentrations, and OSHA has no reason to believe that those individuals would be engaging in tasks that could generate airborne exposures at levels of concern. In keeping with OSHA's intent to only regulate contact with trace concentrations of beryllium when workers are exposed to significant airborne exposure to beryllium, OSHA proposed that these two provisions targeting downstream handlers of PPE are unnecessary and should be removed.

OSHA received only a few comments that specifically addressed the proposed changes to paragraphs (h)(2) and (h)(3). NJH stated that ''[t]he same protections should be in place for shipyards and constructions as in general industry when using, handling, cleaning and repairing PPE'' (Document ID 2211, p. 10). Additionally, when commenting on OSHA's proposed revisions to paragraph (f), NJH stated that, when workers clean and dismantle containments, ''clothes and PPE for non-blasting workers are likely to be contaminated with beryllium particulate and need to be removed, laundered, stored, cleaned, repaired, and disposed of in a manner similar to that outlined in the original housekeeping provision'' (Document ID 2211, p. 8). NJH also argued that the written exposure control plan should include procedures to identify and minimize beryllium exposures to workers involved in cleaning and maintaining PPE, and that whenever beryllium exposures are generated during a process, PPE used during the process should be handled in the manner outlined in the 2017 final rule (Document ID 2211, p. 9).

OSHA does not agree that it is necessary or appropriate for the construction and shipyards beryllium standards to contain the exact same PPE handling requirements as the general industry beryllium standard. As explained above, OSHA finds it appropriate to tailor the construction and shipyards beryllium standards to the limited operations in those sectors for which OSHA has significant evidence of exposures to beryllium at levels of concern (abrasive blasting operations and some welding operations in shipyards). Those operations do not create a risk of dermal contact with dust, fumes, or mists containing greater-than trace concentrations of beryllium, and therefore PPE used during such

operations will not accumulate surface dust with greater-than-trace concentrations of beryllium. OSHA agrees, however, that it is beneficial and necessary to require employers to establish and describe procedures for removing, cleaning, and maintaining PPE in the written exposure control plan. As discussed in the Summary and Explanation for paragraph (f), OSHA has included such a requirement in paragraph (f)(1)(i)(F) of the standards, and as noted above, has retained the requirement in paragraph (h)(2)(ii) that PPE be removed as specified in the written exposure control plan.

AFL–CIO commented that the proposed modifications to paragraph (h)(2) and (3), when combined with OSHA's proposed changes to paragraph (f), ''increase the cumulative exposure risk for workers wearing'' PPE and ''the risk of cross-contamination and migration of beryllium exposing workers with no respiratory or dermal protection'' (Document ID 2210, p. 7). Particularly, AFL–CIO expressed concern that OSHA's proposed requirement for written exposure control plans to include procedures used to ensure the integrity of each containment used to minimize exposures to employees outside of containments used to limit bystander exposures (paragraph (f)(1)(i)(E) of the construction standard and paragraph (f)(1)(i)(D) of the shipyards standard) ''would create a higher concentration of beryllium dust inside the enclosure,'' while OSHA's proposed revisions to paragraphs (f) and (h)(2) and (3) would no longer require employers to use specific procedures to ensure that PPE is safely doffed (Document ID 2210, p. 7).

AFL–CIO also expressed concern that OSHA's proposed modifications to paragraphs (h)(2) and (3) would not sufficiently protect downstream handlers of PPE. AFL–CIO stated that, ''by removing provisions to keep contaminated PPE separate and labelled, as well as, informing those who will come into contact with the PPE that there is potential of beryllium exposure,'' OSHA has ''assume[d] without evidence that downstream handlers of PPE will not generate airborne exposures,'' which leaves ''other employers at risk of exposing their employees to a carcinogen without their knowledge'' (Document ID 2210, pp. 8, 10). AFL–CIO similarly stated at the hearing that ''there's no evidence in the record that shows that [downstream] workers will not generate airborne exposure and that they should not be informed about the hazards of beryllium'' (Document ID 2222, Tr. 118–19).

In its post-hearing brief, AFL–CIO further discussed its belief that preventing cross-contamination and migration of beryllium-containing dust is essential to protecting workers (see Document ID 2244, pp. 10–15), and cite a 2019 NIOSH publication of a study by Virji et al. that stressed the importance of minimizing dust migration to reduce the risk of beryllium sensitization (Document ID 2244, pp. 11–12 (citing Document ID 2239)). AFL–CIO specifically expressed concern that ''[a]brasive blasting, a high dust producing task, is likely to result in significant dust migration and cross-contamination leading to increased beryllium inhalation and dermal exposure if the provisions in the [2017] final rule do not remain in place'' (Document ID 2244, p. 12).

Although specifically directed in response to OSHA's proposed revisions to paragraph (f), NABTU also expressed its belief that OSHA must retain the standards' procedures for minimizing cross-contamination and migration of beryllium-containing dust (Document ID 2240, p. 5). NABTU likewise pointed to the Virji et al. study, stating that the study indicated ''that workers at a primary beryllium producing facility who were not directly involved in beryllium-related operations were still exposed to beryllium in sufficient quantities to cause beryllium sensitization,'' and therefore provides ''further support to the need to ensure workers handle their clothing and other personal protective equipment in ways that minimize the potential that either they, their family members or others who may handle the PPE are incidentally exposed'' (Document ID 2240, p. 6).

OSHA disagrees with AFL–CIO and NABTU. The modifications to paragraphs (h)(2) and (3), when combined with the modifications to paragraph (f)(1), maintain the necessary protections for workers. As explained above, the activities to which the construction and shipyards standards are tailored (abrasive blasting operations and limited welding operations in shipyards) do not present a risk of dermal contact with beryllium in greater-than-trace concentrations. In this context, the purpose of the provisions of paragraphs (h)(2) and (3) is to prevent workers with significant airborne exposure to beryllium from the additional inhalation risk that could result if beryllium-containing dust were to spread and become re-entrained in the air.

OSHA finds that paragraphs (h)(2) and (3) have been appropriately revised to achieve this purpose. The revised paragraph (h)(2)(i) requires that employees who have reasonably expected airborne exposure to beryllium at levels above the TWA PEL or STEL remove their PPE at the end of the work shift or all tasks involving beryllium, and revised paragraphs (h)(2)(ii) and (h)(3)(ii) prohibit removing PPE, or beryllium from PPE, in a manner that would disperse beryllium into the air. These requirements are supplemented by the requirement in paragraph (f)(1)(i)(F) for employers to include procedures for removing, cleaning, and maintaining PPE in the written exposure control plan, and work in concert with additional provisions that minimize the potential for beryllium-containing dust to spread in the workplace. Specifically, that goal is furthered by the standards' requirements to restrict access to work areas at construction worksites where exposures to beryllium could reasonably be expected to exceed the TWA PEL or STEL (paragraphs (f)(1)(i)(D) and (e)(2)) and establish and limit access to regulated areas at shipyard worksites (paragraph (e)); establish procedures to ensure the integrity of containments (paragraphs (f)(1)(i)(E) in construction and (f)(1)(i)(D) in shipyards);[28] establish engineering and work practice controls (paragraph (f)(2)); and, engage in housekeeping practices that limit the potential for airborne exposure to beryllium (paragraph (j)).

To further prevent beryllium-containing dust from creating an additional inhalation risk to employees who already have the potential for airborne exposure above the TWA PEL or STEL, OSHA has decided against finalizing its proposal to remove former paragraph (h)(2)(iv) from the standards, and has retained a revised version of that requirement in the standards. As discussed above, paragraph (h)(2)(iv) previously required the employer to

[28] AFL–CIO's concern that these containment integrity provisions in paragraph (f) will increase the levels of exposure for employees who are required to wear PPE under the beryllium standards is mistaken. As discussed in the Summary and Explanation for paragraph (f), these new provisions do not require employers to use containments, but rather require that, when an employer chooses to use a containment (such as a tarp or other structure), the employer must include in its written exposure control plan specific procedures for ensuring the integrity of the containment. The purpose of the paragraphs is to ensure that, when an employer chooses to use a containment, it is used in such a way that employees outside of the containment are not inadvertently exposed to beryllium at levels above the TWA PEL or STEL. Contrary to AFL–CIO's suggestion, adding these paragraphs to the standards will merely ensure that containments, when used, accomplish their intended function.

ensure that no employee removes beryllium-contaminated PPE from the workplace, except for employees authorized to do so for the purposes of laundering, cleaning, maintaining or disposing of beryllium-contaminated PPE at an appropriate location or facility away from the workplace. OSHA proposed to remove this provision because the data-supported operations that produce beryllium exposures of concern in the construction and shipyards industries (abrasive blasting and some welding in shipyards) will not produce ''beryllium-contaminated'' PPE as OSHA has defined that term (see 83 FR at 19939).

However, upon consideration of commenters' concerns, and particularly those regarding the risk of cumulative airborne exposure from contaminated PPE, OSHA has determined that removing this provision would insufficiently protect employees who already have airborne exposure above the PEL from the additional inhalation risk that could occur if they were allowed to remove their PPE from the worksite without first properly cleaning it. As OSHA explained in the NPRM and previously in this Summary and Explanation, where employees working with materials containing trace concentrations of beryllium have reasonably expected airborne exposure above the TWA PEL or STEL due to their work activity, and would thus be required to use PPE under paragraph (h)(1), they will likely be working in highly dusty environments that could accumulate large amounts of dust on their PPE (84 FR at 53913). OSHA finds that it is appropriate to ensure that such workers clean their PPE in accordance with paragraph (h)(3)(ii) prior to removing it from the worksite to prevent them from being further exposed to airborne beryllium if the dust on their PPE were to be re-entrained in their vehicles or homes. Therefore, rather than removing paragraph (h)(2)(iv) entirely, OSHA is revising the provision (and renumbering it as (h)(2)(iii)) to require the employer to ensure that no employee with reasonably expected exposure above the TWA PEL or STEL removes PPE required by the beryllium standard from the workplace unless it has been cleaned in accordance with paragraph (h)(3)(ii).

As explained below, the provisions that OSHA is removing in this final rule from paragraphs (h)(2) and (3) (specifically, former paragraphs (h)(2)(iii) and (v) and (h)(3)(iii)) do not further the goal of preventing workers from encountering beryllium-containing dust that could be re-entrained in the air and exacerbate an already-significant lung burden. OSHA has therefore determined that the provisions are unnecessary.

As discussed above, former paragraph (h)(2)(iii) required the employer to ensure that each employee stores and keeps beryllium-contaminated PPE from street clothing and that storage facilities prevent cross-contamination as specified in the written exposure control plan required by paragraph (f)(1) of this standard, but PPE cannot become ''beryllium-contaminated,'' as OSHA has defined that term (see 83 FR at 19939), in the operations to which these standards are being tailored. Moreover, OSHA has determined that it is unnecessary to retain and revise former paragraphs (h)(2)(iii) so that it applies to PPE required by the beryllium standards, as OSHA has done for (h)(2)(ii) and (h)(3)(ii), because such a provision would not provide protection beyond that already provided by OSHA's sanitation standards in construction and shipyards.

The sanitation standards for both construction and shipyards require employers to provide change rooms under certain circumstances. As explained in the Summary and Explanation of paragraph (i), the sanitation standard for construction requires employers to provide change rooms if a particular standard requires employees to wear protective clothing because of the possibility of contamination with toxic materials (29 CFR 1926.51(i)). The change rooms must be equipped with separate storage facilities for street clothes and protective clothing. Similarly, the sanitation standard for shipyards requires change rooms when the employer provides protective clothing to prevent employee exposure to hazardous or toxic substances (29 CFR 1915.88(g)). Furthermore, the employer must provide change rooms that provide privacy and storage facilities for street clothes, as well as separate storage facilities for protective clothing.

Because the beryllium standards require PPE where exposures may exceed the TWA PEL or STEL, employers are required to provide change rooms under the sanitation standards where employees can store and keep PPE separate from street clothing to prevent cross-contamination. OSHA finds that, combined with the requirements in paragraph (h)(2)(ii) and (h)(3)(ii) regarding the safe removal and cleaning of PPE, the requirement in paragraph (f)(1) to include procedures for removing and cleaning PPE in the written exposure control plan, and the training requirements of paragraph (m), the sanitation standards' requirement allowing employees to remove and store their PPE in separate storage facilities provide the necessary protections for employees in the construction and shipyards context. Accordingly, OSHA is finalizing its proposal to revoke former paragraph (h)(2)(iii) in both standards.

As for former paragraphs (h)(2)(v) and (h)(3)(iii), which target downstream handlers of PPE, OSHA explained in the NPRM that it has no reason to believe that such individuals have airborne exposure to beryllium at levels above the TWA PEL or STEL. In response to the NPRM, no commenters provided the agency with any evidence indicating otherwise. Accordingly, OSHA finds that downstream handlers of PPE would not have airborne exposure to beryllium at levels of concern that could be exacerbated by exposure to any residual dust encountered during the PPE removal, laundering, cleaning or repair process. And, given that the operations to which OSHA is tailoring the standards only involve materials containing trace concentrations of beryllium and/or do not pose a significant risk of skin contamination, and that OSHA only intended for the standards to prevent contact with materials containing trace concentrations of beryllium when there are significant airborne exposures at levels of concern, former paragraphs (h)(2)(v) and (h)(3)(iii) are not necessary to protect downstream handlers of PPE from dermal contact with beryllium.

As for AFL–CIO's criticism that the agency has not produced evidence to prove that downstream workers are *not* exposed to airborne beryllium at levels above the TWA PEL or STEL, OSHA has no obligation or authority to prescribe remedies for problems for which it has no evidence of their existence. OSHA did not have evidence of any such exposure when it promulgated the standards in 2017, and its inclusion of the protections for downstream handlers of PPE in the 2017 final rule was due to the agency borrowing provisions from the general industry standard without appropriately accounting for only trace exposures to beryllium in abrasive blasting and welding operations as they pertain to dermal contact.

With the exception of former paragraph (h)(2)(iv) (renumbered as (h)(2)(iii)), AFL–CIO's and NABTU's comments have not persuaded the agency that any of the provisions that it proposed to remove from paragraphs (h)(2) and (3) are necessary to protect workers in construction and shipyards. Both commenters appear to assume that workers in the construction and shipyards industries require protection

against dermal contact with beryllium, but as explained above, the operations to which OSHA is tailoring the construction and shipyards standards do not pose a risk of dermal contact with beryllium in greater-than-trace concentrations, and OSHA never intended to protect against such contact unless the individual has exposure to airborne beryllium at levels exceeding the TWA PEL or STEL. Furthermore, as explained in the Summary and Explanation for paragraph (f), the Virji et al. study, to which both AFL–CIO and NABTU cite, likely does not reflect current conditions in general industry facilities, and thus does not establish that construction employees who enter a general industry site today would require protection from dermal contact with beryllium in more than trace amounts. OSHA has determined that, given the data-supported operations that produce exposures of concern in this context, the revised paragraphs (h)(2) and (3), working in concert with other relevant provisions in the standards, provide workers with the necessary protection against the additional inhalation exposure that could be posed by the spread of dust containing trace amounts of beryllium.

Several other commenters responded that OSHA's proposed changes to paragraph (h) do not go far enough, and that none of the beryllium standards' ancillary provisions, including the PPE provision, are necessary (Document ID 2203, p. 1–2, 11; 2199, p. 3; 2205, p. 2; 2206, pp. 10–13; 2209, pp. 1–2; 2241, pp. 3–4). CISC specifically commented that, because abrasive blasting employees already wear PPE, OSHA has not established that requiring the provision and use of PPE when employees have reasonably expected airborne exposure to beryllium above the TWA PEL or STEL will significantly reduce the risk of harm (Document ID 2203, p. 11; 2241, p. 3). ABMA similarly claimed that ''[t]here is no evidence that the pre-existing standards governing abrasive blasting are insufficient to protect employees, and there is no evidence that exposure to the trace amounts of naturally occurring beryllium in abrasive blasting (or welding) has resulted in any material impairment of health to employees in all of the many years this work has been performed'' (Document ID 2206, p. 11).

OSHA did not propose in this rulemaking to remove the standards' PPE requirements in their entirety, and in fact, explained in the NPRM that it determined in the 2019 final rule that removing paragraph (h) in its entirety would not sufficiently protect workers from airborne exposure to beryllium (84 FR at 53913). OSHA acknowledged that other standards already require some employees engaged in abrasive blasting and welding operations in the construction and shipyards sectors to use PPE. However, some workers with known exposure to beryllium in construction and shipyards, such as abrasive blasting helpers, would not be fully protected if OSHA revoked the requirements for PPE in their entirety. In addition, other OSHA standards do not provide specific PPE removal, cleaning, and maintenance requirements. As explained above, the PPE removal and cleaning provisions in these standards are necessary to minimize the spread of beryllium-containing dust, which, if re-entrained could create additional inhalation exposures for workers with reasonably expected airborne exposure to beryllium at levels exceeding the TWA PEL or STEL. Commenters have provided no new information indicating that such protections are unnecessary, and OSHA finds that the PPE provisions that it is promulgating in paragraph (h) are necessary and appropriate to protect workers in the construction and shipyards industries.

Former Paragraph (i) Hygiene Areas and Practices

In this final rule, OSHA is removing paragraph (i), hygiene areas and practices, from the beryllium standards for construction and shipyards. OSHA has acknowledged the importance of hygiene practices throughout the beryllium rulemaking process (see, *e.g.,* 82 FR at 2684–85; 84 FR at 53915). However, it has also acknowledged that the sanitation standards in general industry (29 CFR 1910.41), construction (29 CFR 1926.51), and shipyards (29 CFR 1915.88) include provisions similar to some of those in the beryllium standards (84 FR at 53914). In the NPRM, OSHA explained that it was reconsidering the need to include additional, beryllium-specific hygiene requirement in the construction and shipyards standards, in light of the specific exposure sources in these industries; specifically, abrasive blasting operations involving beryllium in trace amounts and limited welding operations in which dermal exposure is not a concern (84 FR at 53914–15).

Based on the evidence in the record and after reviewing the comments and hearing testimony pertaining to hygiene areas and practices, OSHA has determined that the sanitation standards for construction (29 CFR 1926.51) and shipyards (29 CFR 1915.88) provide protections comparable to those in paragraph (i) of the beryllium standards for construction and shipyards and that additional requirements will not materially increase protections in these sectors. Accordingly, OSHA is removing paragraph (i) from the beryllium standards for construction and shipyards.

Paragraph (i) of the 2017 final rule established requirements for hygiene areas and practices in general industry (29 CFR 1910.1024), construction (29 CFR 1926.1024), and shipyards (29 CFR 1915.1024). As promulgated in 2017, paragraph (i) required employers in all three industries to: (1) Provide readily accessible washing facilities to remove beryllium from the hands, face, and neck (paragraph (i)(1)(i)); (2) ensure that employees who have dermal contact with beryllium wash any exposed skin (paragraph (i)(1)(ii)); (3) provide change rooms if employees are required to use personal protective clothing and are required to remove their personal clothing (paragraph (i)(2)); (4) ensure that employees take certain steps to minimize exposure in eating and drinking areas (paragraph (i)(3)); and (5) ensure that employees do not eat, drink, smoke, chew tobacco or gum, or apply cosmetics in areas where there is a reasonable expectation of exposure above the TWA PEL or STEL (paragraph (i)(4)).

After publishing the 2017 final rule, OSHA clarified in a direct final rule (DFR) for general industry that the agency only intended to regulate contact with trace beryllium to the extent that it causes airborne exposures of concern (83 FR at 19938). Unlike in general industry, where processes involving exposure to beryllium are varied and employees are exposed to a variety of materials that can contain high concentrations of beryllium, exposures in the construction and shipyards industries are primarily limited to abrasive blasting operations in construction and shipyards and a small number of welding operations in shipyards (Document ID 2042, FEA Chapter III, pp. 103–11 and Table III–8e) (see the Summary and Explanation for paragraph (f)(1) for a discussion of the potential for additional sources of exposure in these sectors). While the extremely high airborne exposures during abrasive blasting operations can expose workers to beryllium in excess of the PEL, the blasting materials contain only trace amounts of beryllium (Document ID 2042, FEA Chapter IV, p. 612). Moreover, the record before the agency contains evidence of beryllium exposure during only limited welding operations in shipyards (Document ID 2042, FEA Chapter III, Table III–8e) and as discussed previously, OSHA has

determined that for these limited welding operations the exposure of concern is exposure to airborne beryllium and not dermal contact.

In the NPRM, OSHA preliminarily determined that, based on the trace beryllium content of blasting materials and the available information on welding operations, the construction and shipyards sectors do not have operations where skin or surface contamination in the absence of significant airborne exposures is an exposure source of concern (84 FR at 53906, 53914–15). In light of the existing OSHA standards providing many of the same protections as the beryllium standards, the limited operations where beryllium exposure may occur in construction and shipyards, and the trace quantities of beryllium present in construction and shipyard operations, OSHA preliminarily determined that the requirements for hygiene areas and practices in the 2017 beryllium standards for construction and shipyards may be unnecessary to protect employees in these industries and proposed to remove all provisions of paragraph (i) from the construction and shipyard standards (84 FR 53915–16). Accordingly, the agency proposed to remove paragraph (i) from the construction and shipyard standards (84 FR at 53916). Detailed explanations of each provision and OSHA's reasoning for removing them are presented below, along with discussion of and response to comments received on the proposal.

Paragraph (i)(1) of both the construction and shipyards standards required that, for each employee required to use PPE by the standard, employers provide readily accessible washing facilities for use in removing beryllium from the hands, face, and neck (paragraph (i)(1)(i)), and ensure employees who have dermal contact with beryllium wash any exposed skin at the end of the activity, process, or work shift and prior to eating, drinking, smoking, chewing tobacco or gum, applying cosmetics, or using the toilet (paragraph (i)(1)(ii)). OSHA proposed to remove these provisions because existing standards already require the use of washing facilities for workers in construction and shipyards.

The sanitation standard for construction (29 CFR 1926.51(f)) requires employers to provide adequate washing facilities maintained in a sanitary condition for employees engaged in operations where contaminants may be harmful to the employees. It also requires that these washing facilities must be in proximity to the worksite and must be so equipped as to enable employees to remove such substances. Lavatories are also required at all places of employment and must be equipped with hot and cold running water, or tepid running water. Hand soap or similar cleansing agents must be provided along with hand towels, air blowers, or clean continuous cloth toweling, convenient to the lavatories. The sanitation standard for shipyards (29 CFR 1915.88(e)) similarly requires employers to provide handwashing facilities at or adjacent to each toilet facility. The criteria for these handwashing facilities are similar to the construction industry in that they must be equipped with hot and cold running water or tepid running water, soap, or skin cleansing agents capable of disinfection or neutralizing the contaminant, and drying materials and methods. This standard further requires the employer to inform each employee engaged in operations in which hazardous or toxic substances can be ingested or absorbed about the need for removing surface contaminants from their skin's surface by thoroughly washing their hands and face at the end of the work shift and prior to eating, drinking, or smoking (see 29 CFR 1915.88(e)(3)). Even though the sanitation standards do not specifically mention beryllium, the use of the terms harmful substances in the construction sanitation standard and hazardous or toxic substance in the shipyard sanitation standard encompass beryllium exposure where airborne exposure exceeds, or can reasonably be expected to exceed, the TWA PEL or STEL.

With respect to abrasive blasting, the sanitation standards' washing facilities requirements are triggered by the use of blasting media; either due to contaminants in the blasting media (which may include beryllium, lead, hexavalent chromium, cadmium, and arsenic) or contamination from the substrate or coatings on the substrate. Similarly, in the limited welding operations involving beryllium exposure, workers will likely be exposed to other hazardous chemicals (including hexavalent chromium, lead, and cadmium) (see *https://www.osha.gov/SLTC/weldingcuttingbrazing/chemicals.html*), triggering the requirements of the sanitation standards. Accordingly, the sanitation standards provide comparable protections to the washing facilities requirements that OSHA is proposing to remove from both the construction and shipyard standards (paragraphs (i)(1)(i) and (ii)).

OSHA also proposed to remove paragraph (i)(2), which required employers to provide change rooms where employees are required to remove their personal clothing in order to don PPE (paragraph (i)(2)), because the sanitation standards already provide comparable protections (84 FR at 53915). The sanitation standard for construction (29 CFR 1926.51(i)) requires employers to provide change rooms if a particular standard requires employees to wear protective clothing because of the possibility of contamination with toxic materials. The change rooms must be equipped with storage facilities for street clothes and separate storage facilities for the protective clothing must be provided. Similarly, the sanitation standard for shipyards (29 CFR 1915.88(g)) requires change rooms when the employer provides protective clothing to prevent employee exposure to hazardous or toxic substances. Furthermore, the employer must provide change rooms that provide privacy and storage facilities for street clothes, as well as separate storage facilities for protective clothing. Because the beryllium standards require PPE where exposures may exceed the TWA PEL or STEL, employers are required to provide change rooms under the sanitation standards, just as they would have been required by paragraph (i)(2) of the beryllium standards.

OSHA further proposed to remove paragraph (i)(3) from the construction and shipyards standards, which established requirements for eating and drinking areas. Paragraph (i)(3)(i) required that surfaces in eating and drinking areas be kept as free as practicable of beryllium and paragraph (i)(3)(ii) required that employees remove or clean contaminated clothing prior to entering these areas. OSHA proposed to remove these provisions for two reasons. First, provisions in the sanitation standards for construction (29 CFR 1926.51(g)) and shipyards (29 CFR 1915.88(h)) already require employers to ensure that food, beverages, and tobacco products are not consumed or stored in any area where employees may be exposed to hazardous or toxic materials. Second, these provisions relate to minimizing dermal contact.[29] As explained in the Summary and Explanation for paragraph (h), OSHA

[29] In the 2019 construction and shipyards final rule, in which OSHA declined to revoke all of the ancillary provisions of these standards, OSHA stated that there was not complete overlap between the sanitation standards and the eating and drinking area requirements of paragraph (i)(3) (84 FR at 51395). That rule, however, did not address whether additional beryllium-specific requirements were necessary in light of the trace exposures in these contexts.

intends that provisions aimed at addressing dermal contact should only apply to materials containing trace amounts of beryllium where there is also the potential for significant airborne exposure. OSHA preliminarily determined that the processes in construction and shipyards creating exposure to beryllium are either processes that involve materials containing less than 0.1 percent beryllium by weight or processes that do not produce surface or skin contamination (84 FR at 53916).

OSHA further explained that other parts of the beryllium standard will reduce the potential for airborne beryllium in eating and drinking areas (84 FR at 53916). Specifically, when employees are cleaning up dust resulting from operations that cause, or can reasonably be expected to cause, airborne exposures over the TWA PEL or STEL, the employer must ensure the use of methods that minimize the likelihood and level of airborne exposure (see paragraph (j)). And under proposed paragraph (h)(2)(ii), employers must ensure that PPE required by the standard is not removed in a manner that disperses beryllium into the air. Given that the construction and shipyard operations known to involve beryllium exposure involve only trace amounts of beryllium (or, in the case of welding, do not pose a dermal contact risk), and that other provisions of the beryllium standard such as engineering controls and housekeeping requirements serve to minimize airborne exposures, OSHA preliminarily determined that existing standards adequately protect employees in eating and drinking areas (84 FR at 53916).

OSHA also proposed to remove the reference in paragraph (i)(3)(iii) which required that eating and drinking facilities provided by the employer must be in accordance with the sanitation standards. OSHA does not believe it is necessary to maintain this reference, as this would be the only requirement remaining in paragraph (i) and employers are required to comply with the sanitation standards regardless.

Finally, OSHA proposed to remove paragraph (i)(4), which required the employer to ensure that no employees eat, drink, smoke, chew tobacco or gum, or apply cosmetics in work areas where there is a reasonable expectation of exposure above the TWA PEL or STEL. The sanitation standards prohibit consuming food or beverages in areas exposed to toxic material and therefore provides the appropriate protections for areas where exposures are above the PEL. OSHA preliminarily determined that the sanitation standards are substantially similar to former paragraph (i)(4) and provide appropriate protections for areas where exposures are above the PEL (84 FR at 53916).

In the 2019 NPRM, OSHA requested comment on the proposed removal of paragraph (i), especially comments and data on the use of wash facilities and change rooms in construction and shipyards for operations that would be covered by the beryllium standards (84 FR at 53916).

Several commenters disagreed with OSHA that the hygiene provisions under paragraph (i) should be rescinded. AFL–CIO commented that removing paragraph (i) will increase workers' risk of cumulative beryllium exposure and could lead to migration of beryllium to other areas, resulting in inhalation exposure to other workers (Document ID 2210, p. 8). They argued that the sanitation standards leave gaps in coverage, in light of ''the significant risk of impairment to worker health at low exposure limits and the carcinogenicity of beryllium,'' and that other provisions of the beryllium standard addressing airborne exposure are insufficient to justify removing the hygiene provisions (Document ID 2210, p. 8). In post-hearing comments, AFL–CIO reiterated their position and stated that the 2017 final rule found paragraph (i) ''prevents additional airborne and dermal exposure to beryllium, accidental ingestion of beryllium, spread of beryllium inside and outside the workplace and reduces significant risk of beryllium sensitization and CBD'' (Document ID 2239, p. 2).

AFL–CIO did not identify which protections in paragraph (i) are left unaddressed by the sanitation standards. With respect to increases in cumulative exposure or migration of beryllium resulting in increased airborne exposure, OSHA has explained that the sanitation standards for construction and shipyards contain comparable requirements for change rooms (29 CFR 1926.51(i); 29 CFR 1915.88(g)) and washing facilities (29 CFR 1926.51(f); 29 CFR 1915.88(e)) and prohibit contamination in eating and drinking areas (29 CFR 1926.51(g); 29 CFR 1915.88(h)). At the same time, existing provisions of the beryllium standards further reduce the potential for airborne exposure by ensuring beryllium-containing dust is cleaned up by methods that minimize the likelihood and level of such exposure (paragraph (j)) and that PPE is removed and cleaned in a manner that does not disperse beryllium into the air (paragraphs (h)(2) and (3)). Regarding the need for provisions to protect against dermal contact, OSHA has explained that it does not intend such provisions to apply where, as here, exposure involves materials containing only trace amounts of beryllium (see the Summary and Explanation for paragraph (h)). Ultimately, OSHA disagrees with the AFL–CIO's broad and unelaborated assertion that these protections are inadequate.

NABTU, resubmitting comments previously entered in the docket, argued that the hygiene provisions ''provide protections not only for abrasive blasting workers, but for all construction workers who may be exposed to beryllium,'' including workers who perform maintenance, repair, renovation, or demolition of worksites that contain beryllium (Document ID 2202, 2017 comment, p. 7; see also Document ID 2202, 2015 comment, p. 9). According to NABTU, providing washing and clean-up facilities to beryllium-exposed workers benefits all workers at the site, ''especially those who don't perform beryllium-exposing tasks, who may not be aware of the hazards of beryllium'' (Document ID 2202, 2017 comment, p. 7). At the public hearing, when asked which hygiene provisions they viewed as important for abrasive blasting operations in construction, NABTU's representative identified ''handwashing facilities . . . [and] the ability to change out of clothing that's contaminated with the dust'' (Document ID 2222, Tr. 105).

In their post-hearing brief, NABTU again emphasized their position that OSHA should retain provisions related to dermal contact in construction and argued that the sanitation standard for construction lacks ''the level of specificity necessary to ensure construction workers adequate protection'' (Document ID 2240, p. 8). Specifically, although paragraph (f) of the sanitation standard requires construction employers to provide washing facilities, NABTU notes that it does not specify that workers must use these facilities following dermal contact with beryllium and before ''eating drinking, smoking, chewing tobacco or gum, applying cosmetics, or using the toilet'' (Document ID 2240, p. 9). And although paragraph (g) prohibits eating or drinking in ''any area exposed to a toxic material,'' NABTU asserts that it ''does not address the range of activities covered by the beryllium standard'' (Document ID 2240, p. 9). Finally, they state that the sanitation standard does not require employees to remove surface beryllium from their clothing or PPE before taking the equipment into an eating or drinking area (Document ID 2240, p. 9).

OSHA agrees with NABTU that washing and clean-up facilities benefit all workers at a worksite and that all workers with beryllium exposure should be protected. However, the agency has determined that a beryllium-specific requirement is not necessary to provide these protections in the construction context. OSHA has determined that the sanitation standard for construction provides the same protections as the beryllium standard with respect to washing facilities (29 CFR 1926.51(f)) and change rooms (29 CFR 1926.51(i)).

OSHA disagrees with NABTU that the sanitation standard for construction lacks sufficient specificity to protect workers in the construction industry. First, with respect to the previous requirement in paragraph (i)(1)(ii) that employees with dermal contact wash exposed skin prior to ''eating, drinking, smoking, chewing tobacco or gum, applying cosmetics, or using the toilet,'' this requirement was triggered on and specifically aimed at addressing dermal contact (82 FR at 2684).[30] OSHA has addressed commenters' concerns regarding dermal contact previously in this preamble (see the Summary and Explanation for paragraph (f)), and simply notes again its determination that this is not an exposure source of concern in the construction operations known to involve beryllium exposure.

The same rationale applies to NABTU's concerns regarding the list of prohibited activities as they appear in paragraph (i)(4). OSHA initially included these provisions due to the risk of ''beryllium contaminating the food, drink, tobacco, gum, or cosmetics'' (82 FR at 2688). Having received no comments related to this provision when OSHA original proposed it for the general industry standard, OSHA extended ''substantively identical'' requirements to the construction and shipyards standards in the 2017 final rule (82 FR at 2688). In light of OSHA's determination in this final rule that exposures in the construction and shipyards sectors are limited to trace amounts of beryllium, the agency finds that this is no longer a concern in these sectors. Next, after considering NABTU's assertion that the sanitation standard does not require employees to remove surface beryllium from their clothing or PPE before taking the equipment into an eating or drinking area, OSHA has reviewed the existing requirements of 29 CFR 1926.51 and determined that this is not the case. If an area contains PPE covered with surface beryllium, such that employees may be exposed through re-entrainment of the beryllium-containing dust, 29 CFR 1926.51(g) by its terms prohibits employees from consuming or storing food, beverages, or tobacco products in that area.

NJH commented that, although there is ''likely some overlap'' between the beryllium and sanitation standards, it is important to ensure that ''special protections'' are in place to protect workers from beryllium exposures (Document ID 2211, p. 10). NJH specifically noted that contaminated change rooms may potentially exposure workers not otherwise working with or exposed to beryllium (Document ID 2211, p. 10). OSHA notes that paragraph (i)(2) in each of the beryllium standards required employers to provide change rooms in accordance with the beryllium standard and the relevant sanitation standard, when an employee is required to change from street clothes to don PPE (29 CFR 1926.1124(i)(2); 29 CFR 1915.1024(i)(2)). Paragraph (h)(2)(iii) of the beryllium standards, in turn, required employers to ensure that beryllium-contaminated PPE is kept separate from street clothes and that storage facilities prevent cross-contamination (29 CFR 1926.1124(h)(2)(iii); 29 CFR 1915.1024(h)(2)(iii)). However, the sanitation standards each also require that change rooms contain separate storage facilities for street clothes and PPE to prevent cross-contamination (29 CFR 1926.51(i); 29 CFR 1915.88(g)). OSHA finds that, combined with the requirements in paragraph (h)(2) and (3) of the beryllium standards regarding the safe removal and cleaning of PPE, the sanitation standards for construction and shipyards protect against contamination of required change rooms to the same extent as paragraph (i).

Finally, one commenter argued that paragraph (i) must be included for ''implementation and consistency with other comprehensive health standards'' (Document ID 2197). However, the commenter did not identify how relying on the sanitation standards would result in implementation issues. With respect to consistency, although it is true that some health standards contain substance-specific hygiene requirements, the breadth and content of the requirements differ by standard. For example, the hygiene requirements of the methylene chloride standard (29 CFR 1926.1152) address only the provision of washing facilities, while the requirements in other standards, such as the cadmium standard (29 CFR 1926.1127), contain numerous, more detailed requirements. Other health standards, such as the standards for vinyl chloride (29 CFR 1926.1117), benzene (29 CFR 1926.1128), and respirable crystalline silica (29 CFR 1926.1153), contain no substance-specific hygiene requirements at all and rely solely on the general sanitation standard. Thus, relying on the sanitation standards rather than beryllium-specific hygiene requirements will not create inconsistency among OSHA's comprehensive health standards.

OSHA has reviewed these comments and the record as a whole and has decided to follow through with the proposed removal of paragraph (i). In light of existing OSHA sanitation standards which provide protections comparable to those in paragraph (i) of the beryllium standards for construction and shipyards and the trace quantities of beryllium present in these industries (or, in the case of welding operations, the lack of skin or surface contamination), OSHA has determined that additional, beryllium-specific hygiene requirements will not materially increase protections for workers in these industries. Accordingly, the agency is removing former paragraph (i) from the construction and shipyard standards. By doing so, OSHA intends to tailor the beryllium standards for construction and shipyards to ensure they are no more complicated or onerous than necessary to appropriately protect workers, thereby improving compliance.

Paragraph (j) Housekeeping

In this final rule, paragraph (j) of the construction and shipyards standards mandates several housekeeping requirements aimed at reducing workers' airborne exposure to beryllium. Paragraph (j)(1) requires employers to use cleaning methods that minimize the likelihood and level of airborne exposure to beryllium when cleaning up dust resulting from operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL. Paragraph (j)(2) prohibits dry sweeping or brushing for cleaning up dust from operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL unless other methods that minimize the likelihood and level of airborne exposure are not safe or effective. Paragraph (j)(3) prohibits the use of compressed air for cleaning if its use

[30] In the general industry DFR, the agency revised the definition of ''dermal contact with beryllium'' to apply only to skin exposure to beryllium ''in concentrations greater than or equal to 0.1 percent by weight'' (83 FR at 19940). OSHA notes that under this revised definition of dermal contact, the requirement in paragraph (i)(1)(ii) would never be triggered in the context of abrasive blasting operations in construction and shipyards.

causes, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL. Paragraph (j)(4) requires respirator use and personal protective clothing and equipment where employees use dry sweeping, brushing, or compressed air to clean. Finally, paragraph (j)(5) requires cleaning equipment to be handled and maintained in a manner that minimizes the likelihood and level of airborne exposure and re-entrainment of airborne beryllium in the workplace.

This final rule includes several changes from paragraph (j) as promulgated in the 2017 final rule. As OSHA explained in the proposal, the agency acknowledged in the 2017 final rule that different approaches may be warranted for the housekeeping provisions for construction and shipyards than for general industry due to the nature of the materials and identified work processes with beryllium exposure in construction and shipyards (82 FR at 2690). OSHA recognized that beryllium exposure in these industries is limited primarily to abrasive blasting in construction and shipyards and a small number of welding operations in shipyards (Document ID 2042, FEA Chapter III, pp. 103–11 and Table III–8e). While the extremely high airborne dust exposures during abrasive blasting operations can expose workers to beryllium in excess of the PEL, slag-based abrasive media contains only trace amounts of beryllium (Document ID 2042, FEA Chapter IV, p. 612). Moreover, the record before the agency contains evidence of beryllium exposure during only limited welding operations in shipyards (Document ID 2042, FEA Chapter III, Table III–8e). Nonetheless, in the 2017 final rule, OSHA applied most of the same requirements to these industries as to general industry,[31] where the operations with beryllium exposure are significantly more varied and employees are exposed to materials with significantly higher beryllium content.

Since publication of the 2017 final rule, OSHA has undertaken several additional rulemaking efforts affecting the beryllium standards for construction and shipyards. OSHA clarified in the beryllium general industry DFR that the agency only intended to regulate contact with trace beryllium to the extent that it caused airborne exposures of concern. OSHA explained that the agency never intended for provisions aimed primarily at protecting workers from the effects of dermal contact to apply in the case of materials containing only trace amounts of beryllium (83 FR at 19938).

OSHA also published its 2017 proposal to revoke the ancillary provisions of the construction and shipyards beryllium standards in light of overlap with existing OSHA standards applicable to these sectors (82 FR 29182). With respect to the housekeeping provisions of paragraph (j), OSHA identified existing standards that at least partially duplicated the requirements of the beryllium standards. Specifically, OSHA cited the construction ventilation standard, which requires that dust not be allowed to accumulate outside abrasive blasting enclosures and that spills be cleaned up promptly (29 CFR 1926.57(f)(7)). OSHA also identified certain provisions of OSHA's general ventilation standard for abrasive blasting (29 CFR 1910.94(a)), which apply to abrasive blasters in shipyards, and require that dust must not be permitted to accumulate on the floor or on ledges outside of an abrasive-blasting enclosure, and dust spills must be cleaned up promptly. (29 CFR 1910.94(a)(7)). Although OSHA ultimately determined that existing standards did not duplicate all of the requirements of paragraph (j), the agency acknowledged that certain revisions may be appropriate to account for partial overlap in these standards (84 FR at 51378).

In the 2019 NPRM, OSHA announced that it was reconsidering its approach to the housekeeping provisions in the construction and shipyards standards based primarily on two rationales. First, OSHA preliminarily determined that skin or surface contamination in the absence of significant airborne exposures is not an exposure source of concern in the operations with known beryllium exposure in the construction and shipyards sectors; that is, abrasive blasting with material containing trace quantities of beryllium and limited welding operations in shipyards. Second, OSHA preliminary determined that partial overlap between paragraph (j) and existing OSHA standards made certain revisions to these requirements appropriate (84 FR at 53916–17). Accordingly, OSHA proposed a number of changes to paragraph (j) in both standards.

First, OSHA proposed to remove paragraph (j)(1), which required employers to follow the written exposure control plan in paragraph (f) when cleaning beryllium-contaminated areas and to ensure that spills and emergency releases of beryllium are cleaned up promptly and in accordance with the written exposure control plan (84 FR at 53917). OSHA explained that routine general housekeeping and housekeeping related to spills are adequately covered by the existing ventilation standard for construction (29 CFR 1926.57(f)(7)) and OSHA's general ventilation standard (29 CFR 1910.94(a)) applicable to shipyards (84 FR at 53917). OSHA also explained that because the housekeeping provisions are triggered by only one operation (abrasive blasting) using materials with trace amounts of beryllium and the main objective of these provisions is to minimize airborne exposure, a unique written plan for how to clean is unnecessary in this context. OSHA noted that this is in contrast to general industry, where there is the concern for protecting workers from both airborne exposures and dermal contact over a variety of beryllium-containing materials and processes and where employers may need to have more complicated or unique cleaning procedures to adequately protect workers. Finally, with respect to emergency releases of beryllium, OSHA elsewhere in the proposal preliminarily determined that the operations with beryllium exposure in the construction and shipyards sectors do not have emergencies in which exposures differ from the normal conditions of works (see 84 FR at 53909), rendering housekeeping procedures specific to emergency releases unnecessary.

OSHA also proposed revising paragraph (j)(2), which addressed the use of cleaning methods that minimize the likelihood and level of airborne exposure, the use of dry sweeping, brushing and compressed air for cleaning, the use of respiratory protection and personal protective equipment when employing certain types of cleaning methods, and handling and maintaining cleaning equipment (84 FR at 53917). The first proposed revision relates to paragraph (j)(2)(i), renumbered as (j)(1), which required the use of HEPA-filtered vacuuming or other methods that minimize the likelihood and level of airborne exposure when cleaning in beryllium-contaminated areas. The second proposed revision relates to paragraph (j)(2)(ii), renumbered as (j)(2), which prohibited dry sweeping or brushing for cleaning in beryllium-contaminated areas unless HEPA-filtered vacuuming or other methods that minimize the

[31] Due to the transient nature of the work processes in construction and shipyards and the fact that most of the work occurs outside, OSHA decided not to require employers in these industries to maintain all surfaces as free as practicable of beryllium, as it had done in general industry. Rather, the agency required employers in these industries to follow their written exposure control plan when cleaning beryllium-contaminated areas (82 FR at 2690).

likelihood and level of airborne exposure are not safe or effective.

In both paragraphs, OSHA proposed replacing the phrase ''cleaning in beryllium-contaminated area'' with ''cleaning up dust resulting from operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL'' (84 FR at 53917). In the 2018 DFR, OSHA clarified the general industry beryllium standard by defining ''contaminated with beryllium'' and ''beryllium-contaminated'' as contaminated with dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight; a condition not applicable to abrasive blasting operations in construction and shipyards (84 FR at 53917; 83 FR at 19939–40). Because the agency preliminarily determined that there are no operations covered by the construction or shipyard beryllium standards that would create such a beryllium-contaminated surface, the agency proposed to revise these portions of renumbered paragraphs (j)(1) and (2). OSHA explained that the agency intends these provisions to apply where workers are either working in regulated areas in shipyards or in areas with exposures above the TWA PEL or STEL in construction. As such, OSHA preliminarily determined that the presence of dust produced by operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL is a more appropriate trigger for these requirements (84 FR at 53917).

OSHA also proposed to remove the references to ''HEPA-filtered vacuuming'' in renumbered paragraphs (j)(1) and (2) and instead to refer simply to methods that minimize the likelihood and level of airborne exposure. OSHA explained that in abrasive blasting operations, where large amounts of dust are generated, the use of such vacuums may be problematic due to filter overload and clogging which may cause additional exposures (84 FR at 53917). Because the use of HEPA-filtered vacuums may not be appropriate in abrasive blasting operations, OSHA proposed to revise paragraph (j) of both standards to remove the references to such vacuums.

OSHA next proposed to revise paragraph (j)(2)(iii), renumbered as paragraph (j)(3), which prohibited the use of compressed air for cleaning in beryllium-contaminated areas unless the compressed air is used in conjunction with a ventilation system designed to capture the particulates made airborne by the use of compressed air (84 FR at 53917). OSHA again proposed to remove the reference to ''beryllium-contaminated areas'' for reasons already discussed. OSHA also proposed to prohibit the use of compressed air for cleaning where its use causes, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL, without reference to the use of ventilation. OSHA explained that in the 2017 final rule, the agency determined that the use of compressed air might occasionally be necessary in general industry (84 FR at 53918; see 82 FR at 2693). Similarly, for construction and shipyards, OSHA intended at the time to prohibit the use of compressed air during cleaning of beryllium contaminated areas or materials designated for recycling or disposal unless used in conjunction with a ventilation system (84 FR at 53918). In the proposal, OSHA stated that the agency was now reconsidering the practicality of using ventilation with compressed air when cleaning areas with copious amounts of dust produced during abrasive blasting at construction and shipyard sites. Instead, OSHA proposed to limit the use of compressed air to circumstances in which there is a limited quantity of dust, which, if re-entrained, would not result in exposures above the TWA PEL or STEL (84 FR at 53918).

OSHA next proposed revising paragraph (j)(2)(iv), renumbered as paragraph (j)(4), which addressed respirator use and personal protective clothing and equipment where employees use dry sweeping, brushing, or compressed air to clean in beryllium-contaminated areas. OSHA again proposed to remove the reference to ''beryllium-contaminated areas'' for reasons already discussed and to instead simply require the use of respiratory protection and PPE ''in accordance with paragraphs (g) and (h)'' when dry sweeping, brushing, or compressed air is used (84 FR at 53918).

Finally, OSHA proposed removing the disposal provision in paragraph (j)(3), which required that, when transferring beryllium-containing materials to another party for use or disposal, employers must provide the recipient a copy of the warning label required by paragraph (m) (84 FR at 53918). Separately in the proposal, OSHA proposed removing the labeling requirement in paragraph (m) altogether. OSHA explained that all beryllium-containing materials in the shipyard and construction industries contain or produce only trace amounts of beryllium. Accordingly, OSHA explained, this revision is consistent with OSHA's intention, explained in the 2018 DFR, that provisions aimed at protecting workers from the effects of dermal contact should not apply to materials containing only trace amounts of beryllium, such as abrasive blasting media, unless those workers are also exposed to airborne beryllium at or above the action level (84 FR at 53918; see 83 FR at 19940). OSHA further explained that the revision aligns with the housekeeping requirements of the general industry beryllium standard (as modified by the DFR), which does not require labeling for materials that contain only trace quantities of beryllium and are designated for disposal, recycling, or reuse (84 FR at 53918). OSHA emphasized that these materials must still be labeled according to the Hazard Communication standard (29 CFR 1910.1200) and, if appropriate, the hazards of beryllium must be addressed on the label and Safety Data Sheet (SDS) (84 FR at 53918).[32] For additional discussion on labeling requirements, see the Summary and Explanation for paragraph (m).

Some commenters disagreed with the proposed changes to paragraph (j) in both comments submitted to the record and in testimony at the public hearing. Many reiterated in their comments that they believe that workers in the construction and shipyard industries are exposed during activities other than abrasive blasting and welding, some of which may involve beryllium in greater-than-trace amounts. These commenters included AFL–CIO (Document ID 2210, p. 9), NJH (Document ID 2211, p. 11), NABTU (Document ID 2240, p. 9), ACOEM (Document ID 2213, p. 3), and certain members of Congress (Document ID 2208, p. 6). As in other areas of their comments, these commenters identified additional operations that they believe involve beryllium exposure, primarily the dressing of non-sparking tools and construction, maintenance, decommissioning, and demolition work at beryllium-processing facilities. With respect to the requirements of paragraph (j), some of these commenters argued that the potential for additional exposures in these operations counsel against removing any housekeeping requirements—but particularly those aimed at addressing dermal contact with beryllium—to tailor these standards to abrasive blasting and welding operations.

[32] OSHA also proposed some minor, non-substantive changes to paragraph (j), including renumbering existing paragraph (j)(2)(v) as paragraph (j)(5) and removing the heading for ''Cleaning Methods'' to refer to these requirements only as ''Housekeeping'' (84 FR at 53918, FN 8). OSHA received no comments on these changes and is finalizing them as proposed.

OSHA has addressed commenters' concerns regarding additional sources of exposure previously in this preamble in the Summary and Explanation for paragraph (f) and refers readers to that discussion. To summarize, although OSHA acknowledges the potential for exposures beyond abrasive blasting and welding operations, the record continues to lack sufficient data for the agency to characterize the nature, locations, or extent of beryllium exposure in application groups other than abrasive blasting and certain welding operations. Further, the agency has reason to believe that any additional exposures that may occur do not present a dermal contact risk in these sectors. As a result, OSHA finds that it is appropriate to further tailor certain provisions of the beryllium standards for construction and shipyards—including the housekeeping requirements—to those operations for which the agency has data; that is, abrasive blasting operations with material containing trace amounts of beryllium and limited welding operations where dermal contact is not an exposure source of concern.

NABTU specifically urged OSHA to retain paragraph (j)(1), which requires employers to follow their written exposure control plans when cleaning beryllium-contaminated areas and dealing with spills and emergency releases. According to NABTU, OSHA's determination that the only sources of contamination with which employers need be concerned come from abrasive blasting is incorrect and therefore the ventilation standard for construction (29 CFR 1926.57(f)(7)) does not provide adequate coverage (Document ID 2240, p. 9). Similarly, AFL–CIO disagreed with the proposed removal of this paragraph stating that the existing ventilation standards for construction and shipyards are not effective at addressing the toxicity of beryllium (Document ID 2210, pp. 8–9; 2222, Tr. 116–17).

OSHA has determined that in the context of the known exposures in construction and shipyards sectors, the previous requirements of paragraph (j)(1) do not meaningfully increase protections for workers beyond those provided by existing OSHA standards. As stated above, the ventilation standards for construction (29 CFR 1926.57(f)(7)) and general industry (29 CFR 1910.94(a)(7)), applicable to shipyards, both require that spills must be cleaned up promptly, just as required by paragraph (j)(1) of the beryllium standards. Further, beyond the requirements of paragraph (j)(1), these standards specifically require that the employer not permit dust to accumulate outside of the abrasive blasting enclosure. These standards, in conjunction with the other provisions in paragraph (j) that serve to further reduce the potential for exposures above the PEL or STEL, provide the appropriate level of protection for workers in these sectors. Further, in light of the limited operations with beryllium exposure in these sectors, OSHA has determined that paragraph (j) provides sufficient guidance for employers on the limited circumstances in which they are allowed to use cleaning methods such as dry sweeping and compressed air, making a unique written plan for how to clean unnecessary in this context. Accordingly, the agency is removing from paragraph (j) the requirement for employers to follow the written exposure control plan in paragraph (f) when cleaning beryllium-contaminated areas and to ensure that spills and emergency releases of beryllium are cleaned up promptly and in accordance with the written exposure control plan.

AFL–CIO disagreed with what it framed as OSHA's decision to trigger the use of cleaning methods on exposures above the PEL or STEL instead of ''a more conservative trigger of beryllium-contamination,'' claiming the agency is ignoring the risk of health effects at exposures below the PEL (Document ID 2210, p. 9). First, OSHA notes that AFL–CIO misstates the revised trigger for paragraph (j)'s cleaning requirements. OSHA intentionally drafted the requirement to use cleaning methods that minimize the likelihood and level of airborne exposure (renumbered paragraph (j)(1)) and the prohibition on dry sweeping or brushing (renumbered paragraph (j)(2)) to apply whenever an employer ''cleans up dust resulting from'' operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL. As explained above, OSHA intends these provisions to apply where workers are either working in regulated areas in shipyards or in areas with exposures above the TWA PEL or STEL in construction. However, the requirements apply to cleaning up dust in these areas regardless of whether the operation that produced the dust is being performed at the time of the cleaning. In other words, cleaning methods are tied to the location of operations and are not triggered on active exposure above the TWA PEL or STEL, as AFL–CIO suggests. And although revised paragraph (j)(3) prohibits the use of compressed for cleaning when its use can reasonably be expected to cause airborne exposure above the PEL or STEL, compressed air would not satisfy paragraph (j)(1)'s requirement for the use of cleaning methods that minimize airborne exposure unless other more effective methods were infeasible.

Further, in the general industry DFR, OSHA revised the definitions of ''contaminated with beryllium'' and ''beryllium-contaminated'' to clarify that these terms refer to contamination with dust, fumes, mists, or solutions containing beryllium in concentrations greater than or equal to 0.1 percent by weight (83 FR at 19939–40). OSHA reiterates the agency's determination that beryllium contamination, as the agency defines it, does not occur from the trace quantities of beryllium used in abrasive blasting. OSHA has likewise determined that welding operations in shipyards do not produce this sort of skin or surface contamination. If OSHA maintained the term ''beryllium-contaminated'' in paragraph (j), the requirements for when and how employers can use dry sweeping, brushing, or compressed air, or when they must employ cleaning methods that minimize airborne exposure, would likely never be triggered and workers already exposed would not receive the benefit of these protections. For this reason, OSHA has determined that it is more appropriate to trigger these requirements on the presence of dust produced by an operation that causes, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL.

AFL–CIO also indicated that they opposed OSHA's proposal ''to remove the requirement for 'HEPA filtered vacuuming' '' in renumbered paragraphs (j)(1) and (2) and questioned the agency's preliminary determination that such methods may be problematic due to overloading and clogging of the filters (Document ID 2210, p. 8). AFL–CIO contended that HEPA-filtered vacuuming is commonly used and required in other OSHA dust standards and that the record shows this method is the most effecting and safe way to clean toxic dusts and therefore should be used (Document ID 2210, pp. 8–9). OSHA disagrees with AFL–CIO's interpretation that OSHA is removing a requirement to use HEPA-filtered vacuuming. Paragraph (j) has never required the use of HEPA-filtered vacuuming, but instead required the use of HEPA-filtered vacuuming ''or other methods that minimize the likelihood and level of airborne exposure.'' The proposed change removed the specific reference to HEPA-filtered vacuuming while maintaining the requirement that employers utilize cleaning methods that

minimize the likelihood and level of airborne exposure. OSHA has always intended this requirement to be performance-oriented (see 82 FR at 2691). Further, in the 2017 final rule, OSHA acknowledged that ''methods that minimize the likelihood and level of airborne exposure other than HEPA vacuuming may be appropriate for use in construction and shipyards'' (82 FR at 2693). Alternative methods that are effective in minimizing the likelihood and level of airborne exposure can include the use of dust suppressants and wet methods such as wet sweeping or wet shoveling (see 82 FR at 2693).

Moreover, revised paragraphs (j)(1) and (2) do not preclude the use of HEPA-filtered vacuuming for cleaning. Removing this reference simply eliminates any misunderstanding that HEPA-filtered vacuuming is required (as AFL–CIO misinterpreted), particularly where HEPA-filtered vacuuming proves problematic for the particular situation involving the cleanup. Specifically, as OSHA noted in the proposal, abrasive blasting operations produce large amounts of spent abrasive and particulate and the use of HEPA vacuums to clean up these materials may result in continual filter overload and clogging. Constant cleaning of these filters could in fact cause additional exposures. OSHA has determined that removing the specific reference to HEPA-filtered vacuuming while continuing to allow its use is the appropriate approach for the construction and shipyards sectors.

The CISC expressed concern about OSHA's inclusion of restrictions on the use of dry sweeping and brushing for cleaning materials that contain beryllium (Document ID 2203, pp. 16–17). CISC asserted that employers will need to ''assess the extent of naturally occurring beryllium in numerous construction materials to determine whether and how the restriction would apply'' (Document ID 2203, p. 17). OSHA disagrees with this perceived consequence of prohibiting the use of dry sweeping and brushing. These restrictions apply only when cleaning up dust from operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL (29 CFR 1926.1124(j)(2)). As explained elsewhere in this preamble, there is no evidence in the record demonstrating that naturally occurring beryllium in common construction materials at the typical construction site create exposures of concern, as CISC suggest. OSHA addresses similar assertions by CISC regarding trace amounts of naturally occurring beryllium in the Summary and Explanation for paragraph (f).

After reviewing these comments and considering the record as a whole, OSHA has determined the proposed changes addressing the use of cleaning methods and prohibiting dry sweeping or brushing will protect workers from exposure to beryllium during cleaning operations and bring clarity to the requirements of these provisions. Therefore, OSHA is adopting the changes to renumbered paragraphs (j)(1) and (2) as proposed.

AFL–CIO also raised concerns that revised paragraph (j)(3) only prohibits the use of compressed air for cleaning when the use causes, or can reasonably be expected to cause, exposures above the PEL or STEL (Document ID 2210, p. 9). AFL–CIO stated that it is a significant deviation from the current provision, which prohibits compressed air unless combined with a ventilation system. In response to OSHA's preliminary determination that ventilation may be impractical in very dusty environments like those created by abrasive blasting operations, AFL–CIO argued that the agency has not demonstrated that the use of ventilation is infeasible or that the requirement for engineering controls should be removed, ''relying only on the use of respirators . . . , ignoring the hierarchy of controls'' (Document ID 2210, p. 9). Finally, AFL–CIO states that OSHA previously determined that prohibiting compressed air unless combined with ventilation was a practical and feasible approach in dusty environments, and that this provision is included in other dust standards (Document ID 2210, p. 9).

First, OSHA believes that ALF–CIO has misunderstood the hierarchy of the housekeeping provisions. The housekeeping requirements in paragraph (j) are triggered when workers clean up dust resulting from operations that cause, or are reasonably expected to cause, airborne exposure above the TWA PEL or STEL. Under paragraph (j)(1), when cleaning in these areas employers must ensure the use of methods that minimize the likelihood and level of airborne exposures. As explained above, the use of compressed air does not satisfy this requirement unless other more effective measures are infeasible. Following the hierarchy of controls, only after other methods that minimize exposures are shown to be ineffective or unsafe can the employer use methods such as dry sweeping, brushing, or compressed air, and then must provide and ensure the use of respiratory protection and PPE during these activities under paragraph (j)(4). Even so, under revised paragraph (j)(3), compressed air is entirely prohibited when its use causes, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL.

OSHA further notes that the evidence in the record demonstrates that abrasive blasting helpers, those responsible for cleaning up spent abrasive, largely have minimal exposure to beryllium. As explained in the Technological Feasibility chapter of the 2017 final rule Final Economic Analysis (FEA), of the 30 abrasive blasting cleanup workers in the exposure profile of the FEA, two had exposures over the new PEL of 0.2 mg/m^3. One cleanup worker had an 8-hour TWA sample result of 1.1 mg/m^3, but blasting took place in the area during this worker's cleanup task and it is likely that the nearby abrasive blasting contributed to the sample result. The other cleanup worker had a sample result of 7.4 mg/m^3, but that worker's exposure appears to be associated with the use of compressed air for cleaning in conjunction with nearby abrasive blasting (82 FR at 29197). This supports OSHA's determination that the use of compressed air can cause exposure over the PEL or STEL and, in this case, this activity would have been prohibited under revised paragraph (j)(3).

After reviewing these comments and considering the record as a whole, OSHA finds the proposed change prohibiting the use of compressed air for cleaning where its use causes, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL will limit the use of compressed air, such as when other methods are not feasible or effective. Also, by requiring respirator use and personal protective clothing and equipment where employees use dry sweeping, brushing, or compressed air to clean will protect workers from exposure to beryllium in circumstances when there is no feasible, alternative methods for cleaning. Therefore, OSHA is adopting the changes to paragraphs (j)(3) and (4) as proposed.

AFL–CIO also disagreed with OSHA's proposal to eliminate former paragraph (j)(3), which required the employer to provide a copy of the warning described in paragraph (m)(2) whenever it transferred materials containing beryllium to another party for use or disposal. AFL–CIO asserted that removing this provision would result in beryllium exposure to downstream employers and workers (Document ID 2210, p. 9). AFL–CIO indicated their belief that OSHA's general hazard communications standard (HCS) is not sufficient to protect downstream recipients of waste materials.

As explained in the Summary Explanation for paragraph (m), OSHA proposed to remove the labeling requirements in paragraph (m), such as the label referenced in paragraph (j)(3), to account for the trace amounts of beryllium encountered in the construction and shipyards sectors and to align these standards with the general industry beryllium standard, which does not require the labeling of material containing less than 0.1 percent beryllium by weight. OSHA reiterates its finding that the known exposures in these sectors are limited to materials containing beryllium in trace quantities and do not present a risk from dermal contact. Further, there is no evidence in the record that downstream recipients of these materials are at risk of airborne exposure above the PEL or STEL from the trace amounts of beryllium in these materials.

Moreover, OSHA explained in the NPRM that abrasive blasting media is often contaminated with several toxic chemicals such as hexavalent chromium or lead from the blasted substrate or coating on the substrate (84 FR at 53918; see OSHA Fact Sheet, Protecting Workers from the Hazards of Abrasive Blasting Materials, available at *https://www.osha.gov/Publications/OSHA3697.pdf*). AFL–CIO itself identified lead, cadmium, and arsenic as hazards associated with abrasive blasting operations (Document ID 2244, p. 11). OSHA remains concerned that providing warnings specific to beryllium for materials that contain trace beryllium and where airborne exposures are not anticipated to be significant may overshadow or dilute hazard warnings for other substances that do present a risk in this context. Neither AFL–CIO nor any other commenter contradicted this concern. OSHA finds that the general HCS requirements provide the appropriate information for spent abrasive blasting media containing only trace amounts of beryllium, where the material may be contaminated with several other toxic substances. Accordingly, OSHA is finalizing its proposal to remove former paragraph (j)(3) from the construction and shipyards standards.

In conclusion, based on the record as a whole OSHA is finalizing paragraph (j) as proposed.

Paragraph (k) Medical Surveillance

Paragraph (k) of the beryllium standard for construction and shipyards addresses medical surveillance requirements. The paragraph specifies which employees must be offered medical surveillance, as well as the frequency and content of medical examinations. It also sets forth the information that must be provided to the employee and employer. The purposes of medical surveillance for beryllium are (1) to identify beryllium-related adverse health effects so that appropriate intervention measures can be taken; (2) to determine if an employee has any condition that might make him or her more sensitive to beryllium exposure; and (3) to determine the employee's fitness to use personal protective equipment, such as respirators. The inclusion of medical surveillance in the beryllium standards for the construction and shipyard industries is consistent with Section 6(b)(7) of the OSH Act (29 U.S.C. 655(b)(7)), which requires that, where appropriate, medical surveillance programs be included in OSHA health standards to aid in determining whether the health of employees is adversely affected by exposure to the hazards addressed by the standard.

In the 2019 NPRM, OSHA proposed several revisions to paragraph (k). First, OSHA proposed removing paragraph (k)(1)(i)(C), which requires medical surveillance after exposure to beryllium during an emergency, to coincide with the removal of the term ''emergency'' from the standards (84 FR at 53918–19). Second, OSHA proposed minor revisions to paragraphs (k)(3)(ii)(A) and (k)(4)(i) to replace the phrase ''airborne exposure to and dermal contact with beryllium'' in these provisions with the simpler phrase ''exposure to beryllium'' (84 FR at 53919). Finally, OSHA proposed two revisions to paragraph (k)(7)(i) to make it consistent with recent changes to the beryllium general industry standard [33] (84 FR at 53919).

With respect to OSHA's proposal to remove paragraph (k)(1)(i)(C), as discussed previously in the Summary and Explanation for paragraph (b), OSHA proposed to remove references to emergencies in the shipyards and construction standards because OSHA expects that any emergency in these industries (such as a release resulting from a failure of the blasting control equipment, a spill of the abrasive blasting media, or the failure of a ventilation system during welding operations in shipyards) would occur only during the performance of routine tasks already associated with the airborne release of beryllium; *i.e.,* during the abrasive blasting or welding process. Therefore, employees would already be protected from exposure in such circumstances. Accordingly, OSHA preliminarily determined that no requirements should be triggered for emergencies in construction and shipyards and proposed to remove references to emergencies in provisions related to respiratory protection, paragraph (g); medical surveillance, paragraph (k); and hazard communication, paragraph (m). The agency also preliminarily determined that without these provisions it would be unnecessary to define the term *emergency* in paragraph (b) (84 FR at 53909).[34]

Some commenters objected to the proposed removal of provisions relating to emergencies. Specifically, these commenters took issue with OSHA's preliminary determination that an uncontrolled release of beryllium in the construction and shipyards industries would not create exposures that differ from normal operations. For a full discussion of these comments and the agency's response, see the Summary and Explanation for paragraph (g). In short, the agency is not persuaded that the types of uncontrolled releases that necessitated emergency provisions in the general industry standard are present in the construction and shipyards industries. Accordingly, OSHA is finalizing its proposal to remove all references to ''emergency'' or ''emergencies'' throughout the construction and shipyards standards. Because those terms no longer appear in the standards' requirements, OSHA is also finalizing its proposal to remove the definition of the term ''emergency'' from paragraph (b).

AFL–CIO, NABTU, and NJH specifically commented on the proposed removal of the emergency exposure trigger for a medical examination in paragraph (k). AFL–CIO opposed the removal of the emergency provisions and argued that medical surveillance should be required following an emergency (Document ID 2210, p. 9). NABTU commented that a failure of a containment used for abrasive blasting would be considered an emergency (Document ID 2222, Tr. 85–86, 91–92). NABTU also noted situations where construction workers could experience emergency exposures to beryllium in manufacturing and processing facilities, and it urged OSHA to retain the

[33] OSHA also proposed a number of minor, non-substantive edits to paragraph numbering and references to account for the addition of a new paragraph (k)(7)(ii).

[34] Due to the removal of paragraph (k)(1)(i)(C), OSHA is also adding the word ''or'' at the end of paragraph (k)(1)(i)(B) (following the semi-colon); removing a reference to paragraph (k)(1)(i)(C) from paragraph (k)(2)(i)(B); and redesignating paragraph (k)(1)(i)(D) as paragraph (k)(1)(i)(C). Consistent with that redesignation, OSHA is replacing the reference to paragraph (k)(1)(i)(D) in paragraph (k)(2)(ii) with a reference to paragraph (k)(1)(i)(C).

definition for emergency and other related protections, such as the trigger for an emergency examination. (Document ID 2240, p. 7). NABTU also commented that questions about emergency exposures should ''be included in the medical and work histories, to ensure that pertinent information about potential exposures is not overlooked.'' (Document ID 2240, p. 8). In contrast, NJH agreed with OSHA that emergencies might not occur, but recommended that if the trigger for emergency exposure is removed, any exposure above the PEL should trigger medical surveillance (Document ID 2211, p. 11). Specifically, NJH commented: ''Jobs and tasks that would generate beryllium exposure (demolition, repair, clean up, abrasive blasting, welding, cleaning and grinding of beryllium containing tools, etc.) may only be done periodically and meeting the ''30 days over the action level'' in order to qualify for medical surveillance may not be easy to quantify or may require extensive recordkeeping as workers move from job to job or contract to contract. Therefore, any exposures above the PEL should trigger the medical surveillance and hazard communication provisions.'' (Document ID 2211, p. 11). Lisa Barker from NJH further testified that persons who are genetically susceptible can become sensitized from limited exposures (Document ID 2222, Tr. 56–57).

As explained in the Summary and Explanation for paragraph (g), OSHA is not reinstating a definition for emergency, and readers should refer to that section for a complete explanation. In response to NABTU's comment that emergency exposures should be included in medical and work histories, OSHA does not specify the individual questions to include in a medical and work history. Instead, OSHA simply requires that medical and work histories include ''past and present exposure to beryllium.'' An unexpected exposure, such as would occur with a containment failure, would therefore be included in the medical and work history for an employee who undergoes medical surveillance under the beryllium standard. In addition, paragraph (k)(4)(i) requires the employer to inform the PLHCP about former and current levels of airborne exposure. OSHA would expect the employer to inform the PLHCP if the employee experienced an incident where he or she was exposed to levels of beryllium that exceeded the employee's typical exposure levels.

In response to NJH's suggestion that, if the emergency provision is removed, OSHA should require medical surveillance for any exposure above the PEL, OSHA notes that NJH's position is not limited to exposures in an emergency but to any exposures any exposures above the PEL that occur for fewer than 30 days. In other words, NJH asks OSHA to reconsider the appropriateness of the 30-day exposure-duration trigger generally. OSHA evaluated the appropriateness of the 30-day trigger in the 2017 final rule. At that time, NJH and other stakeholders opposed the 30-day exposure-duration trigger for medical surveillance. After careful consideration of comments and other evidence in the record, OSHA decided to maintain the 30-day exposure-duration trigger because it is consistent with the agency's risk assessment showing increasing risk of health effects from exposure at increasing cumulative exposures, which considers both exposure level and duration (82 FR at 2528–40, 2698). OSHA found a 30-day trigger to be a reasonable benchmark for capturing increasing risk from cumulative effects caused by repeated exposures. Between that rulemaking and the present, OSHA has not received any additional evidence demonstrating that this benchmark is inappropriate. Finally, OSHA notes that the 30-day exposure-duration trigger is consistent with the general industry beryllium standard and other OSHA health standards, such as the standards for chromium (VI) (29 CFR 1910.1026), cadmium (29 CFR 1910.1027), lead (29 CFR 1910.1025), asbestos (29 CFR 1910.1001), and respirable crystalline silica (29 CFR 1910.1053) (82 FR at 2698).

With respect to NJH's related concern regarding the tracking of exposures in the construction industry—where tasks may be performed intermittently at different locations—similar concerns were raised during the respirable crystalline silica rulemaking. In that rulemaking, OSHA acknowledged that tracking exposures in construction can be challenging. However, it pointed to evidence in the record showing that some construction employers were able to determine which employees were exposed above the PEL based on employee schedules and task-based hazard assessments. (81 FR 16285, 16815–16 (March 25, 2016)). Indeed, an employer can determine eligibility for medical surveillance based on information from exposure assessments for the various tasks and knowledge about how often the task is performed. Compliance officers can also determine if employees who were exposed at or above the action level for 30 or more days a year were not offered medical surveillance by questioning employees about how often they perform certain tasks. As such, OSHA finds it is possible to quantify exposure for employees that are only periodically exposed to beryllium without extensive recordkeeping. Accordingly, OSHA believes it is appropriate to maintain the 30-day trigger and that this will not create undue burdens with respect to recordkeeping.

Moreover, employees experiencing signs or symptoms or other beryllium-related health effects after intermittent or unexpected exposures to beryllium can ask for an examination under paragraph (k)(1)(i)(B). Paragraph (m)(2)(i)(A) requires the employer to provide information and training in accordance with the Hazard Communication Standard (HCS), 29 CFR 1910.1200(h), for each employee who has, or can reasonably be expected to have, airborne exposure to beryllium. Paragraph (m)(2)(ii) also requires employers to ensure that these employees can demonstrate knowledge and understanding of a number of specified topics, including the signs and symptoms of CBD. Thus, employees who are intermittently exposed should possess the knowledge necessary to determine whether they should request an examination. In summary, OSHA has determined that the evidence presented does not support reinstating triggers for an emergency exposure or reconsidering the 30-day exposure-duration as a trigger for medical surveillance.

The second set of changes that OSHA proposed were minor revisions to paragraphs (k)(3)(ii)(A) and (k)(4)(i). Paragraph (k)(3)(ii)(A) previously required the employer to ensure that the employee is offered a medical examination that includes a medical and work history, with an emphasis on, among other things, past and present airborne exposure to or dermal contact with beryllium. Paragraph (k)(4)(i) previously required the employer to ensure that the examining PLHCP (and the agreed upon CBD diagnostic center, if an evaluation is required under paragraph (k)(7) of this standard) had certain information, including a description of the employee's former and current duties that relate to the employee's airborne exposure to and dermal contact with beryllium, if known. In the 2019 NPRM, OSHA proposed to clarify these provisions by replacing the phrase ''airborne exposure to and dermal contact with beryllium'' with the simpler phrase ''exposure to beryllium'' (84 FR at 53919). OSHA reasoned that employees with beryllium exposure of any kind should have access to records of their exposure, and this information should also be made

available to an examining PLHCP and CBD diagnostic center, if applicable. OSHA intended for this proposed change to alleviate any unnecessary confusion created by the use of the term ''dermal contact,'' which is defined in the general industry standard but not in the construction and shipyards standards.

AFL–CIO and NABTU commented on OSHA's proposed changes to paragraphs (k)(3) and (4). AFL–CIO opposed OSHA's proposed revision to paragraph (k)(4)(i), arguing that it is important for the physician to be informed about both airborne and dermal exposures and that removing that clarification would increase confusion by putting the burden on the employer and physician to understand OSHA's intent (Document ID 2210, p. 9). In further support of retaining provisions that provide protection from dermal exposure, AFL–CIO referenced a previous comment from NABTU stating that the skin should be examined because beryllium exposure can result in ''skin irritation, skin bumps, and sores that won't heal.'' (Document ID 2244, pp. 8–9; 1679, Attachment A, p. 1). NABTU commented that OSHA should retain the ''protections against airborne exposures'' in paragraph (k)(3) (Document ID 2240, p. 6).

OSHA clarifies that it does not intend to change the requirements for the type of information provided to the physician, and if the employee does have the potential for dermal exposure, the employer is to provide that information to the physician. OSHA proposed this change not to limit the type of information provided to physicians, but instead, to make clear that employers and employees should inform physicians about *any* type of beryllium exposure. OSHA continues to believe that the change will reduce confusion by removing terminology—the reference to dermal contact—that is not used in the construction and shipyards standard. In addition, the requirement for the PLHCP to examine the skin for rashes is retained in paragraph (k)(3)(ii)(C). Consistent with the 2017 final rule, OSHA continues to believe that it is important to examine the skin for rashes because it could be a sign that dermal sensitization or exposures that put the employee at risk of sensitization have occurred (82 FR at 2471). OSHA disagrees with AFL–CIO that simplifying the language of these provisions will result in confusion, because the revised text clearly encompasses all exposure to beryllium. Accordingly, OSHA has decided to finalize the changes to paragraph (k)(3)(ii)(A) and (k)(4)(i) as proposed.

The final set of changes that OSHA proposed to the construction and shipyard standards' medical surveillance requirements is in paragraph (k)(7), which contains the requirements for an evaluation at a CBD diagnostic center. In this final rule, OSHA is amending paragraph (k)(7) in three ways. First, OSHA is revising paragraph (k)(7)(i) to require that the evaluation be scheduled within 30 days, and occur within a reasonable time, of the employer receiving one of the types of documentation listed in paragraph (k)(7)(i)(A) or (B). Second, OSHA is adding a provision in paragraph (k)(7)(ii), which clarifies that, as part of the evaluation at the CBD diagnostic center, the employer must ensure that the employee is offered any tests deemed appropriate by the examining physician at the CBD diagnostic center, such as pulmonary function testing (as outlined by the American Thoracic Society criteria), bronchoalveolar lavage (BAL), and transbronchial biopsy. The new provision also states that if any of the tests deemed appropriate by the examining physician are not available at the CBD diagnostic center, they may be performed at another location that is mutually agreed upon by the employer and the employee. Third, OSHA is making a number of minor, non-substantive revisions to the numbering and cross-references in paragraph (k)(7) to account for the addition of new paragraph (k)(7)(ii). Specifically, OSHA is renumbering current paragraphs (k)(7)(ii), (iii), (iv), and (v) as (k)(7)(iii), (iv), (v), and (vi), respectively, and is adding a reference to new paragraph (k)(7)(ii) to the newly renumbered paragraph (k)(7)(vi). These proposed changes are consistent with changes the agency proposed to paragraph (k)(7)(i) of the beryllium standard for general industry in December 2018.

Each of these final revisions differ in some way from the proposed amendments based on stakeholder feedback. With regard to the first change concerning the timing of the exam, the previous standard required employers to provide the examination within 30 days of the employer receiving one of the types of documentation listed in paragraph (k)(7)(i)(A) or (B). The purpose of the 30-day requirement was to ensure that employees receive the examination in a timely manner. However, since the publication of the 2017 final rule, stakeholders have raised concerns that it is not always possible to schedule and complete the examination and any required tests within 30 days (84 FR at 53919).

To address this concern, OSHA proposed that the employer provide an initial consultation with the CBD diagnostic center, which could occur via telephone or virtual conferencing methods, rather than the full evaluation, within 30 days of the employer receiving one of the types of documentation listed in paragraph (k)(7)(i)(A) or (B). OSHA explained that providing a consultation before the full examination at the CBD diagnostic center would demonstrate that the employer made an effort to begin the process for a medical examination. OSHA also noted that the proposed change would also (1) allow the employee to consult with a physician to discuss concerns and ask questions while waiting for a medical examination, and (2) allow the physician to explain the types of tests that are recommended based on medical findings about the employee and explain the risks and benefits of undergoing such testing. In both the 2019 NPRM for construction and shipyards (84 FR at 53919) and the 2018 NPRM for general industry (83 FR at 63758), OSHA requested comments on the appropriateness of providing the initial consultation within 30 days and on the sufficiency of a consultation via telephone or virtual conference.

OSHA received several comments on the proposed changes from NJH, AFL–CIO, and Materion. NJH commented that an examination at the CBD diagnostic center should not be required to occur within 30 days of the referral because openings at clinics may not be available within a 30-day period (Document ID 2211, p. 12). NJH further noted that ''[i]t is common practice in most diagnostic centers to schedule specialty exams within a 3-month window due to the need to coordinate worker time away from work and home, physician visits, pulmonary function testing, chest imaging, bronchoscopy and other testing for one clinical evaluation visit'' (Document ID 2211, p. 12). At the public hearing, NJH testified that an evaluation can take up to three days when an employee undergoes procedures such as bronchoscopy because the employee has to be cleared for testing, undergo testing on the following day, and then spend the night locally to ensure there are no adverse effects before discharge (Document ID 2222, Tr. 54).[35] NJH also

[35] In response to the 2018 NPRM for general industry, OSHA received similar comments on the proposed timeline for the evaluation at the CBD Diagnostic Center from ATS, NJH, and Materion (Document ID OSHA–2018–0003–0021, p. 3; OSHA–2018–0003–0022, pp. 5–6; OSHA–2018–0003–0038, p. 34). DOD recommended that the evaluation at the CBD Diagnostic center be scheduled within seven days (Document ID OSHA–2018–0003–0029, p. 2), but OSHA found that this

Continued

opposed the proposed requirement for a consultation that can be performed via telephone or virtual conferencing within 30 days of the employer receiving documentation recommending a referral. NJH commented: ''A video or phone consultation adds cost and logistics to scheduling and is not necessary as the PLHCP who sees the employee for screening provides information on the clinical evaluation. HIPAA privacy issues of a phone or video conference also exist. A full clinical evaluation including review of both the available medical and exposure data and hands-on medical assessment are essential to providing the best, most efficient care—from a time and financial perspective.'' (Document ID 2211, pp. 12–13.)

Lisa Barker from NJH further testified that workers who are sensitized but feel well may decide to forgo additional testing following a video consultation (Document ID 2222, Tr. 54–55). These workers would miss the opportunity to determine if they have the disease, and if so, receive treatments to slow progression upon initial confirmation of sensitization (Document ID 2222, Tr. 54–55). NJH also expressed concerns related to the expertise and availability of a PLHCP who might perform the consultation and about workers who may not have a health care provider to facilitate a phone or video consultation (Document ID 2243, p. 6).

NJH recommended that the employer be required to schedule the appointment within 30 days, but that the actual evaluation can take place beyond 30 days of the confirmed abnormal result (Document ID 2211, p. 13). AFL–CIO agreed with NJH on the proposed timeline for an evaluation at a CBD diagnostic center (Document ID 2210, p. 9). Materion agreed with NJH that an evaluation at the CBD diagnostic center should be scheduled within 30 days after sensitization is confirmed and documented; however, it noted that employees can withhold test results from employers (Document ID 2237, p. 5).[36]

After considering these comments, OSHA is convinced that scheduling a phone or virtual consultation with the CDB diagnostic center is an unnecessary step that adds logistical complications and costs. OSHA finds that the scheduling approach suggested by NJH addresses both the logistical difficulties and the timing concerns with respect to the requirements in the current standard. Moreover, OSHA finds that employees will have enough information (through trainings under paragraph (m) and discussions with the PLHCP) to allow them to decide whether to choose to be evaluated at the CBD diagnostic center without the need for an additional consultation.[37] OSHA is therefore amending paragraph (k)(7)(i) to require that the employer schedule an examination at a CBD diagnostic center within 30 days of receiving one of the types of documentation listed in paragraph (k)(7)(i)(A) or (B). In response to Materion's concern that an employee can choose to withhold the recommendation for an evaluation at a CBD diagnostic center from the employer, the paragraph makes clear that the appointment must be scheduled within 30 days of the ''employer's receipt'' of the appropriate documentation. That means that the employer's obligations do not commence until the employer receives the documentation for an evaluation at a CBD diagnostic center following the employee's authorization.

To achieve the intent of the 2017 final rule and the 2019 NPRM that evaluation at a CBD diagnostic center occurs in a timely manner, OSHA is adding that the evaluation must occur within a reasonable time. Requiring that the evaluation occur within a reasonable time ensures that the evaluation be done as soon as practicable based upon availability of openings at the CBD diagnostic center and the employee's preferences. This revision better addresses OSHA's original intent that the employee be examined within a timely period, while providing employees and employers with maximum flexibility and convenience.

The second change that OSHA proposed to paragraph (k)(7)(i) relates to the contents of the examination at the CBD diagnostic center. As discussed in more detail above, the former definition of *CBD diagnostic center*—which stated that the evaluation at the diagnostic center ''must include'' a pulmonary function test as outlined by American Thoracic Society criteria, bronchoalveolar lavage (BAL), and transbronchial biopsy—could have been misinterpreted to mean that the examining physician was required to perform each of these tests during every clinical evaluation at a CBD diagnostic center. That was not OSHA's intent. Rather, the agency merely intended to ensure that any CBD diagnostic center has the capacity to perform any of these tests, which are commonly needed to diagnose CBD. Therefore, OSHA proposed revising the definition to clarify that the CBD diagnostic center must simply have the ability to perform each of these tests when deemed appropriate.

To account for that proposed change to the definition of *CBD diagnostic center* and to ensure that the employer provides those tests if deemed appropriate by the examining physician at the CBD diagnostic center, OSHA proposed expanding paragraph (k)(7)(i) to require that the employer provide, at no cost to the employee and within a reasonable time after consultation with the CBD diagnostic center, any of the three tests mentioned above, if deemed appropriate by the examining physician at the CBD diagnostic center (84 FR at 53919). OSHA explained that the revision would also clarify the agency's original intent that, instead of requiring all three tests to be conducted after referral to a CBD diagnostic center, the standard would allow the examining physician at the CBD diagnostic center the discretion to select one or more of those tests as appropriate (84 FR at 53919).

OSHA received comments addressing the types of tests that should be conducted for the evaluation of CBD. NJH commented that at a minimum, a clinical evaluation for CBD should include ''full pulmonary function testing (including lung volumes, spirometry and diffusion capacity for carbon monoxide) and chest imaging'' (Document ID 2211, p. 4); that the examination should include ''bronchoalveolar lavage and biopsy, whether or not a person shows signs or symptoms of frank, chronic beryllium disease'' (Document ID 2222, Tr. 56); and that ''the services should be available at the center'' (Document ID 2211, p. 12). NJH recommended that OSHA follow the American Thoracic Society guidelines recommending that beryllium sensitized individuals undergo ''[Pulmonary function testing] and chest imaging (either a chest radiograph or chest CT [computerized tomography] scan,'' with consideration of bronchoscopy, depending on

would not give employees enough time to consider obligations and have discussions with family members. The agency also found the 30-day trigger to be administratively convenient because it is consistent with other triggers in the beryllium standard (85 FR 42621).

[36] In response to the NPRM for general industry, Materion found OSHA's proposed change for a consultation with a CBD diagnostic center more workable than an evaluation at a CBD Diagnostic Center within 30 days, but similar to the comments provided for this construction and shipyards NPRM, ATS and NJH disagreed with the requirement for a consultation (Document ID OSHA–2018–0003–0038, p. 34; OSHA–2018–0003–0021, p. 3; OSHA–2018–0003–0022, pp. 5–6).

[37] Under paragraph (k)(6)(i)(D), the employer is to ensure that the PLHCP explains the results of the medical examination to the employee, including results of tests conducted and medical conditions related to airborne beryllium exposure that require further evaluation or treatment.

''absence of contraindications, evidence of pulmonary function abnormalities, evidence of abnormalities on chest imaging, and personal preference of the patient'' (Document ID 2211, pp. 2, 4, 12). Similarly, NABTU submitted a description of the Building Trades National Medical Screening Program recommending that sensitized persons without clinical signs of CBD undergo pulmonary function testing and a high resolution chest CT, with lavage or biopsy only if the pulmonary function tests or CT scans suggest CBD or if the patient prefers to undergo lavage or biopsy (Document ID 2202, Attachment 4, PDF page 97). Lisa Barker from NJH testified that if OSHA does not specify such tests, medical directors may not order some tests because of a lack of education or information or because the worker feels well and is not interested in an evaluation (Document ID 2222, Tr. 66–68).[38]

After reviewing these comments and the remainder of the record on this issue, OSHA remains convinced that pulmonary function testing, BAL, and transbronchial biopsies are important diagnostic tools but finds that the examining physician at the CBD diagnostic center is in the best position to determine which diagnostic tests are appropriate for particular workers. The agency believes that the modified definition of the term *CBD diagnostic center,* which requires the centers to have the capacity to perform these three tests, will serve to ensure that healthcare providers at the centers are aware of the importance of and are able to perform these tests.

However, OSHA understands that the proposed provision could be misinterpreted to mean that the employer does not have to make available additional tests that the examining physician deems appropriate for reasons such as diagnosing or determining the severity of CBD. That was never the agency's intent. In fact, OSHA noted the potential for other tests, as deemed necessary by the CBD diagnostic center physician, at several points in the preamble to the 2017 final rule (see, *e.g.,* 82 FR at 2709, 2714). Similar to paragraph (k)(3)(ii)(G), which provides that the employer must ensure that the employee is offered as part of the initial or periodic medical examination any test deemed appropriate by the PLHCP, OSHA intends for the employer to ensure the employee is offered any tests deemed appropriate by the examining physician at the CBD diagnostic center, including tests for diagnosing CBD, for determining its severity, and for monitoring progression of CBD following diagnosis. Allowing the physician at the CBD diagnostic center to order additional tests that are deemed appropriate is also consistent with most OSHA substance-specific standards, such as respirable crystalline silica (29 CFR 1910.1053) and chromium (VI) (29 CFR 1910.1026).

To clarify the agency's intent that the physician at the CBD diagnostic center has discretion to order appropriate tests, and to further respond to stakeholder concerns regarding the necessity of pulmonary function testing, BAL, and transbronchial biopsies, OSHA is adding a new paragraph (k)(7)(ii), which focuses on the content of the examination. This new provision requires that the evaluation include any tests deemed appropriate by the examining physician at the CBD diagnostic center, such as pulmonary function testing (as outlined by the ATS criteria), BAL, and transbronchial biopsy. OSHA intends for the new provision to make clear that the employer must provide additional tests, such as those recommended by NJH, ATS guidelines, and by Building Trades National Medical Screening Program, at no cost to the employee, if those tests are deemed necessary by the examining physician. The agency also believes that explicitly naming the three examples of tests that may be appropriate will further emphasize their importance to examining physicians at the CBD diagnostic centers.

Consistent with OSHA's original intent, those tests are only required to be offered if deemed appropriate by the physician at the CBD diagnostic center. For example, if lung volume and diffusion tests were performed according to ATS criteria as part of the periodic medical examination under paragraph (k)(3), and the physician at the CBD diagnostic center found them to be of acceptable quality, those tests would not have to be repeated as part of a CBD evaluation. The addition of paragraph (k)(7)(ii) clarifies that the employer must, however, offer any test that the PLHCP deems appropriate. Consistent with previous health standards and the meaning of the identical phrase in paragraph (k)(3)(ii)(G), OSHA intends the phrase ''deemed appropriate'' to mean that additional tests requested by the physician must be both related to beryllium exposure and medically necessary, based on the findings of the medical examination (see 82 FR at 2709; Occupational Exposure to Respirable Crystalline Silica, 81 FR 16286, 16514 (March 25, 2016)). Because of the technical expertise that a facility must have in order to meet the definition of a CBD diagnostic center, OSHA is also confident that physicians at those facilities will have the expertise to identify additional tests that may be useful to diagnose or assess the severity of CBD.

New paragraph (k)(7)(ii) also addresses the possibility that a test that is deemed appropriate by the examining physician at the CBD diagnostic center might not be available at that center. Although OSHA's intention has been to require any testing to be provided by the same CBD diagnostic center unless the employer and employee agree to a different CBD diagnostic center (see 83 FR at 63758), there may be cases where the CBD diagnostic center does not perform a type of test deemed appropriate by the examining physician. In such a case, OSHA wants to ensure that the employee can receive the appropriate test. Therefore, OSHA is also including in paragraph (k)(7)(ii) a requirement that if any of those tests deemed appropriate by the physician are not available at the CBD diagnostic center, they may be performed at another location that is mutually agreed upon by the employer and the employee. This other location does not need to be a CBD diagnostic center as long as it is able to perform tests according to requirements under paragraph (k).

In summary, final paragraph (k)(7)(i) requires that the employer provide an evaluation at no cost to the employee at a CBD diagnostic center that is mutually agreed to by the employer and the employee. The evaluation must be scheduled within 30 days and must occur within a reasonable time of the employer receiving one of the types of documentation listed in paragraph (k)(7)(i)(A) or (B). Final paragraph (k)(7)(ii) requires that the evaluation include any tests deemed appropriate by the examining physician at the CBD diagnostic center, such as pulmonary function testing (as outlined by the ATS criteria), BAL, and transbronchial biopsy. Paragraph (k)(7)(ii) further requires that if any of the tests deemed appropriate by the examining physician are not available at the CBD diagnostic center, they may be performed at another location that is agreed upon by

[38] Similar comments regarding the need for certain tests to diagnose CBD were submitted in response to the general industry NPRM by ATS, NJH, and AOEC (Document ID OSHA–2018–0003–0021, p. 3; OSHA–2018–0003–0022, p. 3; OSHA–2018–0003–0028, p. 2).

the employer and employee and at no cost to the employee.[39]

Paragraph (m) Communication of Hazards

Paragraph (m) of the beryllium standards for construction and shipyards sets forth the employer's obligations to comply with OSHA's Hazard Communication Standard (HCS) (29 CFR 1910.1200) relative to beryllium, and to take additional steps to warn and train employees about the hazards of beryllium. Under the HCS, beryllium manufacturers and importers are required to evaluate the hazards of beryllium and prepare labels and safety data sheets (SDSs) and provide both documents to downstream users. Employers whose employees are exposed to beryllium in their workplace must develop a hazard communication program and ensure that employees are trained on the hazards of beryllium. These employers must also ensure that all containers of beryllium are labeled and that employees are provided access to the SDSs. In addition to the requirements under the HCS, paragraph (m)(1)(ii) of the beryllium standards specify certain criteria that must be addressed in classifying the hazards of beryllium. In the standard for shipyards, paragraph (m)(2) requires employers to provide and display warning signs with specified wording at each approach to a regulated area. Paragraph (m)(3) of the shipyards standard, and paragraph (m)(2) of the construction standard, details employers' duties to provide information and training to employees.

In the 2019 NPRM, OSHA proposed three changes to paragraph (m) of the construction and shipyard standards to align with proposed changes to other provisions in these standards. First, OSHA proposed to remove the paragraph (m) provisions that require specific language for warning labels applied to bags and containers of clothing, equipment, and materials contaminated with beryllium (paragraph (m)(2) in construction and paragraph (m)(3) in shipyards).[40] This is consistent with OSHA's proposal to remove the corresponding requirements to provide such warning labels from paragraphs (h)(2)(v) and (j)(3). As explained in the 2019 NPRM, and earlier in this Summary and Explanation with regard to paragraphs (h)(2)(v) and (j)(3), OSHA proposed to remove the requirements in both standards to label PPE removed from the workplace for laundering, cleaning, maintenance, or disposal and to label beryllium-containing material destined for disposal in accordance with the labeling requirements in paragraph (m) of the 2017 final rule. The agency proposed these changes to reflect its intent that provisions aimed at protecting workers from the effects of dermal contact need not apply to materials containing only trace amounts of beryllium—like all beryllium-containing material used in abrasive blasting in the construction and shipyards industries—in the absence of significant airborne exposure. OSHA applied the same rationale to the limited welding operations in shipyards, where the agency had evidence that at most only trace amounts of particulate beryllium will form (84 FR at 53906); see also the Summary and Explanation for paragraphs (h) and (j). Accordingly, the agency preliminarily determined that labels are not necessary to protect employees in the context of trace beryllium in construction and shipyards, and, therefore, the provisions of paragraph (m) mandating specific language for such labels are likewise unnecessary.

National Jewish Health (NJH) objected to OSHA's proposal, stating that all PPE and waste that is contaminated with or contains beryllium should be labeled as such. ''It is not always the case that the contamination contains only trace amounts of beryllium. . . . It cannot be overlooked that workers in the construction industries may be involved in demolition and disassembly of beryllium contaminated buildings, machines and materials'' (Document ID 2211, p. 13). NJH further noted that DOE beryllium training materials state, ''Laundry workers and personnel who are responsible for the cleaning and maintenance of respirators have a high potential for being exposed to airborne beryllium dust'' (Document ID 2211, p. 13; COMMUNICATING HEALTH RISKS WORKING SAFELY WITH BERYLLIUM: Training Reference for Beryllium Workers and Managers/Supervisors Facilitator Manual, Beryllium Health Risk Communication Task Force, DOE, April 2002, *https://www.energy.gov/sites/prod/files/2014/09/f18/communicating_0.pdf*). AFL–CIO similarly expressed concern that without the labeling requirements of the 2017 standard, downstream recipients of contaminated PPE and scrap materials generated during renovation or demolition of beryllium manufacturing sites would not be informed of the potential for airborne beryllium exposure for workers handling these items (Document ID 2210, pp. 8–9; 2222, pp. 118–19).

AFL–CIO also raised concerns about the removal of labeling requirements for construction materials that are contaminated with beryllium that are dumped in landfills (Document ID 2244, pp. 3–4). AFL–CIO indicated that landfill workers are at risk of exposure to airborne dust that may be created by their work activities. Without label information on beryllium-containing waste materials sent from construction activities, they argue, landfill workers may not don appropriate PPE to protect themselves from beryllium exposure while performing their work duties. In their comments, NABTU also included landfill employees as a group of workers with potential beryllium exposure from construction activities (Document ID 2202, p. 4).

OSHA has no evidence that laundry or landfill workers who handle PPE or materials designated for disposal from construction sites or shipyards would engage in tasks that generate airborne exposure of concern. First, the agency believes that NJH's reliance on DOE's 2002 instruction manual is misplaced. The manual is directed specifically to DOE facilities; facilities that processed materials containing beryllium in more than trace quantities. In fact, for purposes of DOE's own beryllium regulations, the agency defines *beryllium* as any insoluble beryllium compound or alloy *containing 0.1 percent beryllium or greater* that may be released as an airborne particulate (10 CFR 850.3). The DOE manual is therefore not relevant to the construction and shipyards context.

Furthermore, evidence in the record demonstrates that, with respect to materials containing only trace quantities of beryllium, airborne dust concentrations must be very high for exposures to approach even the action level (AL). For dust containing less than 4 ppm beryllium, airborne dust concentrations would have to exceed 25 mg/m3 to reach the beryllium AL of 0.1 μg/m^3. This level of dust would

[39] OSHA is also making a number of minor, non-substantive revisions to the numbering and cross-references in paragraph (k)(7) to account for the addition of new paragraph (k)(7)(ii). Specifically, OSHA is renumbering current paragraphs (k)(7)(ii)–(v) as (k)(7)(iii), (iv), (v), and (vi), and is adding a reference to new paragraph (k)(7)(ii) to the newly renumbered paragraph (k)(7)(vi).

The addition of paragraph (k)(7)(ii) and consequential renumbering of current paragraphs (k)(7)(ii)–(v) also affects two other cross-references in the standard. Paragraphs (l)(1)(i)(B) and (l)(1)(ii) reference paragraphs (k)(7)(ii) and (k)(7)(iii), respectively. In this final rule, OSHA is updating those references to reflect the renumbering in paragraph (k)(7).

[40] As a result, OSHA proposed to renumber paragraph (m)(4) in the shipyards standard (29 CFR 1915.1024) as (m)(3), renumber paragraph (m)(3) in the construction standard (29 CFR 1926.1124) as (m)(2), and revise the references in paragraph (m)(1)(ii) of both standards accordingly.

significantly exceed the OSHA PEL for nuisance dust, or Particulate Not Otherwise Classified (PNOC), of 15 mg/m^3 (see Document ID 2235, p. 2; FEA for the 2017 Final Rule, Chapter IV, p. IV–640). OSHA has no reason to suspect that residual dust on PPE and other materials from construction and shipyards sites is likely to create this level of airborne dust from laundry or landfill operations. Therefore, the agency has determined that recipients of PPE or waste from these worksites are not expected to be exposed at airborne levels of concern from re-entrainment of trace beryllium from these materials. And, as explained previously, provisions aimed at protecting workers from the effects of dermal contact need not apply to materials containing only trace amounts of beryllium unless those workers are also exposed to significant airborne beryllium.

OSHA has retained certain provisions that protect construction and shipyard employees whose work activities involve exposures exceeding the PEL, such as abrasive blasters, from further airborne exposure via re-entrainment of beryllium-containing dust from PPE or other surfaces in the workplace. These include requiring the employer to ensure that each employee removes personal protective clothing and equipment required by this standard at the end of the work shift or at the completion of all tasks involving beryllium, whichever comes first (paragraph (h)(2)(i)); requiring the employer to ensure that personal protective clothing and equipment required by this standard is not removed in a manner that disperses beryllium into the air (paragraph (h)(2)(ii)); requiring the employer to ensure that all reusable personal protective clothing and equipment required by this standard is cleaned, laundered, repaired, and replaced as needed to maintain its effectiveness (paragraph (h)(3)(i)); requiring the employer to ensure that beryllium is not removed from personal protective clothing and equipment required by this standard by blowing, shaking or any other means that disperses beryllium into the air (paragraph (h)(3)(ii)); and requiring the employer to include procedures for removing, cleaning, and maintaining personal protective clothing and equipment in accordance with paragraph (h) of this standard in their written exposure control plan(s) (paragraph (f)(1)(i)(F)).

OSHA proposed to remove those provisions which would apply only to employees whose work activities do not involve airborne exposure above the PEL, for whom potential exposure to re-entrained beryllium from materials containing trace amounts is not a significant concern. As OSHA explained in the Summary and Explanation for paragraphs (h)(2)(v) and (j)(3), this approach is consistent with the general industry standard as modified by the DFR, which does not require labeling for materials that contain only trace quantities of beryllium and are designated for disposal, recycling, or reuse.

In the case where construction workers are removing materials from a beryllium manufacturing site covered by the general industry standard, beryllium-contaminated materials destined for disposal must be cleaned and labeled by the host employer pursuant to paragraph (j)(3) of the beryllium standard for general industry. Indeed, even without the specific requirement in the beryllium standard, OSHA has had a long-standing interpretation that the HCS requires upstream suppliers to pass on any information they have regarding known contaminants of scrap transferred to downstream recipients (see Letter to Edward L. Merrigan, from John Miles, Jr., Directorate of Field Operations (May 23, 1986), available at *https://www.osha.gov/laws-regs/standardinterpretations/1986-05-23*).

Finally, AFL–CIO quoted a comment previously submitted by Washington Group International (WGI) (see Document ID 0324) which includes the proposition that ''it is crucial that government/industrial buildings be screened for beryllium process operations'' and appears to suggest that, similar to DOE facilities, all facilities should do air monitoring and wipe sampling and pass this information on to future facility users (Document ID 2244, p. 4). It is unclear whether AFL–CIO intended their presentation of WGI's quote to suggest that all government and industrial buildings should air-monitor and sample surfaces for the presence of beryllium. OSHA believes that this approach may be appropriate for DOE, which has a limited number of sites that are known to have processed beryllium. However, requiring all government and industrial sites to do air monitoring and wipe sampling would be of little value since the likelihood of finding beryllium would be minuscule. Beryllium, unlike lead and asbestos, is not found in common building materials or coatings (see Document ID 2237, pp. 2–3). Therefore unless a manufacturing site has evidence that beryllium is present through the review of SDSs, the likelihood that workers will encounter materials contaminated with beryllium is low. And, as noted above, where construction workers are removing materials from a beryllium manufacturing site covered by the general industry standard, beryllium-contaminated materials destined for disposal must be cleaned and labeled by the host employer pursuant to paragraph (j)(3) of the beryllium standard for general industry.

Accordingly, OSHA has determined that the previous labeling provisions in paragraph (m) (paragraph (m)(2) in construction and (m)(3) in shipyards) are not necessary in the construction and shipyards contexts and is finalizing the removal of these provisions as proposed.

OSHA next proposed to revise the provisions of paragraph (m) for employee information and training to remove requirements related to emergency procedures ((m)(3)(ii)(D) in construction and (m)(4)(ii)(D) in shipyards)[41] and personal hygiene practices ((m)(3)(ii)(E) in construction and (m)(4)(ii)(E) in shipyards). These proposed revisions correspond with OSHA's proposed removal of emergency procedures and personal hygiene practices from the construction and shipyard standards. As discussed in the 2019 NPRM and earlier in this Summary and Explanation, OSHA proposed to remove references to emergencies in the shipyards and construction standards because OSHA expects that any emergency in these industries (such as a release resulting from a failure of the blasting control equipment, a spill of the abrasive blasting media, or the failure of the ventilation system for welding operations in shipyards) would occur only during the performance of routine tasks already associated with the airborne release of beryllium; *i.e.,* during the abrasive blasting or welding process (84 FR at 53917; see also the Summary and Explanation for paragraph (g)). As such, any uncontrolled release of beryllium in these operations would not create exposures that differ from the normal conditions of work and workers will already be protected by the other provisions of paragraph (g). OSHA also proposed to remove the hygiene provisions of the construction and shipyard standards due to overlap with existing OSHA standards, the limited operations where beryllium exposure may occur in construction and shipyards, and the trace quantities of beryllium present in these operations (84 FR at 53920; see also the Summary

[41] OSHA proposed to renumber the provisions of paragraph (m)(3)(ii) in construction and (m)(4)(ii) in shipyards to reflect the removal of this paragraph.

and Explanation for paragraph (i)). As with the previously discussed labeling requirement, OSHA reasoned that the removal of these provisions would render the correlating training requirements unnecessary.

In response to OSHA's proposal to remove the hygiene provisions and related training requirements from both standards in favor of OSHA's general sanitation standards, NJH stated that ''beryllium exposure poses a unique hazard for workers.'' As such, NJH argued that employees should continue to be trained on beryllium-specific hygiene practices (Document ID 2211, p. 13). AFL–CIO objected to the removal of requirements on training for both emergency and hygiene provisions, though they did not provide any additional explanation of their opposition (Document ID 2210, p. 10). As stated above, OSHA proposed to remove the training requirements related to emergencies and hygiene areas and practices from paragraph (m) because the agency proposed to remove the underlying requirements from the regulatory text.

With respect to emergencies, OSHA has determined that the operations with known beryllium exposure in the construction and shipyards sectors do not have emergencies in which exposures differ from the normal conditions of work. As such, workers in these operations are already protected by other provisions of the beryllium standards and emergency-specific provisions are not necessary (see the Summary and Explanation for paragraph (g)). OSHA has also determined that partial overlap between the hygiene requirements of the beryllium standards for construction and shipyards and those of existing OSHA standards, combined with the trace quantities of beryllium present in these industries, make beryllium-specific hygiene requirements unnecessary in the construction and shipyards standards (see the Summary and Explanation for paragraph (i)). OSHA is finalizing the regulatory text as proposed for these provisions. In light of OSHA's decision to remove these requirements, OSHA finds that it is unnecessary to maintain the beryllium-specific training requirements for these provisions. Accordingly, OSHA is finalizing the removal of training provisions on emergency procedures ((m)(3)(ii)(D) in construction and (m)(4)(ii)(D) in shipyards) and hygiene areas and practices ((m)(3)(ii)(E) in construction and (m)(4)(ii)(E) in shipyards), as proposed.

OSHA also proposed to revise paragraphs (m)(3)(i) in construction and (m)(4)(i) in shipyards—renumbered in the final standards as (m)(2)(i) and (m)(3)(i), respectively—to remove dermal contact as a trigger for training. The 2017 final standards for general industry, construction, and shipyards originally provided for limited training for each employee who has, or can reasonably be expected to have, airborne exposure to or dermal contact with beryllium. Specifically, paragraph (m)(3)(i)(A) in construction and (m)(4)(i)(A) in shipyards provided for training for each such employee in accordance with the requirements of the HCS (29 CFR 1910.1200(h)), including specific information on beryllium as well as any other hazards addressed in the workplace hazard communication program.[42] However, in the 2017 final rule, OSHA recognized that beryllium exposure in the construction and shipyard industries is narrowly limited to trace quantities contained in certain abrasive blasting media and to exposure during some welding operations in shipyards (82 FR at 2690; see also the 2017 FEA, Document ID 2042, p. III–66). OSHA clarified in the 2018 DFR for general industry that it did not intend for provisions aimed at protecting workers from the effects of dermal contact to apply in the case of materials containing only trace amounts of beryllium (83 FR at 19938). Therefore, OSHA preliminarily determined in the 2019 NPRM for construction and shipyards that training in accordance with the HCS should be provided to each employee who has, or can reasonably be expected to have, airborne exposure to beryllium, without regard to dermal contact. OSHA noted that both standards already exempt materials containing less than 0.1 percent beryllium by weight where the employer has objective data demonstrating that employee exposure to beryllium will remain below the action level as an 8-hour TWA under any foreseeable conditions (See 29 CFR 1926.1124(a)(3) (construction) and 29 CFR 1915.1024(a)(3) (shipyards)). OSHA reasoned that the HCS training requirements in proposed paragraph (m)(2) for construction and proposed paragraph (m)(3) for shipyards would continue to apply to all workers that are covered under these standards, regardless of the potential for dermal contact (84 FR at 53920–21). OSHA did not receive any comments on the removal of dermal contact as a trigger for training in accordance with the HCS and is therefore finalizing it as proposed.

OSHA also proposed to revise renumbered paragraphs (m)(2)(ii)(A) in the construction standard and (m)(3)(ii)(A) in the shipyards standard to remove references to ''airborne exposure'' and ''dermal contact'' and instead to require training on the health hazards associated with ''exposure to beryllium.'' OSHA likewise proposed to revise renumbered paragraphs (m)(2)(ii)(D) in the construction standard and (m)(3)(ii)(D) in the shipyards standard to require training on measures employees can take to protect themselves from ''exposure to beryllium.'' These revisions, OSHA explained, would maintain OSHA's intent that training must cover both airborne and skin exposure while both resolving an inconsistency between the shipyards and construction standards with respect to references to dermal contact and simplifying the provisions (84 FR at 53921).

AFL–CIO commented that ''OSHA should not alter the requirement for employers to train workers on the health hazards associated with airborne and dermal exposure to beryllium.'' According to the AFL–CIO, it is important for a worker to be provided with all potential exposure scenarios, including airborne and dermal exposures, so they can understand the full risk of exposure (Document ID 2210, p. 10). As the agency emphasized in the 2019 NPRM, the phrase ''exposure to beryllium'' is intended to encompass both airborne and skin exposure to beryllium (84 FR at 53921). Thus, the proposed language maintains the requirement to train workers on both airborne and dermal exposures. By resolving an inconsistency in the previous standards regarding dermal contact, OSHA intends the proposed change to ensure that employers include dermal contact when training workers on the specific hazards of beryllium.

In previously submitted comments, NABTU has expressed concern that they do not see a high level of awareness about hazards related to beryllium among workers in the construction industry apart from abrasive blasters and contract workers for DOE, citing a survey the union performed with trainers in the construction industry (Document ID 2202, Attachment 1, p. 8). OSHA believes that a few factors could explain this lack of awareness outside DOE and abrasive blasting. First, as explained earlier in this preamble, abrasive blasting is the primary source of exposure in the construction industry

[42] Paragraph (m)(3)(ii) in the 2017 construction standard and paragraph (m)(4)(ii) in the 2017 shipyard standard required the employer to ensure that each employee who is or can reasonably be expected to be exposed to airborne beryllium can demonstrate knowledge of all nine enumerated categories of information.

and even the agency has been unable to obtain reliable data about any additional sources of exposure in the construction industry. This suggests that exposures in other contexts, if they occur, are rare (see the summary and explanation for paragraph (f)). Second, OSHA notes that while DOE has had a specific beryllium standard in place since 1999 (10 CFR part 850) due to the particular risks of exposure in its facilities, OSHA's comprehensive standards were only promulgated in 2017.

OSHA included hazard communication and training provisions in these standards specifically to ensure awareness in those industries covered by the standards. As employers implement the beryllium standards for general industry, construction, and shipyards, the agency expects this lack of awareness to dissipate. Furthermore, paragraph (e)(2) of the HCS (29 CFR 1910.1200) requires employers who produce, use, or store hazardous chemicals at a workplace to ensure that workers have access to safety data sheets and to inform workers of any precautionary measures needed during ''normal operation conditions or foreseeable emergencies.'' These requirements of the HCS further serve to raise awareness among potentially exposed workers. OSHA has considered the comments in the record and, for the reasons explained above, is finalizing the changes to paragraph (m) as proposed.[43]

Paragraph (n) Recordkeeping

Paragraph (n) of the beryllium standards for construction and shipyards requires employers to make and maintain records of air monitoring data, objective data, medical surveillance, and training. It also requires employers to make all required records available to employees, their designated representatives, and the Assistant Secretary in accordance with OSHA's records access standard, 29 CFR 1910.1020. The 2017 final rule required employers to include employees' Social Security Numbers (SSNs) in air monitoring data ((n)(1)(ii)(F)), medical surveillance ((n)(3)(ii)(A)), and training ((n)(4)(i)) records. In the 2019 NPRM, OSHA proposed to revise paragraphs (n)(1)(ii)(F), (n)(3)(ii)(A), and (n)(4)(i) of both the construction and shipyards standards to remove those requirements (84 FR at 53921). This final rule adopts the proposed revisions, eliminating the requirements to include employee SSNs in monitoring data, medical surveillance, and training records.

In the 2015 beryllium NPRM which led to the 2017 final rule, OSHA proposed to require inclusion of employee SSNs in records related to air monitoring, medical surveillance, and training, as it had done in several existing substance-specific health standards (80 FR 47566, 47806 (August 7, 2015)). In their comments, some stakeholders objected to the proposed requirements based on concerns about employee privacy and the risk of identity theft (82 FR at 2730). In the 2017 final rule, OSHA acknowledged these concerns, but concluded that, due to the agency's past consistent practice of requiring an employee's SSN on records, any change to such requirements should be comprehensive and apply to all OSHA standards, not just the standards for beryllium (82 FR at 2730).

After OSHA published the 2015 beryllium proposal but before issuing the 2017 final beryllium rule, OSHA published its Standards Improvement Project–Phase IV (SIP–IV) proposed rule (81 FR 68504, 68526–28 (October 4, 2016)), in which the agency proposed to delete all requirements for employers to include employee SSNs in records required by the agency's substance-specific standards. Because the beryllium standards had not yet been finalized, they were not included in the SIP–IV proposal. Accordingly, the 2017 final rule for beryllium included the SSN requirements. However, OSHA acknowledged in the preamble that the SIP–IV rulemaking was ongoing and stated that it would revisit its decision to require employers to include SSNs in beryllium records in light of the SIP–IV rulemaking, if appropriate (82 FR at 2730).

After promulgating the 2017 final rule, OSHA finalized Phase IV of its Standards Improvement Project (SIP–IV), which removed from OSHA standards all requirements for employee SSNs in employer records (84 FR 21416, 21439–40 (May 14, 2019)).[44] As OSHA explained in the SIP–IV final rule, removing requirements for SSNs results in additional flexibility for employers and allows employers to develop systems that best work for their unique situations (84 FR at 21440). OSHA also explained that the change would protect employee privacy and lower the risk of identity theft (84 FR at 21439–40). Consistent with the SIP–IV final rule, OSHA proposed in the 2019 NPRM to modify the beryllium standards for construction and shipyards by removing the requirements to include SSNs in the recordkeeping provisions in paragraphs (n)(1)(ii)(F) (air monitoring data), (n)(3)(ii)(A) (medical surveillance) and (n)(4)(i) (training) (84 FR at 53921).

Two commenters, the AFL–CIO (Document ID 2210, p. 10) and NJH (Document ID 2211, p. 14), expressed general support for the proposed removal of the requirements to include employees' SSNs in these three sets of records. No commenter opposed the proposed revisions. However, after stating their support for the change, NJH noted that ''it is important that there is an identifying link between exposure monitoring data and medical surveillance data in order to identify areas of increased risk'' (Document ID 2211, p. 14).

OSHA acknowledges NJH's concern but notes that the beryllium standards have never required employers to link their exposure monitoring to medical surveillance data in this way. Even so, employers remain free to utilize SSNs, or any other unique employee identifier, if doing so helps them to identify areas of increased risk. Regardless, the agency believes that areas of increased risk will be identifiable based on the medical surveillance records alone. Paragraph (k)(6) requires that, with the employee's consent, the licensed physician's written medical opinion for the employer must include the PLCHP's recommendations regarding limitations on the employee's airborne exposure to beryllium, referrals to a CBD Diagnostic Center, continued medical surveillance, and medical removal. This information will alert the employer to possible increased risk of exposure in the processes in which that employee works and the need to reevaluate these processes. It may also trigger the requirement in paragraph (f)(1)(ii) that the employer review and evaluate the effectiveness of its written exposure control plan. Therefore, OSHA has determined that the proposed revisions to paragraph (n) will not impair the identification of areas of increased risk within a worksite or facility.

NJH's comment also touches on a related concern regarding the removal of requirements to record workers' SSNs in exposure monitoring and medical

[43] OSHA is also removing the heading ''Employee Information'' from paragraphs (m)(2)(iv) in the construction standard and (m)(3)(iv) in the shipyards standard to comply with the Federal Register's drafting rules. The requirements of these provisions are unchanged.

[44] Eliminating requirements to include SSNs in records is also responsive to a directive from OMB that calls for federal agencies to identify and eliminate unnecessary collection and use of SSNs in agency systems and programs (See Memorandum from Clay Johnson III, Deputy Director for Management, Office of Management and Budget, to the Heads of Executive Departments and Agencies Regarding Safeguarding Against and Responding to the Breach of Personally Identifiable Information (M–07–16), May 22, 2007 (available at: *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-16.pdf*).

records. As OSHA explained in the SIP–IV NPRM, the agency originally required the collection of employee SSNs in its standards because SSNs are assigned at birth and do not change over time. SSNs are therefore useful for research that tracks employees over time, as is done in some epidemiological studies of workplace populations (81 FR at 68527). While OSHA acknowledged the usefulness of SSNs for such research, the agency further noted that other tracking methods have emerged that allow researchers to conduct these studies without the use of SSNs. OSHA stated that due to the seriousness of the threat of identity theft and the availability of other methods for tracking employees for research purposes, it was appropriate to reexamine the SSN collection requirements in its standards (81 FR at 68527). Weighing these considerations in the SIP–IV final rule, OSHA determined that it was appropriate to remove from OSHA standards all requirements for employee SSNs in employer records (84 FR at 21439–40). OSHA reaffirms its conclusions on this issue here.

Accordingly, OSHA is finalizing the proposed changes to paragraph (n) in this final rule, which will align the beryllium standards for construction and shipyards with OSHA's other substance-specific standards by removing the requirements to include employees' SSNs in air monitoring data ((n)(1)(ii)(F)), medical surveillance ((n)(3)((ii)(A)), and training ((n)(4)(i)) records. OSHA expects that compliance with paragraph (n) as revised will be straightforward for construction and shipyard employers who already comply with other OSHA standards that no longer contain requirements to include employee SSNs in records. Lastly, OSHA notes, as it did in the SIP–IV final rule, that by removing the requirements to include SSNs in records, OSHA is not requiring employers to delete SSNs from existing records or prohibiting employers from using SSNs in records if they wish to do so (see 84 FR at 21439–40).

IV. Final Economic Analysis

A. Introduction

This Final Economic Analysis (FEA) addresses issues related to the profile of affected application groups, establishments, and employees; and the cost savings and the benefits of OSHA's rule to modify several construction and shipyard ancillary provisions. This rule makes no changes to the 2017 final rule's TWA PEL and STEL for the shipyard and construction industries. Relative to the estimated costs in the Final Economic Analysis (2017 FEA) in support of the January 9, 2017, beryllium final rule (Document ID 2042), this FEA would lead to total annualized cost savings of $2.5 million in 2019 dollars at a 3 percent discount rate over 10 years; and total annualized cost savings of $2.6 million in 2019 dollars at a discount rate of 7 percent over 10 years. When the Department uses a perpetual time horizon, the annualized cost savings of the rule would be $2.3 million in 2016 dollars at a 7 percent discount rate.

The rule is not a ''significant regulatory action'' under Executive Order 12866 or the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*); nor is it a ''major rule'' under the Congressional Review Act (5 U.S.C. 801 *et seq.*). Neither the benefits nor the costs of this rule exceed $100 million. In addition, they do not meet any of the other criteria specified by the UMRA for a significant regulatory action or the Congressional Review Act for a major rule.

This final rule makes several changes to the beryllium standards for construction and shipyards. These changes are designed to accomplish three goals: (1) To more appropriately tailor the requirements of the construction and shipyards standards to the particular exposures in these industries in light of partial overlap between the beryllium standards' requirements and other OSHA standards; (2) to more closely align the shipyards and construction standards to the general industry beryllium standard with respect to the medical definitions and medical surveillance requirements, where appropriate; and (3) to clarify certain requirements with respect to materials containing only trace amounts of beryllium.

This FEA provides OSHA's assessment of how this rule will affect the costs and benefits of complying with the beryllium standards for construction and shipyards, including costs adjustments to reflect changes in exposure rates and baseline compliance rates. All costs are estimated in 2019 dollars. Costs reported in 2019 dollars were applied directly in this FEA; wage data were updated to 2019 dollars using BLS data (BLS, 2020a);[45] and all other costs reported for years earlier than 2019 were updated to 2019 dollars using the GDP implicit price deflator (BEA, 2020).[46]

This introduction to the FEA is followed by:

- Section B: Profile of Affected Application Groups, Establishments, and Employees
- Section C: Technological Feasibility Summary
- Section D: Cost Savings
- Section E: Benefits

B. Profile of Affected Application Groups, Establishments, and Employees

Introduction

In this section, OSHA presents the profile of industries affected by this final rule. The profile data in this section are drawn from the industry profiles in Chapter III and exposure profiles and data in Chapter IV of the 2017 FEA (Document ID 2042); the PEA for the June 27, 2017 beryllium proposal (2017 PEA) (82 FR 29189–216); and the PEA for the October 8, 2019 beryllium proposal (2019 PEA) (82 FR at 53922–45). Much of the analysis here is unchanged from the 2019 PEA because, as will be explained below, the agency received no new information or data during the comment period that would alter the agency's analysis.

In the 2017 FEA, OSHA first identified the North American Industrial Classification System (NAICS) industries, both in the shipyard and construction sectors, with potential worker exposure to beryllium. Next, OSHA provided statistical information on the affected industries, including the number of affected entities and establishments, the number of workers whose exposure to beryllium could result in disease or death (''at-risk workers''), and the average revenue and profits for affected entities and establishments by six-digit NAICS industry.[47] The agency provided this information for each affected industry as

[45] Bureau of Labor Statistics, Occupational Employment Statistics Survey—May 2019 (Released March 31, 2020) (Document ID 2248), available at *http://www.bls.gov/oes/tables.htm* (Accessed July 9, 2020) (BLS, 2020a).

[46] Bureau of Economic Analysis, Table 1.1.9. Implicit Price Deflators for Gross Domestic Product (Document ID 2246), available at *https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=3&isuri=1&nipa_table_list=13* (Accessed July 9, 2020) (BEA, 2020).

[47] The Census Bureau defines an establishment as a single physical location at which business is conducted or services or industrial operations are performed. The Census Bureau defines a business firm or entity as a business organization consisting of one or more domestic establishments in the same state and industry that are specified under common ownership or control. The firm and the establishment are the same for single-establishment firms. For each multi-establishment firm, establishments in the same industry within a state will be counted as one firm; the firm employment and annual payroll are summed from the associated establishments. (U.S. Census Bureau, Statistics of U.S. Businesses, Glossary, 2017, *https://www.census.gov/programs-surveys/susb/about/glossary.html* (Accessed March 3, 2017)).

a whole, as well as for small entities, as defined by the Small Business Administration (SBA), and ''very small'' entities, defined by OSHA as those with fewer than 20 employees, in each affected industry (U.S. Census Bureau, 2014). For each industry sector identified, the agency described the uses of beryllium and estimated the number of establishments and employees that would be affected by the beryllium standards. Employee exposure to beryllium can also occur as a result of certain processes (such as welding) that are found in many industries. This analysis will use the term ''application group'' to refer to a cross-industry group with a common process.

In Chapter III of the 2017 FEA, OSHA described each application group; identified the processes and occupations with beryllium exposure, including available sampling exposure measurements; and explained how OSHA estimated the number of establishments working with beryllium and the number of employees exposed to beryllium. Those estimates and the exposure profiles for abrasive blasting in construction and shipyards, and welding in shipyards,[48] are presented in this section, along with a brief description of the application groups and an explanation of the derivation of the revised exposure profiles. For additional information about these data and the application groups, please see Chapter III of the 2017 FEA.[49] Finally, this section discusses wage data, the hire rate, and current industry practices.

Affected Application Groups

OSHA's 2017 FEA identified one affected application group in the construction sector and two application groups in the shipyard sector with potential beryllium exposure. Both the shipyard and construction sectors have affected employees in the abrasive blasting application group, and the shipyard sector has affected employees in the welding application group. OSHA's understanding of these affected application groups has not changed. For a full description of these application groups, see Chapter III of the FEA for the 2017 final rule (Document ID 2042) and section V.B. of the 2017 construction and shipyards NPRM, the Profile of Affected Application Groups, Establishments, and Employees within the PEA (82 FR at 29189–29200).

As discussed throughout this preamble, several commenters to the October 9, 2019 NPRM took issue with OSHA's focus on abrasive blasters and welders, arguing that construction and shipyards workers in various other jobs may be exposed to beryllium. For example, commenters argued that workers may be exposed to beryllium during the dressing of beryllium-containing non-sparking tools (Document ID 2208, p. 6; 2211, p. 7; 2222, Tr. 17–19) and during decommissioning, demolition, or renovation work at facilities that process beryllium (Document ID 2213, p. 3; 2239, p. 1; 2222, Tr. 84–85). However, as explained in the Summary and Explanation for paragraph (f), these commenters did not provide, nor does the record contain, sufficient data for the agency to characterize exposures in these or any other application groups outside of abrasive blasting and welding. The agency suspects that if additional exposures do occur they are rare, and would not significantly impact the agency's economic analysis.

Other commenters, including the CISC and NDA, suggested that the agency has underestimated the cost of complying with the beryllium standard for construction because, they contend, all construction employers must perform exposure assessment to determine whether beryllium is present at their worksite in trace amounts (Document ID 2203, p. 16; 2205, p. 2). However, as discussed in the Summary and Explanation, apart from certain abrasive blasting media, those materials at the typical construction site that the agency has identified as containing beryllium in trace amounts (*i.e.,* rock, soil, concrete, and brick) are not likely to release airborne beryllium above the action level under foreseeable conditions and therefore do not typically trigger the requirements of the standard. Further, for any additional materials containing comparably low levels of beryllium, an employer may rely on objective data that employees will not be exposed above the PEL for total airborne dust to qualify for the exemption under paragraph (a)(3). Hence the agency does not expect any workplace assessments to be needed for construction sites using typical construction materials containing trace amounts of beryllium.

Accordingly, the application groups for this FEA remain the same as those identified in the 2019 PEA; that is, abrasive blasting in construction and shipyards and certain welding operations in shipyards.

Exposure Profile

This section summarizes the data from the 2017 FEA (see Document ID 2042, FEA Chapter IV—Technological Feasibility). It is presented here for informational purposes only. The information in this section is drawn entirely from the 2017 FEA except for updated revenue data.

Abrasive Blasting in Construction and Shipyards

The primary abrasive blasting job categories include the abrasive blasting operator (blaster) and pot tender (blaster's helper or assistant) during open blasting projects. Support personnel such as pot tenders or abrasive media cleanup workers might also be employed to clean up (*e.g.,* by vacuuming or sweeping) and recycle spent abrasive and to set up, dismantle, and move containment systems and supplies (NIOSH, 1976, Document ID 0779; NIOSH, 1993, 0777; NIOSH, 1995, 0773; NIOSH, 2007, 0770; Flynn and Susi, 2004, 1608; Meeker et al., 2005, 0699).

Section 15 of Chapter IV of the 2017 FEA included a detailed discussion of exposure data and analysis for the development of the exposure profile for workers in abrasive blasting operations. Because OSHA addressed general industry abrasive blasting operations in other general industry sections where appropriate, such as in the nonferrous foundries industry, the exposure profile in Section 15 addressed only exposure data from construction and shipyard tasks. The exposure profile for abrasive blasters, pot tenders/helpers, and abrasive media cleanup workers was based on two National Institute for Occupational Safety and Health (NIOSH) evaluations of beryllium exposure from abrasive blasting with coal slag, unpublished sampling results for abrasive blasting operations from four U.S. shipyards, and data submitted by the U.S. Navy (NIOSH, 1983, Document ID 0696; NIOSH, 2007, 0770; OSHA, 2005, 1166; U.S. Navy, 2003, 0145).

Welding in Shipyards

Similar to the profile for abrasive blasting activities, OSHA used exposure data from the 2017 FEA to develop the exposure profile for welding in shipyards. OSHA used the exposure data from Chapter IV–10 Appendices 2 and 3 and combined the aluminum base metal and non-aluminum or unknown base material data. OSHA removed shorter duration samples that appeared in Appendix 3 of FEA chapter IV–10. Seven maritime welding samples from

[48] The exposure profile used for welding in shipyards in this FEA, and in the 2017 PEA, differs from the exposure profile used in Chapter III the 2017 FEA because OSHA is now using maritime-specific data from the appendices to Chapter IV of the 2017 FEA. See 82 FR 29195.

[49] OSHA contractor Eastern Research Group (ERG) provided support for the 2017 FEA.

Appendix 3, Table IV.61 with sampling durations of 240 minutes or greater were used in this profile to represent the 8-hour TWA samples.

Compared to the 2017 FEA, this caused a change in the exposure profile for welders in shipyards. The exposure profile for welding in shipyards is based on data presented in Appendices 2 and 3 of Sections 10.6 and 10.7 of Chapter IV, and again is more fully summarized in Section IV of the 2017 PEA. Those data measure exposures of shipyard-based welders, and OSHA has determined that it is a more suitable data set on which to base the exposure profile of welders in shipyards than the data used in the 2017 FEA, which were based on general industry welding exposures.

Tables IV–1 and IV–2 summarize, from the exposure profiles, the number of workers at risk of beryllium exposure and the distribution of 8-hour TWA beryllium exposures by affected application group and job category. Exposures are grouped into ranges (*e.g.,* >0.05 μg/m^3 and <0.1 μg/m^3) to show the percentages of employees in each job category and sector exposed at levels within the indicated range.

Table IV–3 presents data by NAICS code on the estimated number of workers at risk of beryllium exposure for each of the same exposure ranges, based on the exposure profile data and the estimated number of workers in each job category and application group. As shown, an estimated 2,168 workers have beryllium exposures above the TWA PEL of 0.2 μg/m^3.

TABLE IV–1—DISTRIBUTION OF BERYLLIUM EXPOSURES BY APPLICATION GROUP AND JOB CATEGORY OR ACTIVITY

Job category/activity	Exposure level (μg/m^3)								
	0 to ≤0.05 (%)	>0.05 to ≤0.1 (%)	>0.1 to ≤0.2 (%)	>0.2 to ≤0.25 (%)	>0.25 to ≤0.5 (%)	>0.5 to ≤1.0 (%)	>1.0 to ≤2.0 (%)	>2.0 (%)	Total (%)
Abrasive Blasting—Construction									
Abrasive Blaster	15.2	15.2	25.7	2.5	12.4	4.7	5.4	18.9	100.0
Pot Tender	28.1	28.1	43.8	0.0	0.0	0.0	0.0	0.0	100.0
Cleanup	33.3	33.3	26.7	0.0	0.0	0.0	3.3	3.3	100.0
Abrasive Blasting—Shipyards									
Abrasive Blaster	15.2	15.2	25.7	2.5	12.4	4.7	5.4	18.9	100.0
Pot Tender	28.1	28.1	43.8	0.0	0.0	0.0	0.0	0.0	100.0
Cleanup	33.3	33.3	26.7	0.0	0.0	0.0	3.3	3.3	100.0
Welding—Shipyards									
Welder	47.4	47.4	1.5	0.0	0.0	3.0	0.7	0.0	100.0

Note: Data may not sum to totals due to rounding.
[a] The lowest exposure range in OSHA's technological feasibility analysis is ≤0.1 μg/m^3 (see Chapter IV–02, Limits of Detection for Beryllium Data, in the 2017 FEA (Document ID 2042)). Because OSHA lacked information on the distribution of worker exposures in this range, the agency evenly divided the workforce exposed at or below 0.1 μg/m^3 into the two categories shown in this table and in the columns with identical headers in Tables IV–2 and IV–3 of this PEA. OSHA recognizes that this simplifying assumption may overestimate exposure in these lower exposure ranges.
* Employers in application group Abrasive Blasting—Shipyards are shipyards employing abrasive blasters that use mineral slag abrasives to etch the surfaces of boats and ships.
** Employers in application group Welding in Shipyards employ welders in shipyards. Some of these employers may do both welding and abrasive blasting.
Source: Table V–7, 2017 beryllium proposal (82 FR at 29195).

TABLE IV–2—NUMBER OF WORKERS EXPOSED TO BERYLLIUM BY AFFECTED APPLICATION GROUP, JOB CATEGORY, AND EXPOSURE RANGE (mg/m^3)

Application group/job category	Exposure level (μg/m^3)								
	0 to ≤0.05	>0.05 to ≤0.1	>0.1 to ≤0.2	>0.2 to ≤0.25	>0.25 to ≤0.5	>0.5 to ≤1.0	>1.0 to ≤2.0	>2.0	Total
Abrasive Blasting—Construction									
Abrasive Blaster	511	511	863	83	416	159	182	636	3,360
Pot Tender	945	945	1,470	0	0	0	0	0	3,360
Cleanup	560	560	448	0	0	0	56	56	1,680
Abrasive Blasting—Shipyards									
Abrasive Blaster	186	186	314	30	152	58	66	232	1,224
Pot Tender	344	344	536	0	0	0	0	0	1,224
Cleanup	204	204	163	0	0	0	20	20	612
Welding—Shipyards									
Welder	13	13	1	0	0	1	1	0	26
Total									
Construction Subtotal	2,016	2,016	2,781	83	416	159	238	692	8,400
Maritime Subtotal	747	747	1,013	30	152	59	87	252	3,086
Total, All Industries	2,763	2,763	3,794	114	568	218	324	944	11,486

Note: Data may not sum to totals due to rounding. Figures with actual values representing less than one person have been rounded up to one (person).
* Employers in application group Abrasive Blasting—Shipyards are shipyards employing abrasive blasters that use mineral slag abrasives to etch the surfaces of boats and ships.
** Employers in application group Welding in Shipyards employ welders in shipyards. Some of these employers may do both welding and abrasive blasting.
Source: Table V–8, 2017 beryllium proposal (82 FR at 29196).

TABLE IV–3—NUMBER OF WORKERS EXPOSED TO BERYLLIUM BY AFFECTED INDUSTRY AND EXPOSURE LEVEL (mg/m^3)

Application Group/ NAICS	Industry	Exposure Level ($\mu g/m^3$)								
		0 to ≤0.05	>0.05 to ≤0.1	>0.1 to ≤0.2	>0.2 to ≤0.25	>0.25 to ≤0.5	>0.5 to ≤1.0	>1.0 to ≤2.0	>2.0	Total
Abrasive Blasting—Construction										
238320	Painting and Wall Covering Contractors.	1,046	1,046	1,443	43	216	82	123	359	4,360
238990	All Other Specialty Trade Contractors.	970	970	1,337	40	200	76	114	333	4,040
Abrasive Blasting—Shipyards										
336611a	Ship Building and Repairing.	734	734	1,013	30	152	58	87	252	3,060
Welding in Shipyards										
336611b	Ship Building and Repairing.	13	13	1	0	0	1	1	0	26
Total										
Construction Subtotal		2,016	2,016	2,781	83	416	159	238	692	8,400
Maritime Subtotal		747	747	1,013	30	152	59	87	252	3,086
Total, All Industries		2,763	2,763	3,794	114	568	218	324	944	11,486

Note: Data may not sum to totals due to rounding. Figures with actual values representing less than one person have been rounded up to one (person).
* Employers in application group Abrasive Blasting—Shipyards are shipyards employing abrasive blasters that use mineral slag abrasives to etch the surfaces of boats and ships.
** Employers in application group Welding in Shipyards employ welders in shipyards. Some of these employers may do both welding and abrasive blasting.
Source: Table V–9, 2017 beryllium proposal (82 FR at 29196).

Summary of Affected Establishments and Employers

As shown in Table IV–4, OSHA estimates that a total of 11,486 workers in 2,796 establishments will be affected by this rule. Also shown are the estimated annual revenues for these entities. Table IV–5 presents the agency's estimate of affected entities defined as small by SBA, and Table IV–6 presents OSHA's estimate of affected establishments and employees by NAICS industries for the subset of small entities with fewer than 20 employees.[50] For the tables showing the characteristics of small and very small entities, OSHA generally assumed that beryllium-using small entities and very small entities would be the same proportion of overall small and very small entities as the proportion of beryllium-using entities to all entities as a whole in a NAICS industry. OSHA in the 2017 PEA and subsequent rulemaking analyses has requested public comment on the profile data presented in Tables IV–4, IV–5, and IV–6, and has received none.

TABLE IV–4—CHARACTERISTICS OF INDUSTRIES AFFECTED BY OSHA'S BERYLLIUM STANDARDS—ALL ENTITIES

NAICS code	Industry	Total entities [a]	Total establishments [a]	Total employees [a]	Affected entities [b]	Affected establishments [b]	Affected employees [b]	Total revenues ($1,000) [a]	Revenues/ entity [a]	Revenues/ establishment [a]
Abrasive Blasting—Construction										
238320	Painting and Wall Covering Contractors.	31,317	31,376	163,073	1,088	1,090	4,360	$21,099,458	$673,738	$672,471
238990	All Other Specialty Trade Contractors.	28,734	29,072	193,631	998	1,010	4,040	42,420,391	1,476,313	1,459,149
Abrasive Blasting—Shipyards										
336611a	Ship Building and Repairing.	604	689	108,311	604	689	3,060	28,142,463	46,593,482	40,845,374
Welding in Shipyards										
336611b	Ship Building and Repairing.	604	689	108,311	6	7	26	28,142,463	46,593,482	40,845,374
Total										
Construction Subtotal		60,051	60,448	356,704	2,086	2,100	8,400	63,519,849	1,057,765	1,050,818
Maritime Subtotal		604	689	108,311	610	696	3,086	28,142,463	46,593,482	40,845,374
Total, All Industries		60,655	61,137	465,015	2,696	2,796	11,486	91,662,312	1,511,208	1,499,294

[a] Data may not sum to totals due to rounding. [a] US Census Bureau, Statistics of US Businesses: 2012 (Document ID 2034).

[50] Tables IV–5 and IV–6 indicate that small entities affected by the proposed rule contain 2,714 affected establishments affiliated with entities that are small by SBA standards and 2,365 affected establishments affiliated with entities that employ fewer than 20 employees. However, the small and very small entity figures in Tables IV–5 and IV–6 were not used to prepare the cost savings estimates in Section D of this FEA. For costing purposes in Section D, OSHA included small establishments owned by larger entities versus the figures in Tables IV–5 and IV–6 because such establishments do not qualify as ''small entities'' for the purposes of a Regulatory Flexibility Analysis. To see the difference in the number of affected establishments by size for costing purposes, consider the example of a ''large entity'' with 500 employees, consisting of 50 ten-employee establishments. In Section B., each of these 50 establishments would be excluded from Tables IV–5 and IV–6 because they are part of a ''large entity''; in Section D., where all establishments are included because there is no filter for entity size, each would be considered a small establishment. Thus, for purposes of Section D., there are 2,399 affected establishments with fewer than 20 employees, 369 affected establishments with between 20 and 499 employees, and 28 establishments with more than 500 employees. Census (2015) Statistics of US Businesses data suggest there are also a total of 3,464 establishments affiliated with entities in construction and shipyards employing between 20 and 499 employees, of which approximately 157 would be affected by the rule.

[b] OSHA estimates of employees potentially exposed to beryllium and associated entities and establishments. Affected entities and establishments constrained to be less than or equal to the number of affected employees.
Source: Table V–4, 2017 beryllium proposal (82 FR at 29192), with updated revenues as shown in Document ID 2250.

TABLE IV–5—CHARACTERISTICS OF CONSTRUCTION AND SHIPYARD INDUSTRIES AFFECTED BY OSHA'S BERYLLIUM STANDARDS—SMALL ENTITIES

NAICS code	Industry	SBA small business classification (employees) [a]	Small business entities [b]	Establishments for small entities [b]	Small entity employees [b]	Affected small business entities [c]	Affected small establishments [c]	Affected employees for small entities [c]	Total revenues for small entities ($1,000) [b]	Revenues/ small entity	Revenues/ small establishment
Abrasive Blasting—Construction											
238320	Painting and Wall Covering Contractors	100	31,221	31,243	133,864	1,085	1,085	3,579	$17,822,841	$570,861	$570,459
238990	All Other Specialty Trade Contractors	100	28,537	28,605	143,112	991	994	2,986	32,076,205	1,124,022	1,121,350
Abrasive Blasting—Shipyards											
336611a	Ship Building and Repairing	1,250	585	629	27,170	585	629	768	6,507,836	11,124,507	10,346,322
Welding in Shipyards											
336611b	Ship Building and Repairing	1,250	585	629	27,170	6	6	7	6,507,836	11,124,507	10,346,322
Total											
Construction Subtotal			59,758	59,848	276,976	2,076	2,079	6,565	49,899,046	835,019	833,763
Maritime Subtotal			585	629	27,170	591	635	775	6,507,836	11,124,507	10,346,322
Total, All Industries			60,343	60,477	304,146	2,667	2,714	7,340	56,406,882	934,771	932,700

Data may not sum to totals due to rounding.
[a] SBA Size Standards, 2016.
[b] US Census Bureau, Statistics of US Businesses: 2012 (Document ID 2034).
[c] OSHA estimates of employees potentially exposed to beryllium and associated entities and establishments. Affected entities and establishments constrained to be less than or equal to the number of affected employees.
Source: Table V–5, 2017 beryllium proposal (82 FR at 29194), with updated revenues as shown in Document ID 2250.

TABLE IV–6—CHARACTERISTICS OF INDUSTRIES AFFECTED BY OSHA'S BERYLLIUM STANDARDS—ENTITIES WITH FEWER THAN 20 EMPLOYEES

Application group	NAICS	Industry	Entities with <20 employees [a]	Establishments for entities with <20 employees [a]	Employees for entities with <20 employees [a]	Affected entities with <20 employees [b]	Affected establishments for entities with <20 employees [b]	Affected employees for entities with <20 employees [b]	Total revenues for entities with <20 employees ($1,000) [a]	Revenues per entity with <20 employees	Revenue per estab. for entities with <20 employees
Abrasive Blasting—Construction											
Abrasive Blasting—Construction.	238320	Painting and Wall Covering Contractors.	29,953	29,957	87,984	1,041	1,041	2,352	$11,448,144	$382,204	$382,153
Abrasive Blasting—Construction.	238990	All Other Specialty Trade Contractors.	27,026	27,041	90,82	939	939	1,895	20,708,351	766,238	765,813
Abrasive Blasting—Shipyards*											
Abrasive Blasting—Shipyards.	336611a	Ship Building and Repairing.	380	381	2,215	380	381	381	589,796	1,552,093	1,548,020
Welding in Shipyards**											
Welding in Shipyards.	336611b	Ship Building and Repairing.	380	381	2,215	4	4	4	589,796	1,552,093	1,548,020
Total											
Construction Subtotal			56,979	56,998	178,806	1,980	1,980	4,247	32,156,495	564,357	564,169
Shipyards Subtotal			380	381	2,215	384	385	385	589,796	1,552,093	1,548,020
Total, All Industries			57,359	57,379	181,021	2,364	2,365	4,632	32,746,291	570,901	570,702

Data may not sum to totals due to rounding.
[a] US Census Bureau, Statistics of US Businesses: 2012 (Document ID 2034).
[b] OSHA estimates of employees potentially exposed to beryllium and associated entities and establishments. Affected entities and establishments constrained to be less than or equal to the number of affected employees.
* Employers in application group Abrasive Blasting—Shipyards are shipyards employing abrasive blasters that use mineral slag abrasives to etch the surfaces of boats and ships.
** Employers in application group Welding in Shipyards employ welders in shipyards. Some of these employers may do both welding and abrasive blasting.
Source: Table V–6, 2017 beryllium proposal (82 FR at 29195), with updated revenues as shown in Document ID 2250.

Loaded Wages and New Hire Rate

For this FEA, OSHA updated the wage estimates from the 2019 PEA. Data for base wages by Standard Occupational Classification (SOC) are from the May 2019 Occupational Employment Statistics survey of the Bureau of Labor Statistics (BLS). OSHA applied a fringe markup (loading factor) of 45.8 percent of base wages (see BLS, Employer Costs for Employee

Compensation, March 2019 (Document ID 2249), available at *https://www.bls.gov/news.release/archives/ecec_06182019.htm*) (BLS, 2020c);[51] loaded hourly wages by application group and SOC are shown in Table IV–7. OSHA also used the new hire rate for manufacturing of 31.8 percent (BLS, Job Openings and Labor Turnover Survey (JOLTS), 2019 (Document ID 2247), available at *http://www.bls.gov/jlt/data.htm*) (BLS, 2020b). Finally, due to changes in data availability in the most recent OES, the occupation for a PLCHP, which in the PEA used Family and General Physicians (SOC 29–1062), has been changed to Physicians, All Other; and Ophthalmologists, Except Pediatric (SOC 29–1228).

Baseline Industry Practices and Existing Regulatory Requirements (''Current Compliance'') on Hazard Controls and Ancillary Provisions

Table IV–8 reflects OSHA's estimate of baseline industry compliance rates, by application group and job category, for each of the ancillary provisions in the construction and shipyards standards. See Chapter III of the 2017 FEA (Document ID 2042) for additional discussion of the baseline compliance rates for each provision, which were estimated based on site visits, industry contacts, published literature, and the Final Report of the Small Business Advocacy Review (SBAR) Panel (SBAR, 2008, Document ID 0345). Note that the compliance rate is typically the same for all jobs in a given sector.

In the 2017 FEA, OSHA estimated that abrasive blasters in construction and shipyards had a 75 percent compliance rate with the PPE requirements in the beryllium standards. The 2017 PEA revised those estimates to 100 percent compliance based on the belief that 29 CFR 1926.57(f)(5)(v) already required abrasive blasting operators to wear full PPE, including respirators, gloves, safety shoes, and eye protection; that 29 CFR 1915.34(c)(3) required full PPE for abrasive blaster operators performing mechanical paint removal in shipyards. Some commenters disagreed with this estimate for abrasive blasting operations. NABTU noted that ''with the exception of abrasive blasting operators wearing type CE respirators, construction workers' use of PPE during abrasive blasting operations is extremely limited.'' (Document ID 2129, p. 11). BHSC also expressed concern about the degree of protection afforded by the other OSHA standards to workers near abrasive blasting operations, stating that the estimated 100 percent PPE use for those workers ''does not have supporting evidence of consistent and standard use across pot tenders and cleanup activities supporting abrasive blasting'' (Document ID 2118, p. 5).

While the agency acknowledges these comments claiming that its revised 100 percent compliance estimate was too high for abrasive blasting operations, OSHA is also removing dermal contact with beryllium as a trigger for PPE requirements. This clarifies and limits the activities that would trigger PPE requirements under this rule, making a higher baseline compliance estimate more appropriate. The agency has determined that a better estimate for PPE for abrasive blasting operations is in between the two previous estimates of 75 percent and 100 percent. OSHA estimates 90 percent compliance for PPE for areas where exposures exceed, or can reasonably be expected to exceed, the TWA PEL or STEL, which are the only areas in which the standards would require PPE under the revisions.

For welders in shipyards, OSHA estimated a 0 percent compliance rate in the 2017 FEA and revised that estimate to 100 percent compliance in the 2017 PEA because gloves are required under 29 CFR 1915.157(a) to protect workers from hazards faced by welders, such as thermal burns (82 FR at 29197–201). The agency received no comments on the compliance rates for welders either from the 2017 PEA or from the 2019 PEA. Hence, OSHA continues to estimate a 100 percent PPE compliance rate for welders in shipyards in areas where exposures can exceed the TWA PEL or STEL because of the overlap with 29 CFR 1915.157(a).[52]

In the 2017 FEA, for the three occupational groups involved in abrasive blasting (operators, pot-tenders, and clean-up workers), OSHA estimated a 75 percent compliance rate with respirators that met the beryllium standards' requirements. In the 2017 PEA (82 FR at 29197), operators, but not pot tenders or clean-up workers, were revised to 100 percent compliance due to the strict existing standards for operators (see §§ 1926.57(f) and 1915.34(c)(3)(iv)). This FEA continues to use these baseline compliance estimates of 100 percent for operators and 75 percent for pot tenders and clean-up workers.

For welders in shipyards, the 2017 FEA estimated 0 percent compliance with proper respirator use and a 25 percent compliance rate with the requirement to establish a respiratory protection program. OSHA revised this estimate to 100 percent in the 2019 PEA (84 FR at 53927) because several other standards address respiratory protection for welders in shipyards, including the Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment standards (29 CFR 1915.12(c)(4)(ii)), the Welding, Cutting, and Heating standards for shipyards (29 CFR 1915.51(d)(2)(iv)), and the general Respiratory Protection standards (29 CFR 1910.134, 1915.154). The agency received no new comment on these revisions to the compliance rates from either the 2017 PEA or the 2019 PEA and will use the same estimates in this FEA.

The baseline compliance rates for the housekeeping provisions in the 2017 FEA were 0 percent for welders in shipyards and 75 percent for blasters, pot tenders, and clean-up workers in abrasive blasting in both construction and shipyards. In the 2017 PEA, OSHA reviewed existing housekeeping requirements and updated the estimate from 75 percent to 100 percent for abrasive blasting operations because some housekeeping is required by existing standards for abrasive blasting operations in construction and shipyards. The Summary and Explanation for housekeeping for this rule discusses the agency's finding that existing standards cover general housekeeping requirements for blasters, pot tenders, and clean-up workers, though these other standards allow some cleaning methods that the beryllium standards, and the revisions, limit, like dry sweeping or brushing and compressed air. Under this rule, housekeeping requirements would no longer apply when dust from trace amounts of beryllium could not be expected to cause airborne exposures above the TWA PEL and STEL. Hence, these requirements will only affect areas where workers are exposed above the TWA PEL or STEL in the exposure profile. While the revisions will limit the methods that employers may use to clean up beryllium, OSHA estimates that cleaning methods that do not disperse beryllium into the air take

[51] A fringe markup (loading factor) of 45.8 percent was calculated in the following way. Employer costs for employee compensation for civilian workers averaged $36.77 per hour worked in March 2019. Wages and salaries averaged $25.22 per hour worked and accounted for 68.6 percent of these costs, while benefits averaged $11.55 and accounted for the remaining 31.41 percent. Therefore, the fringe markup (loading factor) is $11.55/$25.22, or 45.8 percent. Total employer compensation costs for private industry workers averaged $34.49 per hour worked in March 2019 (BLS, 2020c, Document ID 2249).

[52] In fact, the 0 percent baseline compliance rate for PPE in shipyard welding in the 2017 FEA was simply a mistake insofar as baseline compliance rate for PPE for welding in general industry was 100 percent in the same document. 2017 FEA, Ch. III, p. III–188.

approximately the same amount of time as cleaning methods already in use. The agency received no comment on this revision to the compliance rate from either the 2017 PEA or the 2019 PEA. For abrasive blasting operations, the agency therefore maintains from the 2017 PEA its 100 percent compliance rate for housekeeping for abrasive blasting operations.

For welders in shipyards, OSHA estimated a 0 percent compliance rate for housekeeping in both the 2017 FEA and the 2017 PEA. As explained in the Summary and Explanation, OSHA has reason to believe that skin or surface contamination is not an exposure source of concern in welding in shipyards. The revisions would also limit the circumstances in which housekeeping is required. OSHA therefore estimates that in welding in shipyards, employers will not have to engage in additional housekeeping to comply with the revisions and is maintaining its 2019 PEA baseline compliance estimate for housekeeping to 100 percent for welding in shipyards.

In the 2017 PEA, OSHA treated the compliance rates for vacuums, bags, and labels separately from the labor costs of housekeeping. OSHA estimated a 0 percent compliance rate for all industries in construction and shipyards for vacuums, bags, and labels because it believed the cost of such equipment was not covered by other standards. In this FEA, as in the 2019 PEA, OSHA is setting the compliance rates under housekeeping for vacuums, bags, and labels to 100 percent as this rule removes those requirements from the standard.

The baseline compliance rates for the hygiene areas provisions in the 2017 FEA were 0 percent for welders in shipyards and 75 percent for blasters, pot tenders, and clean-up workers in abrasive blasting in both construction and shipyards. As explained in the Summary and Explanation section of this preamble, OSHA is removing paragraph (i), hygiene areas, from the construction and shipyards standards. The standards as modified by this final rule, as in the NPRM, therefore no longer require employers to comply with any hygiene-related provisions, and the baseline compliance is revised to 100 percent to demonstrate that there will be no cost associated with hygiene areas under the rule.

The baseline compliance rate for each of the remaining provisions was unchanged from the 2017 FEA to the 2017 PEA and remains unchanged in this FEA.

As a final point on baseline industry practices, OSHA acknowledges the possibility of a future decline in the use of coal slag abrasive materials but did not receive new evidence on this issue. To the extent that coal slag abrasives are being replaced, for reasons unrelated to the implementation of this standard, by other blasting materials that do not have the potential for beryllium exposures of concern, the costs and benefits of compliance with the TWA PEL and STEL for abrasive blasting operations would also decrease.

TABLE IV–7—LOADED HOURLY WAGES FOR OCCUPATIONS (JOBS) EXPOSED TO BERYLLIUM AND AFFECTED BY OSHA'S BERYLLIUM STANDARD

Provision in the standard	Job	NAICS	SOC [a]	Occupation	Median hourly wage	Fringe markup percentage, total [b]	Loaded hourly (or daily [d]) wage
Monitoring [c]	Industrial Hygienist Consultant.	N/A	N/A	N/A	N/A	N/A	$175.34
Monitoring [d]	IH Technician—Initial						2,808.63
	IH Technician—Additional and Periodic.						1,379.86
Regulated Area/Job Briefing [e].	Production Worker	31–33	51–0000	Production Occupations	17.78	45.8	25.92
Medical Surveillance [e]	Human Resources Manager	31–33	11–3121	Human Resources Managers.	55.29	45.8	80.61
Exposure Control Plan, Medical Surveillance, and Medical Removal [e].	Clerical	31–33	43–4071	File Clerks	16.98	45.8	24.76
Training [e]	Training Instructor	31–33	13–1151	Training and Development Specialists.	28.94	45.8	42.19
Medical Surveillance [e]	Physician (Employers' Physician).	31–33	29–1228	Physicians, All Other; and Ophthalmologists, Except Pediatric.	94.10	45.8	137.19
Multiple Provisions [f]	First Line Supervisor	Various	51–1011	First-Line Supervisors of Production and Operating Workers.	30.30	45.8	44.18

Sources: U.S. Dept. of Labor, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).
[a] 2010 Standard Occupational Classification System. Bureau of Labor Statistics. *http://www.bls.gov/soc/classification.htm.*
[b] BLS, 2020c. 45.8 percent represents fringe as a percentage of base wages. BLS-reported data for fringe as a percentage of total compensation is 31.4 percent.
[c] ERG estimates based on discussions with affected industries, and inflated to 2019 Dollars.
[d] Wages used in the economic analysis for the Silica final rule, inflated to 2019 Dollars.
[e] BLS, 2020a
[f] BLS, 2020a; Weighted average for SOC 51–1011 in NAICS 313000, 314000, 315000, 316000, 321000, 322000, 323000, 324000, 325000, 326000, 327000, 335000, 336000, 337000, and 339000.

TABLE IV–8—ESTIMATED CURRENT COMPLIANCE RATES FOR INDUSTRY SECTORS AFFECTED BY OSHA'S BERYLLIUM STANDARD

Application group	Job	Exposure assessment (%)	Regulated areas/ competent person (%)	Medical surveillance (%)	Medical removal program (%)	Exposure control plan (%)	PPE (%)	Hygiene		Training (%)	Respirators		Housekeeping	
								Employees (%)	Establishments (%)		Employee/ Respirator (%)	Establishment/ Respirator Program (%)	Labor (%)	Vacuum, Bags, Labels (%)
Abrasive Blasting—Construction														
Abrasive Blasting—Construction.	Abrasive Blaster	0	75	75	0	75	90	100	100	75	100	100	100	100
Abrasive Blasting—Construction.	Pot Tender	0	75	75	0	75	90	100	100	75	75	75	100	100
Abrasive Blasting—Construction.	Cleanup	0	75	75	0	75	90	100	100	75	75	75	100	100
Abrasive Blasting—Shipyards														
Abrasive Blasting—Shipyards.	Abrasive Blaster	0	75	75	0	75	90	100	100	75	100	100	100	100
Abrasive Blasting—Shipyards.	Pot Tender	0	75	75	0	75	90	100	100	75	75	75	100	100
Abrasive Blasting—Shipyards.	Cleanup	0	75	75	0	75	90	100	100	75	75	75	100	100
Welding—Shipyards														
Welding—Shipyards ..	Welder	0	0	0	0	0	100	100	100	0	100	100	100	100

Source: U.S. Dept. of Labor, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).
[a] Estimated compliance rates for medical surveillance do not include medical referrals. OSHA estimates that baseline compliance rates for medical referrals are zero percent for all application groups shown in the table.
* Employers in application group Abrasive Blasting—Shipyards are shipyards employing abrasive blasters that use mineral slag abrasive to etch the surfaces of boats and ships.
** Employers in application group Welding in Shipyards employ welders in shipyards. Some of these employers may do both welding and abrasive blasting.

C. Technological Feasibility Summary

This section summarizes OSHA's technological feasibility findings made in the 2017 FEA (see Document ID 2042, FEA Chapter IV—Technological Feasibility). Because this final rule contains no new requirements that might raise feasibility concerns, OSHA's technological feasibility analysis remains unchanged from the 2017 final rule. The findings are presented here for informational purposes only. The information in this section is drawn entirely from the 2017 FEA and contains no new information or assessment.

Overall, based on the information discussed in Chapter IV of the 2017 FEA, OSHA determined that the majority of the exposures in construction and shipyards are either already at or below the new final PEL, or can be adequately controlled to levels below the final PEL through the implementation of additional engineering and work practice controls for most operations most of the time. The one exception is that OSHA determined that workers who perform open-air abrasive blasting using mineral grit (*i.e.,* coal slag) will routinely be exposed to levels above the final PEL even after the installation of feasible engineering and work practice controls, and therefore, these workers will also be required to wear respiratory protection. Therefore, OSHA concluded in the January 9, 2017 final rule that the final PEL of 0.2 μg/m^3 is technologically feasible in abrasive blasting in construction and shipyards and in welding in shipyards.

D. Costs of Compliance

Introduction

Throughout this section, OSHA presents cost-saving formulas in the text, usually in parentheses, to help explain the derivation of cost-saving estimates for the individual provisions. Because the values used in the formulas shown in the text are shown only to the second decimal place, while the spreadsheets supporting the text are not limited to two decimal places, the calculation using the presented formula will sometimes differ slightly from the totals presented in the tables.

These estimates of cost savings are largely based on the cost estimates presented for Regulatory Alternative 2a in the preamble for the 2017 final rule (82 FR at 2612–15), which were in turn derived from the Costs of Compliance chapter (Chapter V) of the 2017 FEA. OSHA has retained the same calculation methods from the 2017 FEA, detailed in Chapter V of that document, and has updated all wages and unit costs to 2019 dollars. All cost savings in this FEA similarly are expressed in 2019 dollars and were annualized using discount rates of 3 percent and 7 percent, as required by OMB.[53] Unit costs developed in this section were multiplied by the number of workers who would have to comply with the provisions, as identified in Section B of this FEA (Profile of Affected Application Groups, Establishments, and Employees). The estimated number of affected workers depends on what level of exposure triggers a particular provision and the percentage of those workers already in compliance. In a few cases, costs were calculated based on the number of firms. As in the 2017 FEA, OSHA is estimating that the beryllium standards will reduce the number of workers exposed to beryllium over the PEL by 90 percent. Therefore, for ancillary provisions that require employers to take action for employees who continue to be exposed over the PEL, like respiratory protection and PPE, OSHA estimates the cost based on ten percent of the number of employees exposed over the PEL in the exposure profiles.

For purposes of calculating costs, OSHA assumes a 250-day work year. This is a standard calculation that OSHA and others use, which assumes employees work 5 days a week with 2 weeks of vacation, resulting in 250 work days per year (50 weeks x 5 work days a week).

Estimated compliance rates are presented in Table IV–8 in Section B of this FEA. The estimated costs for this beryllium rule represent the additional costs necessary for employers to achieve full compliance with the rule. The costs of complying with the beryllium program requirements therefore depend on the extent to which employers in affected application groups have already undertaken some of the required actions. A discussion of affected workers is presented in Section B of this FEA. Complete calculations are available in the OSHA spreadsheet in support of the FEA (Document ID 2250). Annualization periods for expenditures on equipment are based on equipment life, and one-time costs are annualized over a 10-year period.[54] The agency first presents costs for the full 2017 final rule with only updated wages, unit costs, and hiring rates based on 2019 data, updated from the PEA for this proposal. All other estimates (compliance rates, exposure profile, etc.) are the same as the 2017 FEA. This is the baseline from which all cost savings of the rule are benchmarked.

Table IV–9 shows these costs, which total for all occupations in construction and shipyards to $12.8 million at a discount rate of 3 percent, an increase of 4 percent from the equivalent cost for the 2017 FEA ($12.3 million).

TABLE IV–9—TOTAL ANNUALIZED COSTS OF FULL 2017 FINAL BERYLLIUM RULE, BY SECTOR AND SIX-DIGIT NAICS INDUSTRY; RESULTS SHOWN BY SIZE CATEGORY

[3 Percent discount rate, 2019 dollars]

Application group/NAICS	Industry	All establishments	Small entities (SBA-defined)	Very small entities (<20 employees)
Abrasive Blasting—Construction				
238320	Painting and Wall Covering Contractors	$4,770,711	$4,018,176	$2,815,214
238990	All Other Specialty Trade Contractors	4,421,009	3,399,888	2,321,792

[53] See OMB Memo M–17–21 (April 5, 2017), available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf*. OSHA included the 3 percent rate in its primary analysis, but Appendix IV–A of this PEA also presents costs by NAICS industry and establishment size categories using, as alternatives, a 7 percent discount rate—shown in Table IV–21—and a 0 percent discount rate—shown in Table IV–22.

[54] Executive Order 13563 directs agencies ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' In addition, OMB Circular A–4 suggests that analysis should include all future costs and benefits using a ''rule of reason'' to consider for how long it can reasonably predict the future and limit its analysis to this time period. Annualization should not be confused with depreciation or amortization for tax purposes. Annualization spreads costs out evenly over the time period (similar to the payments on a mortgage) to facilitate comparison of costs and benefits across different years. In cases where costs occur on an annual basis, but do not change between years, annualization is not necessary, and OSHA may refer simply to ''annual'' costs.

TABLE IV–9—TOTAL ANNUALIZED COSTS OF FULL 2017 FINAL BERYLLIUM RULE, BY SECTOR AND SIX-DIGIT NAICS INDUSTRY; RESULTS SHOWN BY SIZE CATEGORY—Continued

[3 Percent discount rate, 2019 dollars]

Application group/NAICS	Industry	All establishments	Small entities (SBA-defined)	Very small entities (<20 employees)
Abrasive Blasting—Shipyards				
336611a	Ship Building and Repairing	3,581,319	1,148,925	602,325
Welding in Shipyards				
336611b	Ship Building and Repairing	75,030	21,996	12,306
Total				
Construction Subtotal		9,191,720	7,418,064	5,137,007
Maritime Subtotal		3,656,348	1,170,921	614,631
Total, All Industries		12,848,069	8,588,985	5,751,638

Notes: Figures in rows may not add to totals due to rounding.
Source: US DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

To estimate the cost savings of this rule, OSHA estimated the difference between the costs of the 2017 final rule (with updated wages, prices, and hiring rate), Table IV–9, and the costs of this rule. These cost savings are presented and discussed below. Table IV–10 shows first, by affected application group and six-digit NAICS code, annualized cost savings for all establishments, for all small entities (as defined by the Small Business Act and SBA's implementing regulations; see 15 U.S.C. 632 and 13 CFR 121.201), and for all very small entities (defined by OSHA as those with fewer than 20 employees). OSHA estimates that this rule would yield a total annualized cost savings of $2.5 million using a 3 percent discount rate across the shipyard and construction sectors.

The agency notes that it did not include an overhead labor cost either in the 2017 FEA in support of the January 9, 2017 final standards, the 2017 PEA, the 2019 PEA, or in this FEA. There is not one broadly accepted overhead rate, and the use of overhead to estimate the marginal costs of labor raises a number of issues that should be addressed before applying overhead costs to analyze the costs of any specific regulation. There are several approaches to look at the cost elements that fit the definition of overhead, and there are a range of overhead estimates currently used within the federal government—for example, the Environmental Protection Agency has used 17 percent,[55] and government contractors have reportedly used an average 50 percent for on-site (*i.e.,* company site) overhead.[56] Some overhead costs, such as advertising and marketing, vary with output rather than with labor costs. Other overhead costs vary with the number of new employees. For example, rent or payroll processing costs may change little with the addition of one employee in a 500-employee firm, but those costs may change substantially with the addition of 100 employees. If an employer is able to rearrange current employees' duties to implement a rule, then the marginal share of overhead costs such as rent, insurance, and major office equipment (*e.g.,* computers, printers, copiers) would be very difficult to measure with accuracy.

If OSHA had included an overhead rate when estimating the marginal cost of labor, without further analyzing an appropriate quantitative adjustment, and adopted for these purposes an overhead rate of 17 percent on base wages, the cost savings of this rule would increase by approximately $243,000 per year, or approximately 10 percent above the primary estimate of cost savings.

TABLE IV–10—TOTAL ANNUALIZED COST SAVINGS, BY SECTOR AND SIX-DIGIT NAICS INDUSTRY, FOR ENTITIES AFFECTED BY THE SHIPYARD AND CONSTRUCTION BERYLLIUM STANDARDS

[By size category, 3 percent discount rate, 2019 dollars]

Application group/NAICS	Industry	All establishments	Small entities (SBA-defined)	Very small entities (<20 employees)
Abrasive Blasting—Construction				
238320	Painting and Wall Covering Contractors	$948,051	$780,379	$516,588

[55] Cody Rice, U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program,'' June 10, 2002 (document ID 2025). This analysis itself was based on a survey of several large chemical manufacturing plants: Heiden Associates, Final Report: A Study of Industry Compliance Costs Under the Final Comprehensive Assessment Information Rule, Prepared for the Chemical Manufacturers Association, December 14, 1989.

[56] For a further example of overhead cost estimates, please see the Employee Benefits Security Administration's guidance at Grant Thornton LLP, *2017 Government Contractor Survey, https://www.grantthornton.com/-/media/content-page-files/public-sector/pdfs/surveys/2018/2017-government-contractor-survey.* According to Grant Thornton's *2017 Government Contractor Survey,* on-site rates are generally higher than off-site rates, because the on-site overhead pool includes the facility-related expenses incurred by the company to house the employee, while no such expenses are incurred or allocated to the labor costs of direct charging personnel who work at the customer site. For further examples of overhead cost estimates, please see the Employee Benefits Security Administration's guidance at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-july-2017.pdf.*

TABLE IV–10—TOTAL ANNUALIZED COST SAVINGS, BY SECTOR AND SIX-DIGIT NAICS INDUSTRY, FOR ENTITIES AFFECTED BY THE SHIPYARD AND CONSTRUCTION BERYLLIUM STANDARDS—Continued

[By size category, 3 percent discount rate, 2019 dollars]

Application group/NAICS	Industry	All establishments	Small entities (SBA-defined)	Very small entities (<20 employees)
238990	All Other Specialty Trade Contractors ..	878,469	652,049	417,270
Abrasive Blasting—Shipyards*				
336611a	Ship Building and Repairing	664,522	171,816	86,053
Welding in Shipyards**				
336611b	Ship Building and Repairing	20,896	5,520	3,063
Total				
Construction Subtotal		1,826,520	1,432,428	933,858
Shipyard Subtotal		685,418	177,336	89,116
Total, All Industries		2,511,938	1,609,763	1,022,974

Note: Figures in rows may not add to totals due to rounding.

* Employers in application group Abrasive Blasting—Shipyards are shipyards employing abrasive blasters that use mineral slag abrasives to etch the surfaces of boats and ships.

Source: US DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

Program Cost Savings

This subsection presents OSHA's estimated cost savings from this rule for each provision individually. Each provision will be discussed separately below. Because many of the revisions discussed in the 2019 Preliminary Economic Analysis (PEA) are being finalized as proposed, this FEA focuses primarily on differences from the 2017 final rule. Where OSHA has made changes from the 2019 PEA or received comments related to its analysis, the agency discusses those changes and comments. Where there is either no change from the 2017 final rule or a change that does not alter the underlying methodology, such as a change in compliance rates or the elimination of the dermal contact trigger, no underlying methodology or unit cost estimates are presented as they are the same, updated to 2019 dollars, as the 2017 FEA. In other cases both the initial methodology and unit cost estimates are presented. All cost savings by program element, along with the cost savings for each affected NAICS industry, are shown in Table IV–15 at the end of this program cost-savings section.

Exposure Assessment

OSHA did not propose any changes to paragraph (d), Exposure assessment. OSHA is also not changing any estimates to the baseline compliance rate with this paragraph. Hence, there are no cost savings for this provision.

Beryllium Regulated Areas (Shipyards) and Competent Person (Construction)

OSHA is not making any changes to paragraph (e), the regulated areas provision in shipyards or the competent person provision in construction, nor are there any changes to compliance rates. Hence, there are no cost savings for this provision.

Methods of Compliance

Overview of Regulatory Requirements in the 2017 Final Rule

Under the 2017 beryllium standards, employers are required to establish and maintain a written exposure control plan.

Further, employers must review it at least annually, and must update the exposure control plan when:

(A) Any change in production processes, materials, equipment, personnel, work practices, or control methods results or can reasonably be expected to result in new or additional airborne exposures to beryllium;

(B) The employer becomes aware that an employee has a beryllium-related health effect or symptom, or is notified that an employee is eligible for medical removal; or

(C) The employer has any reason to believe that new or additional airborne exposures are occurring or will occur.

Finally, the employer must make a copy of the written exposure control plan accessible to each employee who is, or can reasonably be expected to be, exposed to airborne beryllium.

Paragraph (f)(2)(i) of the 2017 standards requires employers to use at least one engineering or work practice control where exposures are, or can reasonably be expected to be, above the action level unless the employer can establish that such controls are not feasible or that airborne exposure is below the action level. Paragraph (f)(3) prohibits rotation of workers among jobs to achieve compliance with the TWA PEL and STEL.

Cost Savings Estimates of This Rule

For the written exposure control plan, OSHA is making several revisions. First, OSHA is removing the words ''airborne'' and ''or dermal contact with'' as qualifiers for exposure to beryllium. This will not change coverage of workers for which a written exposure control plan is needed for these sectors, and would therefore have no impact on costs. This rule would reduce the number of elements that must be listed in the plan. The elements OSHA is eliminating are: Procedures for minimizing cross contamination and the migration of beryllium within or to locations outside the workplace; procedures for removing, laundering, cleaning, storing, repairing, and disposing of beryllium contaminated PPE, including clothing, and equipment including respirators; a separate listing of operations and job titles for those that would entail beryllium exposure above action level; and a separate listing of those that would be above the TWA PEL or STEL. This streamlined written control plan would still include a list of operations and job titles that involve exposure to beryllium; a list of engineering controls, work practices,

and respiratory protection; and procedures for restricting access to work areas where airborne exposures are, or can reasonably be expected to be, above the TWA PEL or STEL. OSHA is also including a new requirement to list procedures used to ensure the integrity of each containment used to minimize exposures to employees outside the containment. Finally, there is a change from the NPRM that the written control plan must document procedures for removing, cleaning, and maintaining personal protective clothing and equipment.[57] [58]

The agency estimates that the cost for the written exposure control plan will be cut in half due to the reduced requirements in this rule. This estimate includes the additional time needed for the new paragraphs that require including procedures both for containment and the removal, cleaning, and maintaining of PPE. OSHA estimated in the 2017 final rule that the time burden *per establishment* for an average-sized firm to develop the initial written exposure control plan was 8 hours. With the simplified written plan requirements in this final rule, the agency judges that a manager will need only 4 hours, a reduction of 4 hours, for a per establishment cost savings of $322.44 at an hourly wage of $80.61 (Human Resources Managers, SOC: 11–3121), to develop the plan.

In addition, because larger firms with more affected workers will need to develop more complicated written control plans, OSHA estimated for the 2017 beryllium standards that the development of a plan would require an extra thirty minutes of a manager's time per affected employee over the 4 hours required for average-sized firms. The reduced number of job titles and operations that would need to be listed in some cases for this rule, as well as other elements, will decrease this burden, and the agency has lowered the time per affected employee to 15 minutes, a reduction of 15 minutes. The cost savings for 15 minutes less of a manager's time per affected employee to develop a less complicated plan is $20.15 (0.25 × $80.61) per affected employee in this FEA.

Because of various triggers under which the employer would have to update the plan at least annually after the first year, the agency further estimated that under the 2017 beryllium standards, on average, managers would need 12 minutes (0.2 hours) per affected employee per quarter—or 48 minutes (4 × 12), which equals 0.8 hours, per affected employee per year—to review and update the plan. The streamlined plan will similarly be simpler to update, and the agency assumes the amount will be cut in half, from 48 minutes per employee per year to 24 minutes, a reduction of 24 minutes. Thus, the cost savings for managers to review and update the plan would be $32.24 (0.4 × $80.61 per affected employee) for years 2–10.

Finally, OSHA estimated 5 minutes of clerical time each year per employee for providing each employee with a copy of the written exposure control plan. This will not change under this rule, so there are no cost savings for this element. See Table IV–11 for a summary of these unit cost saving estimates.

TABLE IV–11—UNIT COST SAVINGS FOR WRITTEN EXPOSURE CONTROL PLAN

Item	Value
Develop Plan	
HR Manager Hour Decrease per Establishment	4
HR Manager Hour Decrease per Employee	0.25
HR Manager Wage	$80.61
Unit Cost Savings per Establishment	$322.44
Unit Cost Savings per Employee	$20.15
Review Plan	
HR Manager Hour Decrease per Employee	0.10
Times Reviewed per Year	4
HR Manager Wage	$80.61
Unit Cost Savings per Employee	$32.24
Total	
Unit Cost Savings per Establishment	$322.44
Unit Cost Savings per Employee	$52.39

Sources: BLS, 2020a; BLS, 2018; US DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

OSHA estimates that the total annualized cost savings for reducing the requirements for development and update of a written exposure control plan is $126,668 for all affected industries in shipyards and construction.

In addition, OSHA is revising paragraph (f)(2) concerning engineering and work practice controls by removing the requirement to implement one engineering or work practice control where exposures are between the action level and the PEL. However, based on the technological feasibility analysis presented in Chapter IV of the 2017 FEA, OSHA determined that there were no instances in construction or shipyards where this provision would apply (see Document ID 2042, Chapter V, pp. V–11 to V–12). Thus, this revision has no effect on costs.

OSHA is not revising paragraph (f)(3), which prohibits rotation of workers to achieve the TWA PEL and STEL, so there are no cost savings associated with this provision.

[57] Several commenters discussed the written exposure control plan as it relates to the overall scope of the rule. A discussion of comments on this subject can be found in the Summary and Explanation section. For purposes of this FEA, the agency is not making any adjustments to its scope of affected industries.

[58] This new addition from the NPRM is judged to have negligible effects on the cost of the written control plan. Hence the cost estimates for this provision in this FEA are the same as the NPRM.

OSHA is not revising the baseline compliance estimates for the requirements of paragraph (f), so there are no associated cost adjustments.

Respiratory Protection

Overview of Regulatory Requirements in the 2017 Final Rule

The employer must provide respiratory protection at no cost to the employee and ensure that each employee uses respiratory protection: during periods necessary to install or implement feasible engineering and work practice controls where airborne exposure exceeds, or can reasonably be expected to exceed, the TWA PEL or STEL; during operations, including maintenance and repair activities and non-routine tasks, when engineering and work practice controls are not feasible and airborne exposure exceeds, or can reasonably be expected to exceed, the TWA PEL or STEL; during operations for which an employer has implemented all feasible engineering and work practice controls when such controls are not sufficient to reduce airborne exposure to or below the TWA PEL or STEL; during emergencies; and when an employee who is eligible for medical removal under paragraph (l)(1) chooses to remain in a job with airborne exposure at or above the action level, as permitted by paragraph (l)(2)(ii) of this standard.

The selection and use of such respiratory protection must be in accordance with the Respiratory Protection standard (29 CFR 1910.134). The employer must provide at no cost to the employee a powered air-purifying respirator (PAPR) instead of a negative pressure respirator when respiratory protection is required, an employee requests one, and the PAPR would provide adequate protection to the employee.

Cost Savings Estimates of This Rule

Changes From the 2017 FEA

OSHA is revising paragraph (g) by removing the requirement to provide respiratory protection during emergencies. In the 2017 final rule, OSHA stated that emergencies should be rare and therefore did not account for any respirator costs due to emergencies. The cost adjustments described in this section are due to revised baseline compliance estimates from the 2019 PEA and are discussed below.

Updated Baseline Compliance Estimates

As discussed in section IV.B of this FEA, the compliance rate for respirator use, for abrasive blasting operators only, is estimated to be 100 percent in this FEA, due to closer analysis of existing standards for operators. The 2017 FEA estimated compliance rates for respirators for all abrasive blasting occupations as 75 percent. Hence, there is a cost adjustment due to the 25 percent of operators who will not need to be provided respirators as estimated under the 2017 final rule. For pot tenders and helpers, OSHA is not estimating a change in the compliance rate for respiratory protection. For welders in shipyards, the change in the exposure profile from the 2017 FEA to the 2017 PEA (as explained above in section IV.B.), and retained in this FEA, slightly decreased respirator use as well. The 2017 FEA estimated a 0 percent compliance rate for respiratory protection and a 25 percent compliance rate for setting up a respiratory protection program, while this FEA estimates a 100 percent compliance rate for both. The 2017 FEA estimated 29.7 percent of welders in shipyards had beryllium exposures over the new PEL of 0.2 μg/m^3. The 2017 PEA and this FEA estimate that only 3.7 percent of welders in shipyards have beryllium exposures over the new PEL of 0.2 μg/m^3. As in the 2017 FEA, OSHA is estimating that the beryllium standards will reduce the number of workers with exposures above the PEL by 90 percent.

The cost method that follows is largely the same as that used in the 2017 FEA with updated 2019 wage rates based on BLS data and the GDP implicit price deflator, with two exceptions. First, blasting operators, due to other existing standards (§§ 1926.57(f), 1915.34(c)), must use supplied air respirators (SARs) and will not have the option of requesting a PAPR. Second, no cleaning costs for a PAPR were estimated in the 2017 FEA. This is revised below because OSHA now estimates that PAPRs will need to be cleaned periodically.

Unit Cost Estimates

There are five primary costs for respiratory protection. First, there is a cost per establishment to set up a written respirator program in accordance with the respiratory protection standard (29 CFR 1910.134). The respiratory protection standard requires written procedures for the proper selection, use, cleaning, storage, and maintenance of respirators. OSHA estimates that these procedures will take a human resources manager 8 hours to develop, at an hourly wage of $80.61 (Human Resources Managers, SOC: 11–3121), for an initial cost of $645 (8 × $80.61). Every year thereafter, OSHA estimates that the same employee will take 2 hours to update the respirator program, for an annual cost of $161 (2 × $80.61).

The four other major costs of respiratory protection are the per-employee costs for all aspects of respirator use: Equipment, training, fit testing, and cleaning.

In the 2017 FEA, no respirator cleaning was assumed to be required for PAPRs. OSHA explained in the 2019 PEA that the agency now believes that despite the fact that PAPRs are assigned to individual employees, PAPRs, like half-mask respirators, will need periodic cleaning (84 FR at 53934). No commenter challenged this determination and the agency is including the cost for respirator cleaning in this FEA.

This cleaning cost for a PAPR is estimated to be the same as for a half mask respirator. Periodic cleaning of a PAPR is estimated to be needed every two days, or 125 times annually (250/2). Each cleaning is estimated to take 5 minutes, or 0.08 (5/60) hours, and the wage cost per hour is $25.92 (Production Occupations, SOC: 51–0000). Multiplied together, this gives an annual respirator cleaning cost of $270.03 (125 × 0.08 × $25.92). Summing these costs together, the total annualized per-employee cost for a full-face powered air-purifying respirator is $1460.01 ($147.87 + $96.03 + $946.08 + $270.03).

Cost Savings Estimates

In the 2017 FEA, OSHA estimated that PAPRs would be used 10 percent of the time in situations where only the APF of 10 provided by a half-mask negative pressure respirator would normally be required to comply with the final beryllium TWA PEL and STEL. For the 25 percent of pot tenders and clean-up workers who need respirators (accounting for an unchanged baseline compliance rate of 75 percent), this amounts to 2.5 percent of the pot tenders and clean-up workers who are still exposed over the PEL after the standards take effect who will use PAPRs. OSHA is therefore adjusting the costs by including the cost of cleaning PAPRs for that 2.5 percent of workers.

For the revised compliance rate for abrasive blasting operators, from 75 percent in the 2017 FEA to 100 percent in this FEA, there is a cost adjustment due to the 25 percent of overexposed operators after the standards take effect who should not have had costs taken in the 2017 FEA. Since the 2017 FEA did not estimate cleaning costs for PAPRs, the cost savings here will not include such cleaning costs. This cost savings consists of the cost of PAPRs minus cleaning costs (10 percent of

respirators), and the cost of half-mask respirators (90 percent of respirators).

The cost adjustment due to the change in the exposure profile for welders discussed in section IV.B of this FEA uses this same methodology of accounting for savings due to PAPRs (minus cleaning costs) and half-mask respirators. Furthermore, OSHA notes there is a change in the exposure profile for welders in shipyards from the 2017 FEA, but because the revised baseline compliance rate for these workers is 100 percent, this does not affect the cost adjustment.

The exposure profile (Table IV–2) shows the number of abrasive blasting operators that are above the 0.2 μg/m^3 PEL. This FEA follows the 2017 FEA of estimating 10 percent of workers will still be above the PEL after the standards take effect. The compliance rate for operators went from 75 percent in the 2017 FEA to 100 percent in this FEA, so 25 percent of operators above the PEL after the rule is in place were assigned costs in the 2017 FEA that, with the 100 percent compliance rate, should no longer be taken. In the 2017 FEA, OSHA estimated the average cost of a respirator for an abrasive blasting operator as 90 percent of the cost of a half-mask respirator and 10 percent of a PAPR. For the abrasive blasting operators above the PEL, this gives a total cost adjustment of $41,507.

As discussed above, 2.5 percent of pot-tenders and clean-up workers still exposed above the PEL after the standards take effect will be using PAPRs. The total number of such workers can be found in Table IV–2, and when multiplied by cleaning costs of PAPRs, this gives an additional cost adjustment of $12,556 for the revision from the 2017 FEA of including cleaning costs for PAPRs for these workers.

Welders in shipyards were inadvertently assigned a 0 percent compliance rate in the 2017 FEA, revised in this FEA to 100 percent. Hence all welders in shipyards, found in Table IV–2, will be affected. Like all others needing respirators, in the 2017 FEA, 90 percent were assigned half-mask respirators and 10 percent were assigned PAPRs. These two groups of welders, multiplied by the costs of their respective type of respirators (minus the cleaning costs that were not accounted for in the 2017 FEA), gives a cost adjustment of $871 for welders in shipyards.

The reduction in workers needing respirators and needing to participate in respiratory protection programs due to the update of the compliance rate for abrasive blasting operators in both construction and shipyards and welders in shipyards, the extra cleaning costs for pot-tenders and clean-up workers who opt for PAPRs, and the updated unit costs, together give a total cost adjustment of $54,934, as shown in Table IV–16.

Tables IV–12 and IV–13 summarize the unit cost estimates for the two types of respirators.

TABLE IV–12—UNIT RESPIRATORY PROTECTION COST PER EMPLOYEE

Item	Value	
	Half mask	PAPR
Training		
Class size	4	4
Hours	2	4
Employee wage	$25.92	$25.92
Supervisor wage	$44.18	$44.18
Hourly cost per employee	$36.97	$36.97
Annual Cost Savings per Employee	$73.94	$147.87
Respirator Cleaning Cost Savings		
Frequency per year	125	125
Employee hours	0.08	0.08
Employee wage	$25.92	$25.92
Annual Cost Savings per Employee	$265.30	$270.03
Fit Testing		
Testing group size	4.00	2.00
Employee hours	1.00	2.00
Employee wage	$25.92	$25.92
Supervisor wage	$44.18	$44.18
Annual Cost Savings per Employee	$36.97	$96.03
Equipment Cost		
Respirator	$34.28	$988.31
Respirator service life (years)	2	3
Annualized respirator cost savings (3%)	$17.91	$349.40
Annual accessory cost savings	$214.15	$596.68
Total Annualized Equipment Cost Savings (3%)	$232.06	$946.08
Total		
Equipment	$232.06	$946.08
Training, cleaning, and fit testing	$376.21	$513.93

Note: Figures in rows may not add to totals due to rounding.

Sources: BLS, 2020a; BLS, 2018; Magidglove, 2012; Grainger, 2012e; Restockit, 2012; Spectrumchemical, 2012; Conney, 2012a; Conney, 2012b; Zoro Tools, 2012a; Grainger, 2019c; Grainger, 2019d; Advanz Lens Goggles, 2019; Gemplers, 2012; Buying Direct, 2012; Amazon.com, 2013; Zoro Tools, 2013; Grainger, 2013b; EnviroSafety Products, 2013; BEA, 2020; US DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250); Grainger, 2019a; Grainger, 2019b.

TABLE IV–13—HALF-MASK AND POWERED AIR PURIFYING RESPIRATOR (PAPR) UNIT COST

	Half-mask	PAPR
Respirator		
Respirator	$34.28	$988.31
Annual Costs		
Training	$73.94	$147.87
Cleaning	$265.30	$270.03
Fit Testing	$36.97	$96.03
Accessories	$214.15	$596.68
Annual Subtotal	$590.36	$1,110.61
Annualized Costs		
Years	2	3
Annualized Unit Cost (3%)	$608.27	$1,460.00
Annualized Unit Cost (7%)	$609.31	$1,487.20

Sources: Magidglove, 2012; Grainger, 2012e; Restockit, 2012; Spectrumchemical, 2012; Conney, 2012a; Conney, 2012b; Zoro Tools, 2012a; Grainger, 2019c; Grainger, 2019d; Advanz Lens Goggles, 2019; Gemplers, 2012; Buying Direct, 2012; Amazon.com, 2013; Zoro Tools, 2013; Grainger, 2013b; EnviroSafety Products, 2013; Grainger, 2019a; Grainger, 2019b.

Personal Protective Clothing and Equipment

Overview of Regulatory Requirements in the 2017 Final Rule

Under the 2017 final rule, personal protective clothing and equipment are required for workers in shipyards and construction where exposure exceeds or can reasonably be expected to exceed the TWA PEL or STEL, or where there is a reasonable expectation of dermal contact with beryllium.

The employer must ensure that each employee removes all beryllium-contaminated personal protective clothing and equipment at the end of the work shift, at the completion of all tasks involving beryllium, or when personal protective clothing or equipment becomes visibly contaminated with beryllium, whichever comes first. All such personal protective clothing and equipment must be removed as specified in the written exposure control plan. Personal protective clothing and equipment must be kept separate from street clothing and the employer must ensure that storage facilities prevent cross-contamination. The employer must ensure that personal protective clothing and equipment is not removed from the workplace except by authorized personnel, with appropriate containers and labels that are in accordance with paragraph (m)(2). All reusable personal protective clothing and equipment must be cleaned, laundered, repaired, and replaced as needed.

The employer must ensure that beryllium is not removed from personal protective clothing and equipment by blowing, shaking, or any other means that disperses beryllium into the air. The employer must inform in writing the persons or the business entities who launder, clean, or repair the personal protective clothing or equipment required by this standard of the potentially harmful effects of airborne exposure to and dermal contact with beryllium and that the personal protective clothing and equipment must be handled in accordance with this standard.

Cost Savings Estimates of This Final Rule

OSHA is making several revisions to the PPE provisions of the standards. OSHA is removing the requirements regarding storage facilities, providing PPE based on an expectation of dermal contact with beryllium, removal of PPE when it becomes visibly contaminated with beryllium, storing and keeping PPE separate from employees' street clothing, removal of beryllium-contaminated PPE from the workplace, and transportation and labeling of PPE that is removed from the workplace. OSHA is also removing the qualifier ''beryllium-contaminated'' and replacing it with ''required by this standard.'' A further change from the proposed rule is that OSHA is also adding a provision that states the employer must ensure that no employee with reasonably expected exposure above the TWA PEL or STEL removes personal protective clothing and equipment required by the beryllium standard from the workplace unless it has been cleaned in accordance with paragraph (h)(3)(ii). The 2017 FEA, and the 2019 PEA, estimated that employers would rent rather than buy PPE. The agency continues to estimate this will be the common approach, with any cases due to this last provision having a negligible effect on costs.

Under these changes, the PPE provisions will only apply to employees who are, or can reasonably be expected to be, exposed over the TWA PEL or STEL. In the 2017 FEA, OSHA also estimated PPE costs for the 25 percent of employees who would be exposed below the PEL but who nevertheless may have dermal contact with beryllium. OSHA also estimated ten minutes of clerical time for each establishment with laundry needs to notify the cleaners in writing of the potentially harmful effects of beryllium exposure and how the protective clothing and equipment must be handled in accordance with the beryllium standard, so the removal of that provision will result in a cost savings. OSHA did not estimate costs for extra storage facilities because it judged that no employers would need them.

As stated in the compliance section in IV.B, above, OSHA estimates a 90 percent compliance rate for all PPE for workers who have exposures above the TWA PEL or STEL. This is a change

from the 2017 FEA, which estimated a 75 percent compliance rate for PPE for all workers, not just those exposed above the TWA PEL or STEL. This results in two cost effects. First, there is an adjustment to costs due to the decreased number of workers, from 25 percent to 10 percent, with exposures above the TWA PEL or STEL who will need PPE. The exposure profile (Table IV–2) shows the number of workers who are exposed above the 0.2 μg/m^3 PEL. For those above the PEL, the 15 percent decrease in the compliance rate from 25 percent to 10 percent, along with OSHA's standard calculation that 10 percent of those workers will continue to be exposed above the PEL after the standards take effect, means 1.5 percent of these workers will no longer need PPE. This number of workers times the unit costs (discussed below) gives the cost adjustment for this group. Second, for those workers whose exposures are below the TWA PEL and STEL, there will also be a cost savings for the 25 percent that the 2017 FEA estimated did not have proper PPE, due to the removal of the dermal contact trigger for PPE. The exposure profile (Table IV–2) shows the number of workers below the PEL. OSHA is revising the compliance rate from 75 percent to 100 percent because the PPE provisions are no longer required for those below the TWA PEL and STEL, so 25 percent will no longer need PPE. This number of workers times the unit costs (discussed below) gives the cost savings for this group.

The cost savings due to the removal of the requirement to notify laundries is per-establishment, not per-worker, and the number of establishments can be found in Table IV–4. The total number of affected establishments times the cost of clerical time, below, gives the cost savings for this revision.

In the 2017 FEA, OSHA estimated that employers would rent rather than purchase PPE. The annual cost for rental would be $54.62 per employee, inflated from the 2017 FEA estimate of $48.62. The per-establishment annual cost savings for the ten minutes of clerical time required to notify laundries is $4.12 ($24.76 hourly wage, File Clerks, SOC: 43–4071).

After accounting for the 25 percent of employees who no longer need PPE due to the removal of the dermal contact trigger, the change in the compliance rate from 75 percent to 90 percent, and the removal of the ten minutes of clerical time for notifying laundries, the total annualized cost savings and adjustment for the revisions to the PPE paragraph is estimated to be $167,196 at a 3 percent discount rate.

Hygiene Areas and Practices

Overview of Regulatory Requirements in the 2017 Final Rule

The 2017 final rule requires affected shipyard and construction employers to provide readily accessible washing facilities to remove beryllium from the hands, face, and neck of each employee exposed to beryllium; ensure that employees who have dermal contact with beryllium wash any exposed skin at the end of the activity, process, or work shift and prior to eating, drinking, smoking, chewing tobacco or gum, applying cosmetics, or using the toilet; and provide employees required to use PPE with a designated change room where employees are required to remove their personal clothing. Wherever the employer allows employees to consume food or beverages at a worksite where beryllium is present, the employer must ensure that surfaces in eating and drinking areas are as free as practicable of beryllium and no employees enter any eating or drinking area with personal protective clothing or equipment unless, prior to entry, surface beryllium has been removed from the clothing or equipment by methods that do not disperse beryllium into the air or onto an employee's body. The employer must also ensure that no employees eat, drink, smoke, chew tobacco or gum, or apply cosmetics in work areas where there is a reasonable expectation of exposure above the TWA PEL or STEL.

Cost Savings Estimates in This Rule

OSHA is rescinding this paragraph in its entirety. Both washing facilities and change rooms would no longer be directly required under this rule. However, because PPE is still required where airborne beryllium exceeds the TWA PEL or STEL, employers will still need to provide change rooms where exposures are above the TWA PEL or STEL pursuant to the sanitation standards.

The 2017 FEA estimated no costs for readily accessible washing facilities, under the expectation that employers already have such facilities in place where needed, and this FEA retains this estimate. Therefore, OSHA is estimating no cost savings from washing facilities due to this rule. The 2017 FEA did include costs for disposable head coverings that would be purchased for processes where hair may become contaminated by beryllium. Employers in construction and shipyards will not incur these costs under the existing standards because unlike in general industry, there are no requirements in construction or shipyards to provide showers where hair can become contaminated with beryllium. OSHA is therefore making a cost adjustment to account for this. The annual cost for one disposable head covering per day in 2019 dollars is $31.32 (Grainger, 2013). The number of workers estimated to need such head coverings in the 2017 FEA is 542; so the total annual cost adjustment is $16,975 ($31.32 × 542).

The agency is not estimating cost savings for the removal of requirements to add a change room and segregated lockers. The sanitation standards (29 CFR 1926.51 and 29 CFR 1915.88) require employers to provide change rooms whenever they require employees to wear PPE to prevent exposure to hazardous or toxic substances. Under this rule, employers would still be required by the sanitation standards, combined with the PEL requirements in the 2017 beryllium final rule, to provide PPE to employees to prevent exposure to beryllium. Therefore, no cost savings would arise from this change.

The revisions to the PPE paragraph would remove the need for employees to change out of PPE, generally at the end of a shift, for those not exposed to airborne beryllium above the TWA PEL and STEL. In the 2017 FEA, OSHA included the cost of changing clothes in the costs for the hygiene provisions rather than the PPE provisions. The cost for a clothing change is the same as in the 2017 FEA, updated to 2018 dollars. The agency expected that, in many cases, a worker will simply be adding, and later removing, a layer of clothing (such as a lab coat, coverall, or shoe covers) at work, which might involve no more than a couple of minutes a day. However, in other cases, a worker may need a full clothing change. Taking all these factors into account, OSHA estimated that a worker using PPE would need 5 minutes per day to change clothes (Document ID 2042, p. V–185). The annual cost per employee to change clothes is $540.06. This cost is based on a production worker earning $25.92 an hour (Production Occupation, SOC: 51–0000) and taking 5 minutes per day to change clothes for 250 days per year ((5/60) × $25.92 × 250).

OSHA's removal of the eating and drinking areas and prohibited activities provisions of paragraph (i) have cost implications only for training, which is discussed later in this cost section.

The agency estimates the total annualized cost savings of the removal of paragraph (i) to be $309,464 for all affected establishments. The breakdown of these cost savings by NAICS code can be seen in Table IV–15 at the end of this program cost-savings section.

Housekeeping

Overview of Regulatory Requirements in the 2017 Final Rule

The housekeeping provisions require the employer to follow the written exposure control plan when cleaning beryllium-contaminated areas, ensure that all spills and emergency releases of beryllium are cleaned up promptly and in accordance with the written exposure control plan required under paragraph (f)(1) of this standard. The provisions require the employer to ensure the use of HEPA-filtered vacuuming or other methods that minimize the likelihood and level of airborne exposure when cleaning beryllium-contaminated areas, and prohibit the employer from allowing dry sweeping or brushing for cleaning in such areas unless HEPA-filtered vacuuming or other methods that minimize the likelihood and level of airborne exposure are not safe or effective. The provisions also prohibit the employer from allowing the use of compressed air for cleaning in beryllium-contaminated areas unless the compressed air is used in conjunction with a ventilation system designed to capture the particulates made airborne by the use of compressed air. Where employees use dry sweeping, brushing, or compressed air to clean in beryllium-contaminated areas, the employer must provide, and ensure that each employee uses, respiratory protection and personal protective clothing and equipment in accordance with paragraphs (g) and (h) of the standards. The employer must also ensure that cleaning equipment is handled and maintained in a manner that minimizes the likelihood and level of airborne exposure and the re-entrainment of airborne beryllium in the workplace. When the employer transfers materials containing beryllium to another party for use or disposal, the employer must provide the recipient with the warning required by paragraph (m).

Cost Savings Estimates in This Rule

OSHA is removing the requirements to follow the written exposure control plan when cleaning and to promptly clean up spills and emergency releases. OSHA is also revising the cleaning methods requirements to remove the reference to HEPA-filtered vacuuming and to trigger these provisions on the presence of dust resulting from operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL, rather than on the presence of a ''beryllium-contaminated area.'' In addition, OSHA is removing the qualifier ''in beryllium-contaminated areas'' from the requirement to provide PPE and respiratory protection in accordance with other provisions in the standards. Next, OSHA is prohibiting the use of compressed air for cleaning where the use of compressed air causes, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL. Finally, OSHA is removing the requirement to provide a warning when transferring materials containing beryllium to another party for use or disposal.

The agency is estimating cost savings for removing the requirement to use HEPA-filtered vacuums for shipyards and construction and for removing the need for a warning label when transferring materials containing beryllium to another party for use or disposal. The other cost included for this provision is labor time spent doing housekeeping tasks, and the agency estimates the revisions do not alter its 2017 FEA estimate of an additional 5 minutes per day for each employee.

In the 2017 FEA, OSHA estimated a compliance rate for the housekeeping provisions of 75 percent for all workers in abrasive blasting based on the agency's determination that other standards required some housekeeping for abrasive blasting in both construction and shipyards. As discussed above, a further review of other standards has led the agency to revise its compliance rate for housekeeping to 100 percent. While the revisions will limit the methods that employers may use to clean up beryllium, OSHA estimates that cleaning methods which do not disperse beryllium into the air take approximately the same amount of time as cleaning methods already in use. OSHA is making a cost adjustment in this FEA, maintaining the change in the 2019 PEA, for the additional 25 percent of workers in abrasive blasting operations who are now estimated to be performing housekeeping tasks. Furthermore, while those areas that are below the TWA PEL and STEL no longer have any requirements for housekeeping tasks, OSHA is not estimating an additional cost savings because its revised compliance estimate is already at 100 percent. OSHA estimated in the 2017 FEA that welding in shipyards had a 0 percent compliance rate for housekeeping. This has also been changed to 100 percent compliance in this FEA, as explained in section IV.B of this FEA. OSHA is also making a cost adjustment for this change in the compliance rate.

OSHA estimated the following costs for the housekeeping provisions in the 2017 FEA (Document ID 2042, pp. V–187–190, amounts adjusted for 2019 dollars): A one-time annualized cost per worker of a HEPA-filtered vacuum ($652); the annual cost per worker of the additional time needed to perform housekeeping ($540); and the annual cost of the warning labels per worker ($6). The total annual per-employee cost was $1,197 ($652 + $540 + $6). This per-employee cost is then multiplied by the 25 percent of workers in abrasive blasting operations and 100 percent of the welders who are now estimated to be in compliance versus the 2017 FEA to calculate the cost adjustment due to the revised baseline compliance rates.

The total annualized cost adjustment in this rule due to revisions to this ancillary provision are $1,764,878. The breakdown of these cost savings by NAICS code is shown in Table IV–15 at the end of this program cost-savings section.

Medical Surveillance

Overview of Regulatory Requirements in the 2017 Final Rule

The 2017 final rule requires affected employers in shipyards and construction to make medical surveillance available at a reasonable time and place, and at no cost, to the following employees:

1. Employees who are, or are reasonably expected to be, exposed at or above the action level for more than 30 days per year;
2. Employees who show signs or symptoms of chronic beryllium disease (CBD) or signs or symptoms of other beryllium-related health effects;
3. Employees exposed to beryllium during an emergency; and
4. Employees whose most recent written medical opinion required by this standard recommends periodic medical surveillance.

The medical surveillance paragraph also specifies the frequency with which examinations must be provided, the required contents of the examination, the information that the employer must provide to the physician or other licensed healthcare provider (PLHCP), the information that must be contained in the physician's written medical report for the employee, the information that must be contained in the physician's written medical opinion for the employer, and procedures and requirements related to referral to a CBD diagnostic center.

Cost Savings of This Rule

OSHA is making minor changes to the medical surveillance provision of the 2017 final rule. In response to the 2019 NPRM, the agency received one

comment on its medical exam costs estimates. Referring to comments it had previously submitted, NABTU reiterated its prior assessment of medical exam costs: ''$216 is for shipping of specimen and lab analysis. In a standalone situation an additional charge would be for blood draw, which we estimate to be about $20.00'' (Document ID 2236, p. 2). Because NABTU's initial comments were reviewed and incorporated into the 2017 FEA and their subsequent comment indicates the estimates are generally unchanged, OSHA is not altering any of the unit costs from the 2017 FEA, including these medical surveillance costs.

First, OSHA is removing the emergency trigger for medical surveillance. The 2017 FEA did not break out a separate cost for emergencies, stating that ''a very small number of employees will be affected by emergencies in a given year'' (Document ID 2042, Chapter V, p. V–196). The agency therefore concludes that removing the emergency trigger will result in de minimis cost savings.

OSHA is also modifying the language in paragraph (k)(2)(iii) to match the General Industry standard. This modification adds more detail regarding requirements for a medical examination at the termination of an employee's employment and is meant to clarify who will receive such an exam. The agency does not expect this to significantly change the number of exams performed and judges it to have de minimis cost implications.

OSHA also is replacing from the 2017 standards the phrase ''airborne exposure to and dermal contact with beryllium'' in these provisions with the simpler phrase ''exposure to beryllium.'' As explained in the Summary and Explanation section, this is not a substantive change and has no cost implications.

OSHA proposed a change to the definition of *CBD diagnostic center* to clarify that a center must have a pulmonologist or pulmonary specialist on staff and must be capable of performing a variety of tests commonly used in the diagnosis of CBD, but need not necessarily perform all of the tests during all CBD evaluations. The 2016 FEA did not estimate that all tests would be performed during all CBD evaluations, so the agency takes no cost savings for this change. In response to comments received and to align with changes made in the July 14, 2020 general industry final rule (85 FR 42582), OSHA is further modifying the language of this definition from the language proposed in the 2019 NPRM. Specifically, rather than requiring CBD diagnostic centers to have a pulmonary specialist on site, the definition now specifies that centers must have one on staff. Also, rather than stating that each evaluation must include pulmonary function testing (as outlined by the American Thoracic Society criteria), bronchoalveolar lavage (BAL), and transbronchial biopsy, the definition now states that CBD diagnostic centers must have the capacity to perform such tests. Because the 2017 FEA for a medical examination at a CBD diagnostic center costed the typical tests given by a CBD diagnostic center, these changes have no effect on costs (see Document ID 2042, Chapter V, p. V–204)

OSHA is amending paragraph (k)(7)(i) to require that the employer must provide, at no cost to the employee and at a CBD diagnostic center that is mutually agreed upon by the employer and employee, an evaluation at the CBD diagnostic center that must be scheduled within 30 days, and must occur within a reasonable time. The 2017 beryllium standards required the actual evaluation to take place within 30 days. This change to paragraph (k)(7) allows increased flexibility in scheduling and may lead to minor cost savings.

In the 2019 NPRM, OSHA proposed that the employer provide an initial consultation with the CBD diagnostic center, rather than the full evaluation, within 30 days of the employer receiving notice that a full evaluation must be performed. This initial consultation could be done in conjunction with the tests but it was not required to be. As the initial consultation could be conducted remotely, by phone or virtual conferencing, the cost of the consultation would consist only of time spent by the employee and the PLHCP and would not have to include any travel or accommodation.

In the 2017 FEA, OSHA accounted for the cost of both the employee's time and the local examining physician's time for a 15-minute discussion (2017 FEA, Chapter V, p. V–206). The 2019 PEA concluded that because the consultation at the CBD diagnostic center would replace this initial discussion, there would be no additional cost.

In this final rule, OSHA is not adopting the proposed requirement for an initial consultation with the CBD diagnostic center. Since in the economic analysis the initial consultation was a replacement for a discussion with a local PLCHP, the removal of this requirement will have no change in costs: There will still be the discussion with the local PLCHP with the same unit cost.

OSHA is making another change from the requirements for the CBD diagnostic center examination as proposed in the 2019 NPRM. In this final rule, OSHA has clarified that, if the examining physician at the CBD diagnostic center recommends a test that is not available at that center, the test may instead be performed at another location that is mutually agreed upon by the employer and the employee. In terms of the cost impact of this change, it will allow more flexibility in identifying a location for tests and may allow employers to find more economical travel and accommodation options. The change also aligns the construction and shipyards standards to changes made in the July 14, 2020 general industry final rule. The agency concludes these changes would produce minor, if any, cost savings, and no additional costs.

Another proposed change with potential implications for medical surveillance costs is a proposed change in the definition of *confirmed positive.* The 2019 NPRM proposed to clarify that confirmed positive means the person tested has had two abnormal BeLPT test results, an abnormal and a borderline test result, or three borderline test results obtained within the 30-day follow-up test period after a first abnormal or borderline BeLPT test result. Unlike the 2017 standards, the proposed change explicitly required that the qualifying test results be obtained within one testing cycle (including the 30-day follow-up test period required after a first abnormal or borderline BeLPT test result), rather than arguably over an unlimited time period. The 2019 NPRM explained that some stakeholders had construed the 2017 final rule to allow these tests to cumulate over an unlimited time period though this was not the agency's intent. OSHA explained in the 2019 PEA that the exact effect of this proposed change was uncertain, as it is unknown how many employees would have a series of BeLPT results associated with a confirmed positive finding (two abnormal results, one abnormal and one borderline result, or three borderline results) over an unlimited period of time, but would not have any such combination of results within a single testing cycle.

OSHA received several comments discussing the practicality of the provisions relating to the 30-day testing cycle (Document ID 2208, 2211, 2213, 2237, 2243, and 2244). These comments are discussed in the summary and explanation for paragraph (b). After reviewing the comments and record,

OSHA has further modified the definition of *confirmed positive* in this final rule from the definition proposed in the 2019 NPRM. In this final rule, OSHA is requiring that the set of tests that demonstrate confirmed positive must be from tests conducted within a 3-year period. This change aligns with similar revisions made in the July 14, 2020 general industry final rule. As in the PEA in support of the 2018 proposed revisions to the general industry standard, OSHA concludes that this change would not increase compliance costs and would incidentally yield some cost savings by lessening the likelihood of false positives.

Other changes are to align these standards with the (proposed) general industry standard and, similar to the economic analysis there, are also estimated to only have de minimis effects on costs.

Medical Removal

OSHA is not making any changes to paragraph (l), Medical removal protection. OSHA is also not making any changes to the baseline compliance rate with this paragraph. Therefore, there are no cost savings associated with this provision.

Communication of Hazards

Overview of Regulatory Requirements in the 2017 Final Rule

Paragraph (m) of the beryllium standards for construction and shipyards sets forth the employer's obligations to comply with OSHA's Hazard Communication Standard (HCS) (29 CFR 1910.1200) relative to beryllium, and to provide warnings and training to employees about the hazards of beryllium.

Cost Savings in This Rule

OSHA is making three changes to paragraph (m) in both the construction and shipyards standards. First, OSHA is removing the paragraph (m) provisions that require specific language for warning labels applied to materials designated for disposal or PPE when removed from the workplace ((m)(2) in construction and (m)(3) in shipyards). This is consistent with OSHA's modification to remove the corresponding requirements to provide such warning labels and any cost implications are accounted for in the sections on those corresponding provisions.

Second, OSHA is revising paragraphs (m)(3)(i) in construction and (m)(4)(i) in shipyards—renumbered as (m)(2)(i) and (m)(3)(i), respectively—to remove dermal contact as a trigger for training in accordance with the HCS (29 CFR 1910.1200(h)). As explained in the summary and explanation for paragraph (m), because OSHA judges that there are no workers who would have received training solely due to the potential for dermal contact, the agency has determined that the HCS training requirements will continue to apply to all workers that are covered under the construction and shipyards standards. Regardless, for purposes of its economic analysis, OSHA did not included in the 2017 FEA costs associated with training under the HCS. Accordingly, OSHA expects no cost implications from this change.

Third, OSHA is revising the provisions of paragraph (m) for employee information and training related to emergency procedures ((m)(3)(ii)(D) in construction and (m)(4)(ii)(D) in shipyards) and personal hygiene practices ((m)(3)(ii)(E) in construction and (m)(4)(ii)(E) in shipyards), for consistency with OSHA's removal of emergency procedures and personal hygiene practices from the construction and shipyards standards. OSHA estimates that this change will lead to cost savings.

Below the agency first presents the methodology for training from the 2017 final rule with unit cost estimates updated to 2018 dollars, and then discusses and estimates the cost effects of this rule.

In the 2017 FEA, OSHA estimated that training, which includes hazard communication training, would be conducted by in-house safety or supervisory staff with the use of training modules and videos and would last, on average, eight hours. (Note that this estimate does not include the time taken for hazard communication training that is already required by 29 CFR 1910.1200). The agency judged that establishments could purchase sufficient training materials at an average cost of $2.21 per worker, encompassing the cost of handouts, video presentations, and training manuals and exercises. For initial and periodic training, OSHA estimates an average class size of five workers (each at a wage of $25.92 (updated from Production Occupations, SOC: 51–0000)) with one instructor (at a wage of $42.19 (Median Wage for Training and Development Specialists, SOC: 13–1151)) over an eight hour period. The per-worker cost of initial training is therefore $277.07 ((8 × $25.92) + (8 × $42.19/5) + $2.21).

Annual retraining of workers is also required by the standards. OSHA estimates the same unit costs as for initial training, so retraining would require the same per-worker cost of $277.07.

The first type of cost savings comes from changes to the training provision itself, where the rule rescinds the requirement to train employees on emergency procedures. The agency estimates that this will decrease training time by 15 minutes. Other decreases in training time come from rescinded portions of hygiene requirements, including: Washing areas, change rooms, eating and drinking areas, and cross-contamination. The agency estimates that this would decrease needed training by another hour.

Together this would decrease the required per-employee training from 8 hours to 6.75 hours. Hence, the per-worker cost of initial and retraining is $234.13 ((6.75 × $25.92) + (6.75 × $42.19/5) + $2.21).

Finally, using these unit cost estimates, as well as accounting for industry-specific baseline compliance rates (which, as explained in section IV.B of this FEA, are unchanged from the 2017 FEA), and based on a 31.8 percent new hire rate (BLS 2020b, using the annual manufacturing new hire rate, as was done in the 2017 FEA, updated to the current rate), OSHA estimates that the revisions to the training requirements in the standards would result in an annualized total cost savings of $103,276. The breakdown of these cost savings by NAICS code is shown in Table IV–15 at the end of this program cost-savings section.

Familiarization Costs

In the 2017 final rule, OSHA included familiarization costs to account for employers' time taken to understand the new standards. The changes that OSHA is making to most provisions in this final rule are not extensive. Employers will thus only need to spend a brief amount of time to review them. In the 2019 PEA, OSHA estimated that employers would spend one hour per firm reviewing the changed requirements. As this final rule results in minor distinctions from the 2019 proposed rule, OSHA continues to estimate employers will spend an hour per firm reviewing the changed requirements.

Table IV–14 shows the unit costs, by establishment size, of reviewing the changes in this rule. These costs will likely be one-time costs incurred during the first year after the effective date of a final rule resulting from this rule, but the aggregate costs are annualized for consistency with the other estimates for this rule. Based on the unit familiarization (negative) cost savings in Table IV–14, the total annualized

familiarization costs of this rule are estimated to be $14,480. The breakdown of these costs by NAICS code is in Table IV–15 at the end of this program cost-savings section, and these costs are reflected in the tables as a negative cost savings.

TABLE IV–14—FAMILIARIZATION—CONSTRUCTION AND SHIPYARD ASSUMPTIONS AND UNIT COST SAVINGS

Item	Establishment size (employees)		
	Small (<20)	Medium (20–499)	Large (500+)
Hours per establishment	1.0	1.0	1.0
Total cost savings per establishment	−$44.18	−$44.18	−$44.18
Annualized Cost Savings (3 Percent)	−$5.18	−$5.18	−$5.18

Note: Figures in rows may not add to totals due to rounding.
Source: U.S. DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

TABLE IV–15—ANNUALIZED COST SAVINGS OF PROGRAM REQUIREMENTS FOR INDUSTRIES AFFECTED BY THE BERYLLIUM STANDARD BY SECTOR AND SIX-DIGIT NAICS INDUSTRY
[In 2019 dollars using a 3 percent discount rate]

Application group/NAICS	Industry	Rule familiarization	Exposure assessment	Regulated areas/ competent person	Medical surveillance	Medical removal provision	Written exposure control plan	Protective work clothing & equipment	Hygiene areas and practices	House-keeping	Training	Total program cost savings
Abrasive Blasting—Construction												
238320	Painting and Wall Covering Contractors.	−$5,646	$0	$0	$0	$0	$48,022	$63,055	$117,715	$665,231	$38,933	$927,311
238990	All Other Specialty Trade Contractors.	−5,231	0	0	0	0	44,498	58,427	109,076	616,407	36,076	859,252
Abrasive Blasting—Shipyards												
336611a	Ship Building and Repairing.	−3,569	0	0	0	0	32,985	44,176	82,617	466,882	27,325	650,416
Welding—Shipyards												
336611b	Ship Building and Repairing.	−34	0	0	0	0	1,163	1,538	56	16,358	943	20,025
Total												
Construction Subtotal		−10,877	0	0	0	0	92,520	121,482	226,791	1,281,638	75,009	1,786,563
Maritime Subtotal		−3,603	0	0	0	0	34,148	45,714	82,673	483,241	28,267	670,441
Total, All Industries		−14,480	0	0	0	0	126,668	167,196	309,464	1,764,878	103,276	2,457,003

Note: Figures in rows may not add to totals due to rounding.
Source: U.S. DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

Total Annualized Cost Savings

As shown in Table IV–16, the total annualized cost savings of this rule, using a 3 percent discount rate, is estimated to be about $2.5 million.

TABLE IV–16—ANNUALIZED COST SAVINGS TO INDUSTRIES AFFECTED BY THE BERYLLIUM STANDARD, BY SECTOR AND SIX-DIGIT NAICS INDUSTRY
[2019 Dollars, 3 percent discount rate]

Application group/NAICS	Industry	Engineering controls and work practices	Respirator cost savings	Program cost savings	Total cost savings
Abrasive Blasting—Construction					
238320	Painting and Wall Covering Contractors	$0	$20,740	$927,311	$948,051
238990	All Other Specialty Trade Contractors	0	19,218	859,252	878,469
Abrasive Blasting—Shipyards					
336611a	Ship Building and Repairing	0	14,106	650,416	664,522
Welding—Shipyards					
336611b	Ship Building and Repairing	0	871	20,025	20,896
Total					
Construction Subtotal		0	39,957	1,786,563	1,826,520
Maritime Subtotal		0	14,977	670,441	685,418

TABLE IV–16—ANNUALIZED COST SAVINGS TO INDUSTRIES AFFECTED BY THE BERYLLIUM STANDARD, BY SECTOR AND SIX-DIGIT NAICS INDUSTRY—Continued

[2019 Dollars, 3 percent discount rate]

Application group/NAICS	Industry	Engineering controls and work practices	Respirator cost savings	Program cost savings	Total cost savings
Total, All Industries		0	54,934	2,457,003	2,511,938

Note: Figures in rows may not add to totals due to rounding.
Source: U.S. DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

Time Distribution of Cost Savings

OSHA analyzed the stream of (un-annualized) compliance cost savings for the first ten years after the rule will take effect. As shown in Table IV–17, total compliance cost savings are expected to decline from year 1 to year 2 by almost half after the initial set of capital and program start-up expenditure savings has been incurred. Cost savings are then essentially flat with relatively small variations for the following years.

TABLE IV–17—DISTRIBUTION OF UNDISCOUNTED COMPLIANCE COSTS AND COST SAVINGS BY YEAR

[2019 Dollars]

Year	Program cost savings	Respirators	Engineering controls	Rule familiarization	Total
1	$4,292,553	$88,029	$0	−$123,515	$4,257,066
2	2,217,400	46,790	0	0	2,264,190
3	2,217,400	48,491	0	0	2,265,891
4	2,217,400	52,241	0	0	2,269,641
5	2,217,400	48,491	0	0	2,265,891
6	2,217,400	46,790	0	0	2,264,190
7	2,217,400	53,942	0	0	2,271,342
8	2,217,400	46,790	0	0	2,264,190
9	2,217,400	48,491	0	0	2,265,891
10	2,217,400	52,241	0	0	2,269,641

Note: Figures in rows may not add to totals due to rounding.
Source: U.S. DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

Table IV–18 breaks out total cost savings by each application group for the first ten years. Each application group follows the same pattern of a sharp decrease in cost savings between years 1 and 2, and then remains relatively flat for the remaining years.

TABLE IV–18—TOTAL UNDISCOUNTED COST SAVINGS OF THE BERYLLIUM STANDARD BY YEAR

[2019 Dollars]

Application group	Year									
	1	2	3	4	5	6	7	8	9	10
Abrasive Blasting—Construction	$3,095,549	$1,646,363	$1,647,587	$1,650,286	$1,647,587	$1,646,363	$1,651,510	$1,646,363	$1,647,587	$1,650,286
Abrasive Blasting—Shipyards	1,123,592	599,362	599,808	600,791	599,808	599,362	601,237	599,362	599,808	600,791
Welding—Shipyards	37,925	18,466	18,496	18,564	18,496	18,466	18,595	18,466	18,496	18,564
Total	4,257,066	2,264,190	2,265,891	2,269,641	2,265,891	2,264,190	2,271,342	2,264,190	2,265,891	2,269,641

Note: Figures in rows may not add to totals due to rounding.
Source: U.S. DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

Appendix IV–A

Summary of Annualized Cost Savings by Entity Size Under Alternative Discount Rates

In addition to using a 3 percent discount rate in its cost analysis, OSHA estimated compliance cost savings using alternative discount rates of 7 percent and 0 percent. Tables IV–19 and IV–20 present—for 7 percent and 0 percent discount rates, respectively—total annualized cost savings for affected employers by NAICS industry code and employment size class (all establishments, small entities, and very small entities).

As shown in these tables, the choice of discount rate has only a minor effect on total annualized compliance cost savings—for example, annualized cost savings for all establishments remain flat/slightly increase to $2.6 million using a 7 percent discount rate, and remain flat/slightly decrease to $2.5 million using a 0 percent discount rate.

TABLE IV–19—TOTAL ANNUALIZED COST SAVINGS, BY SECTOR AND SIX-DIGIT NAICS INDUSTRY, FOR ENTITIES AFFECTED BY THE SHIPYARD AND CONSTRUCTION BERYLLIUM STANDARDS

[By size category, 7 percent discount rate, 2019 dollars]

Application group/NAICS	Industry	All establishments	Small entities (SBA-defined)	Very small entities (<20 employees)
Abrasive Blasting—Construction				
238320	Painting and Wall Covering Contractors	$967,892	$796,918	$527,892
238990	All Other Specialty Trade Contractors	896,854	665,964	426,508
Abrasive Blasting—Shipyards*				
336611a	Ship Building and Repairing	678,347	175,887	88,164
Welding in Shipyards**				
336611b	Ship Building and Repairing	21,408	5,687	3,158
Total				
Construction Subtotal		1,864,746	1,462,882	954,400
Shipyard Subtotal		699,755	181,574	91,322
Total, All Industries		2,564,501	1,644,456	1,045,722

Note: Figures in rows may not add to totals due to rounding.

*Employers in application group Abrasive Blasting—Shipyards are shipyards employing abrasive blasters that use mineral slag abrasives to etch the surfaces of boats and ships.

Source: U.S. DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

TABLE IV–20—TOTAL ANNUALIZED COST SAVINGS, BY SECTOR AND SIX-DIGIT NAICS INDUSTRY, FOR ENTITIES AFFECTED BY THE SHIPYARD AND CONSTRUCTION BERYLLIUM STANDARDS

[By size category, 0 percent discount rate, 2019 dollars]

Application group/NAICS	Industry	All establishments	Small entities (SBA-defined)	Very small entities (<20 employees)
Abrasive Blasting—Construction				
238320	Painting and Wall Covering Contractors	$946,753	$779,194	$515,604
238990	All Other Specialty Trade Contractors	877,267	651,005	416,413
Abrasive Blasting—Shipyards*				
336611a	Ship Building and Repairing	663,659	171,313	85,760
Welding in Shipyards**				
336611b	Ship Building and Repairing	20,848	5,487	3,043
Total				
Construction Subtotal		1,824,020	1,430,199	932,017
Shipyard Subtotal		684,507	176,800	88,803
Total, All Industries		2,508,526	1,606,999	1,020,820

Note: Figures in rows may not add to totals due to rounding.

*Employers in application group Abrasive Blasting—Shipyards are shipyards employing abrasive blasters that use mineral slag abrasives to etch the surfaces of boats and ships.

Source: U.S. DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

Appendix IV–B

Summary of Annualized Cost Savings by Cost Type Under Alternative Discount Rates

In addition to using a 3 percent discount rate in its cost analysis, OSHA estimated compliance cost savings using alternative discount rates of 7 percent and 0 percent. Tables IV–21 and IV–22 present—for 7 percent and 0 percent discount rates, respectively—total annualized cost savings for affected employers by NAICS industry code and type of cost savings.

TABLE IV–21—ANNUALIZED COMPLIANCE COST SAVINGS FOR EMPLOYERS AFFECTED BY THE BERYLLIUM STANDARD BY SECTOR AND SIX-DIGIT NAICS INDUSTRY

[7 percent discount rate, in 2019 dollars]

Application group/NAICS	Industry	Engineering controls and work practices	Respirator cost savings	Program cost savings	Total cost savings
Abrasive Blasting—Construction					
238320	Painting and Wall Covering Contractors	$0	$21,257	$946,635	$967,892
238990	All Other Specialty Trade Contractors	0	19,697	877,157	896,854
Abrasive Blasting—Shipyards					
336611a	Ship Building and Repairing	0	14,438	663,909	678,347
Welding—Shipyards					
336611b	Ship Building and Repairing	0	887	20,521	21,408
Total					
Construction Subtotal		0	40,954	1,823,792	1,864,746
Maritime Subtotal		0	15,325	684,430	699,755
Total, All Industries		0	56,279	2,508,222	2,564,501

Note: Figures in rows may not add to totals due to rounding.
Source: U.S. DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

TABLE IV–22—ANNUALIZED COMPLIANCE COST SAVINGS FOR EMPLOYERS AFFECTED BY THE BERYLLIUM STANDARD BY SECTOR AND SIX-DIGIT NAICS INDUSTRY

[0 percent discount rate, in 2019 dollars]

Application group/NAICS	Industry	Engineering controls and work practices	Respirator cost savings	Program cost savings	Total cost savings
Abrasive Blasting—Construction					
238320	Painting and Wall Covering Contractors	$0	$20,684	$926,069	$946,753
238990	All Other Specialty Trade Contractors	0	19,166	858,100	877,267
Abrasive Blasting—Shipyards					
336611a	Ship Building and Repairing	0	14,067	649,592	663,659
Welding—Shipyards					
336611b	Ship Building and Repairing	0	868	19,979	20,848
Total					
Construction Subtotal		0	39,850	1,784,169	1,824,020
Maritime Subtotal		0	14,935	669,571	684,507
Total, All Industries		0	54,786	2,453,741	2,508,526

Note: Figures in rows may not add to totals due to rounding.
Source: U.S. DOL, OSHA, Directorate of Standards and Guidance, Office of Regulatory Analysis (OSHA, 2020) (Document ID 2250).

E. Benefits

The changes in this rule are designed to accomplish three goals: (1) To more appropriately tailor the requirements of the construction and shipyards standards to the particular exposures in these industries in light of partial overlap between the beryllium standards' requirements and other OSHA standards; (2) to more closely align the construction and shipyards standards to the general industry standard, with respect to the updates to the medical definitions and medical surveillance, where appropriate; and (3) to clarify certain requirements with respect to materials containing only trace amounts of beryllium. As to the first group of changes, this rule clarifies that OSHA did not, and does not, intend the provisions aimed at protecting workers from the effects of dermal contact to apply in the case of materials containing only trace amounts of beryllium in the absence of significant airborne exposures. In the prior FEA, OSHA did not isolate any quantifiable benefits from avoiding beryllium sensitization from dermal contact (see discussion at p. VII–16 through VII–18). Therefore, OSHA concludes that the revisions in this rule that focus on dermal contact will not have any impact on OSHA's previous benefit estimates for the standards as a whole.

OSHA also does not expect the second and third groups of changes, *i.e.,* those intended to more closely tailor the standards' requirements to the construction and shipyard industries and closely align them to the general

industry standard's requirements, where appropriate, to result in a reduction in benefits. Rather, as explained in the summary and explanation, OSHA believes that the changes would maintain safety and health protections for workers while aligning the standards with the intent behind the 2017 final rule and otherwise preventing costs that could follow from misinterpretation or misapplication of the standards. Therefore, OSHA determines that the effect of these revisions on the benefits of the standards as a whole would be negligible.

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V. Economic Feasibility Analysis and Regulatory Flexibility Certification

Economic Feasibility Analysis

In the 2017 FEA, OSHA concluded that the beryllium standards for construction and shipyards were both economically feasible (see 82 FR at 2471). OSHA is modifying some of the ancillary provisions in both standards and has concluded that the revisions would, overall, reduce costs for employers in both sectors (see section D, Costs of Compliance, in this FEA). Because the effect of this rule is a net reduction in costs, OSHA has determined that this rule is economically feasible in both the construction and shipyard sectors.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (as amended), OSHA has examined the regulatory requirements of the rule for construction and shipyards to determine whether they would have a significant economic impact on a substantial number of small entities. This rule would modify certain ancillary provisions for shipyards and construction, resulting in a reduction of overall costs. Furthermore, the agency believes that this rule would not impose any additional costs on small entities. Accordingly, OSHA certifies that the rule would not have a significant economic impact on a substantial number of small entities.

VI. OMB Review Under the Paperwork Reduction Act of 1995

A. Overview

OSHA is updating the beryllium standards for the construction and shipyards industries, which contain collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and OMB regulations at 5 CFR part 1320. The beryllium standards for general industry (29 CFR 1910.1024), construction (29 CFR 1926.1124), and shipyards (29 CFR 1915.1024) contain collection of information (paperwork) requirements that have been previously approved by OMB under OMB control number 1218–0267. In this rulemaking, OSHA is separating the collections of information in the beryllium standards for construction and shipyards from those in the general industry standard. Therefore, the agency is submitting two new information collection requests (ICRs)—one for the construction industry and one for the shipyards sector. In addition, OSHA is removing the collections of information related to construction and shipyards from the collections of information currently approved by OMB under control number 1218–0267. This will be a separate action and will occur after OMB approval of the new ICRs.

The PRA defines ''collection of information'' to mean the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format (44 U.S.C. 3502(3)(A)). Under the PRA, a Federal agency cannot conduct or sponsor a collection of information unless OMB approves it, and the agency displays a currently valid OMB control number (44 U.S.C. 3507). Also,

notwithstanding any other provision of law, no employer shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

On January 9, 2017, OSHA published a final rule for the general industry, construction, and shipyard sectors that established new permissible exposure limits and other provisions to protect employees from beryllium exposure, such as requirements for exposure assessment, respiratory protection, personal protective clothing and equipment, housekeeping, medical surveillance, hazard communication, and recordkeeping. OMB approved the collections of information contained in the final rule under OMB Control Number 1218–0267.

On October 8, 2019, OSHA published a proposed rule to modify the construction and shipyard standards by clarifying certain provisions to improve and simplify compliance (84 FR 53902). The 2019 proposal would revise the collections of information contained in the construction and shipyard standard approved by OMB by clarifying requirements related to the written exposure control plan; the cleaning and replacement of personal protection equipment; the disposal, recycling, and reuse of contaminated materials; the frequency of medical examinations for employees who have been exposed to beryllium during an emergency or who show signs and symptoms of CBD; referrals to the CBD diagnostic center; and the collection and recording of social security numbers in medical surveillance and recordkeeping. OSHA prepared and submitted two new ICRs to OMB under the 2019 proposed rule for review in accordance with 44 U.S.C. 3507(d). OSHA proposed to separate the construction and shipyard sectors from the 2017 Beryllium ICR approved by OMB under OMB Control Number 1218–0267. The three beryllium standards would have separate OMB control numbers for each industry.

B. Solicitation of Comments

In accordance with the PRA (44 U.S.C. 3506(c)(2)), the agency solicited public comments on the collection of information contained in the 2019 proposed rule. OSHA encouraged commenters to submit their comments on the information collection requirements contained in the proposed rule under docket number OSHA–2019–0006, along with their comments on other parts of the proposed rule. In addition to generally soliciting comments on the collection of information requirements, the proposed rule indicated that OSHA and OMB were particularly interested in comments on the following items:

- Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- The accuracy of OSHA's estimate of the burden (time and cost) of the proposed collections of information, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information to be collected; and
- Ways to minimize the compliance burden on employers, for example, by using automated or other technological techniques for collecting and transmitting information (78 FR at 56438).

On November 8, 2019, OMB issued a Notice of Action (NOA) assigning the information collection requests new OMB control numbers and stating, ''This OMB action is not an approval to conduct or sponsor an information collection under the Paperwork Reduction Act of 1995. This action has no effect on any current approvals. If OMB has assigned this ICR a new OMB Control Number, the OMB Control Number will not appear in the active inventory. For future submissions of this information collection, reference the OMB Control Number provided. OMB is withholding approval at this time. Prior to publication of the final rule, the agency should provide a summary of any comments related to the information collection and their response, including any changes made to the ICR as a result of comments. In addition, the agency must enter the correct burden estimates.'' At this time, the ICR for the beryllium standard for construction was assigned OMB Control Number 1218–0273 and the beryllium standard for shipyards was assigned OMB Control Number 1218–0272. Copies of the proposed ICRs are available to the public at *http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=1218-0273* and *http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=1218-0272*.

OSHA did not receive any public comments in response to the proposed ICRs.[59] However, the agency received 16 public comments on the proposed rule during the initial comment period. In addition, OSHA held a public hearing on the proposal on December 3, 2019, where the agency heard testimony from several stakeholders (see Document ID 2222; 2223). Participants who filed notices of intention to appear at the hearing were permitted to submit additional evidence and data relevant to the proceedings for a period of 44-days following the hearing. That post-hearing comment period closed on January 16, 2020. The record remained open for an additional 15 days, until January 31, 2020, for the submission of final briefs, arguments, and summations. OSHA received twenty five timely comments during this rulemaking by the close of the last post-hearing comment period of January 31, 2020. The comments submitted in response to the proposed rule and the hearing proceedings did modify some provisions containing collections of information. These responses were considered when OSHA prepared these two new ICRs for the final rule.

C. Information Collection Requirements

As required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2), the following paragraphs provide information about these two ICRs.

Construction (ICR):

1. *Title:* Occupational Exposure to Beryllium for the Construction Industry (29 CFR 1926.1124).

2. *Description of the ICR:* The final rule separates the information collection requirements of the construction standard from the currently approved beryllium ICR. This action creates a new ICR containing only the collection of information requirements for the construction industry.

3. *Brief Summary of the Information Collection Requirements:*

The final rule revises the collection of information requirements contained in the existing ICR for the construction industry, approved under OMB under control number 1218–0267. OSHA, first, has separated the construction collection of information requirements from those of the general industry and shipyards standards and created a new ICR containing only those collection of information requirements in the construction industry. As a result, OMB has assigned a new OMB control number specific to the construction standard (1218–0273). Next, OSHA has updated the new ICR to reflect revisions made by this final rule, which (1) remove provisions in the construction standard that require employers to collect and record employees' social security number; (2) revise the contents

[59] Two commenters submitted comments to docket number OSHA–2019–0006 (see Document ID OSHA–2019–0006–0003; OSHA–2019–0006–0004). The comments did not concern the paperwork requirements but rather addressed other portions of the proposal. Neither comment was submitted during the comment period for the proposed rule, which ended on November 7, 2019.

of the written exposure control plan; and (3) remove certain requirements related to written warnings. See Table VI.1.

TABLE VI.1—COLLECTION OF INFORMATION REQUIREMENTS BEING REVISED IN THE BERYLLIUM STANDARD FOR CONSTRUCTION

Section number and title	Currently approved collection of information requirements	Action taken
§ 1926.1124(f)(1)(i)—Methods of Compliance—Written Exposure Control Plan.	• A list of operations and job titles reasonably expected to involve airborne exposure to or dermal contact with beryllium; • A list of operations and job titles reasonably expected to involve airborne exposure at or above the action level; • A list of operations and job titles reasonably expected to involve airborne exposure above the TWA PEL or STEL; • Procedures for minimizing cross-contamination; • Procedures for minimizing the migration of beryllium within or to locations outside the workplace;	Revised paragraph (f)(1)(i)(A) to list operations and job titles and removed ''airborne'' and ''or dermal contact'' from the text. Removed paragraphs (f)(1)(i)(B) through (E), written exposure control plan.
	• A list of engineering controls, work practices, and respiratory protection required by § 1926.1124(f)(2); • A list of personal protective clothing and equipment required by § 1926.1124(h); • Procedures for removing, laundering, storing, cleaning, repairing, and disposing of beryllium-contaminated personal protective clothing and equipment, including respirators;	Added a new requirement, paragraph (f)(1)(i)(E), to list procedures used to ensure the integrity of each containment used to minimize exposures to employees outside the containment.
	• Procedures used to restrict access to work areas when airborne exposures are, or can reasonably be expected to be, above the TWA PEL or STEL, to minimize the number of employees exposed to airborne beryllium and their level of exposure, including exposures generated by other employers or sole proprietors.	Revised paragraph (f)(1)(i)(H) to require a list procedures for removing, cleaning, and maintaining personal protective clothing and equipment in accordance with paragraph (h) and renumbered as paragraph (f)(1)(i)(F).
§ 1926.1124(f)(1)(ii)(B)—Methods of Compliance—Written Exposure Control Plan.	The employer is notified that an employee is eligible for medical removal in accordance with § 1926.1124(l)(1), referred for evaluation at a chronic beryllium disease (CBD) diagnostic center, or shows signs or symptoms associated with airborne exposure to or dermal contact with beryllium.	Removed ''airborne'' and ''or dermal contact with'' from paragraph (f)(1)(ii)(B).
§ 1926.1124(h)(2)(v)—Personal Protective Clothing and Equipment—Removal and Storage.	When personal protective clothing or equipment required by this standard is removed from the workplace for laundering, cleaning, maintenance or disposal, the employer must ensure that personal protective clothing and equipment are stored and transported in sealed bags or other closed containers that are impermeable and are labeled in accordance with § 1926.1124(m)(3) and the HCS (29 CFR 1910.1200).	Removed this labeling requirement from the beryllium standard for construction and therefore from the ICR.
§ 1926.1124(h)(3)(iii)—Personal Protective Clothing and Equipment—Cleaning and Replacement.	The employer must inform in writing the persons or the business entities who launder, clean or repair the personal protective clothing or equipment required by this standard of the potentially harmful effects of airborne exposure to and dermal contact with beryllium and that the personal protective clothing and equipment must be handled in accordance with the standard.	Removed this requirement from the beryllium standard for construction and therefore from the ICR.
§ 1926.1124(j)(3)—Housekeeping—Disposal.	When the employer transfers materials containing beryllium to another party for use or disposal, the employer must provide the recipient with a copy of the warning described in § 1926.1124(m)(2).	Removed this requirement from the beryllium standard for construction and therefore from the ICR.
§ 1926.1124(k)(1)(i)(C)—Medical Surveillance.	Who is exposed to beryllium during an emergency.	Removed paragraph (k)(1)(i)(C) from the beryllium standard for construction and therefore from the ICR. Renumbered former paragraph (k)(1)(i)(D) as (k)(1)(i)(C).
§ 1926.1124(k)(2)(i)(B)—Medical Surveillance.	An employee meets the criteria of § 1926.1124(k)(1)(i)(B) or (C).	Removed ''or (C)'' from paragraph (k)(2)(i)(B) from the beryllium standard for construction and therefore from the ICR.

TABLE VI.1—COLLECTION OF INFORMATION REQUIREMENTS BEING REVISED IN THE BERYLLIUM STANDARD FOR CONSTRUCTION—Continued

Section number and title	Currently approved collection of information requirements	Action taken
§ 1926.1124(k)(2)(ii)—Medical Surveillance.	At least every two years thereafter for each employee who continues to meet the criteria of § 1926.1124(k)(1)(i)(A), (B), or (D).	Replaced ''(D)'' with ''(C)'' in paragraph.
§ 1926.1124(k)(3)(ii)(A)—Medical Surveillance.	A medical and work history, with emphasis on past and present airborne exposure to or dermal contact with beryllium, smoking history, and any history of respiratory system dysfunction.	Revised paragraph (k)(3)(ii)(A) to remove ''airborne'' and ''or dermal contact'' from the text.
§ 1926.1124(k)(4)(i)—Information Provided to the PLHCP.	A description of the employee's former and current duties that relate to the employee's airborne exposure and dermal contact with beryllium.	Revised paragraph (k)(4)(i) to remove ''airborne'' and ''and dermal contact with'' from the text.
§ 1926.1124(k)(7)—Medical Surveillance—Referral to the CBD Diagnostic Center.	The employer must provide an evaluation at no cost to the employee at a CBD diagnostic center that is mutually agreed upon by the employer and the employee. The examination must be provided within 30 days of either of the events in § 1926.1124(k)(7)(i)(A) or (B).	Revised the initial consultation with the CBD diagnostic center, as follows: The employer must provide an evaluation at no cost to the employee at a CBD diagnostic center that is mutually agreed upon by the employer and the employee. The evaluation at the CBD diagnostic center must be scheduled within 30 days, and must occur within a reasonable time, of: Added a new requirement in paragraph (k)(7)(ii) that the evaluation must include any tests deemed appropriate by the examining physician at the CBD diagnostic center, such as pulmonary function testing (as outlined by the American Thoracic Society criteria), bronchoalveolar lavage (BAL), and transbronchial biopsy. If any of the tests deemed appropriate by the examining physician are not available at the CBD diagnostic center, they may be performed at another location that is mutually agreed upon by the employer and the employee. As result of the changes, OSHA renumbered the subordinate paragraphs in (k)(7).
§ 1926.1124(m)(2)—Warning labels	Consistent with the HCS (29 CFR 1910.1200), the employer must label each bag and container of clothing, equipment, and materials contaminated with beryllium, and must, at a minimum, include the following on the label: DANGER CONTAINS BERYLLIUM MAY CAUSE CANCER CAUSES DAMAGE TO LUNGS AVOID CREATING DUST DO NOT GET ON SKIN	Removed this requirement from the beryllium standard for construction and therefore from the ICR.
§ 1926.1124(m)(3)(i)—Employee information and training.	For each employee who has, or can reasonably be expected to have, airborne exposure to or dermal contact with beryllium	Removed ''airborne'' and ''and dermal contact with'' from paragraph (m)(3)(i).
§ 1926.1124(n)(1)(ii)(F)—Recordkeeping—Air Monitoring Data.	The name, social security number, and job classification of each employee represented by the monitoring, indicating which employees were actually monitored.	Removed the requirement to collect and record social security numbers, as follows: The name and job classification of each employee represented by the monitoring, indicating which employees were actually monitored.
§ 1926.1124(n)(3)(ii)(A)—Recordkeeping—Medical Surveillance.	The record must include the following information about the employee: Name, social security number, and job classification.	Removed the requirement to collect and record social security numbers, as follows: The record must include the following information about the employee: Name and job classification.

TABLE VI.1—COLLECTION OF INFORMATION REQUIREMENTS BEING REVISED IN THE BERYLLIUM STANDARD FOR CONSTRUCTION—Continued

Section number and title	Currently approved collection of information requirements	Action taken
§ 1926.1124(n)(4)(i)—Recordkeeping—Training.	At the completion of any training required by the standard, the employer must prepare a record that indicates the name, social security number, and job classification of each employee trained, the date the training was completed, and the topic of the training.	Removed the requirement to collect and record social security numbers, as follows: At the completion of any training required by the standard, the employer must prepare a record that indicates the name and job classification of each employee trained, the date the training was completed, and the topic of the training.

4. *OMB Control Number:* 1218–0273.

5. *Affected Public:* Business or other-for-profit. This standard applies to employers in the construction industry who have employees that may have occupational exposures to any form of beryllium, including compounds and mixtures, except those articles and materials exempted by paragraphs (a)(2) and (3) of the standard.

6. *Number of Respondents:* 2,100.

7. *Frequency of Responses:* On occasion, quarterly, semi-annually, annual, biannual.

8. *Number of Reponses:* 29,330.

9. *Average Time per Response:* Varies.

10. *Estimated Annual Total Burden Hours:* 18,075.

11. *Estimated Annual Total Cost (Capital-operation and maintenance):* $5,611,902.

Shipyards (ICR):

1. *Title:* Occupational Exposure to Beryllium for the Shipyards Sector (29 CFR 1915.1024).

2. *Description of the ICR:* The final rule separates information collection requirements of the shipyards standard from the currently approved beryllium ICR. This action creates a new ICR containing only the collection of information requirements for the shipyard sector.

3. *Brief Summary of the Information Collection Requirements:*

This final rule revises the collection of information requirements contained in the existing ICR for the shipyards industry, approved under OMB under control number 1218–0267. OSHA, first, has separated the shipyards collection of information requirements from those of the general industry and construction standards and created a new ICR containing only those collection of information requirements in the shipyard sectors. As a result, OMB has assigned a new OMB control number specific to the shipyards standard (1218–0272). Next, OSHA has updated the new ICR to reflect revisions made by this final rule, which (1) remove provisions in the shipyards standard that require employers to collect and record employees' social security number; (2) revise the contents of the written exposure control plan; and (3) remove certain requirements related to written warnings. See Table VI.2.

TABLE VI.2—COLLECTION OF INFORMATION REQUIREMENTS BEING REVISED IN THE BERYLLIUM STANDARD FOR SHIPYARDS

Section number and title	Currently approved collection of information requirements	Action taken
§ 1915.1024(f)(1)(i)—Methods of Compliance—Written Exposure Control Plan.	The employer must establish, implement, and maintain a written exposure control plan, which must contain: • A list of operations and job titles reasonably expected to involve exposure to or dermal contact with beryllium; • A list of operations and job titles reasonably expected to involve airborne exposure at or above the AL; • A list of operations and job titles reasonably expected to involve airborne exposure above the TWA PEL or STEL; • Procedures for minimizing cross-contamination; • Procedures for minimizing the migration of beryllium within or to locations outside the workplace; • A list of engineering controls, work practices, and respiratory protection required by § 1915.1024(f)(2);	Revised paragraph (f)(1)(i)(A) to list operations and job titles reasonably expected to involve exposure to beryllium. Removed paragraphs (f)(1)(i)(B) through (E) the written exposure control plan. Added a new requirement, paragraph (f)(1)(i)(D) to list procedures used to ensure the integrity of each containment used to minimize exposures to employees outside the containment.

TABLE VI.2—COLLECTION OF INFORMATION REQUIREMENTS BEING REVISED IN THE BERYLLIUM STANDARD FOR SHIPYARDS—Continued

Section number and title	Currently approved collection of information requirements	Action taken
	• A list of personal protective clothing and equipment required by § 1915.1024(h); and	Revised paragraph (f)(1)(i)(H) to require a list procedures for removing, cleaning, and maintaining personal protective clothing and equipment in accordance with paragraph (h) and renumbered as paragraph (f)(1)(i)(E).
	• Procedures for removing, laundering, storing, cleaning, repairing, and disposing of beryllium-contaminated personal protective clothing and equipment, including respirators.	
§ 1915.1024(f)(1)(ii)(B)—Methods of Compliance—Written Exposure Control Plan.	The employer is notified that an employee is eligible for medical removal in accordance with § 1915.1024(l)(1), referred for evaluation at a chronic beryllium disease (CBD) diagnostic center, or shows signs or symptoms associated with airborne exposure to or dermal contact with beryllium.	Removed ''airborne'' and ''or dermal contact with'' from paragraph (f)(1)(ii)(B).
§ 1915.1024(h)(2)(v)—Personal Protective Clothing and Equipment—Removal and Storage.	When personal protective clothing or equipment required by this standard is removed from the workplace for laundering, cleaning, maintenance or disposal, the employer must ensure that personal protective clothing and equipment are stored and transported in sealed bags or other closed containers that are impermeable and are labeled in accordance with § 1915.1024(m)(3) and the HCS (29 CFR 1910.1200).	Removed this labeling requirement from the beryllium standard for shipyards and therefore from the ICR.
§ 1915.1024(h)(3)(iii)—Personal Protective Clothing and Equipment—Cleaning and Replacement.	The employer must inform in writing the persons or the business entities who launder, clean or repair the personal protective clothing or equipment required by this standard of the potentially harmful effects of airborne exposure to and dermal contact with beryllium and that the personal protective clothing and equipment must be handled in accordance with the standard.	Removed this requirement from the beryllium standard for shipyards and therefore from the ICR.
§ 1915.1024(j)(3)—Housekeeping—Disposal.	When the employer transfers materials containing beryllium to another party for use or disposal, the employer must provide the recipient with a copy of the warning described in § 1915.1024(m)(2).	Removed this requirement from the beryllium standard for shipyards and therefore from the ICR.
§ 1915.1024(k)(1)(i)(C)—Medical Surveillance.	Who is exposed to beryllium during an emergency.	Removed paragraph (k)(1)(i)(C) from the beryllium standard for construction and therefore from the ICR. Renumbered former paragraph (k)(1)(i)(D) as (k)(1)(i)(C).
§ 1915.1124(k)(2)(i)(B)—Medical Surveillance.	An employee meets the criteria of § 1915.1024(k)(1)(i)(B) or (C).	Removed ''or (C) of this standard'' from paragraph (k)(2)(i)(B) from the beryllium standard for construction and therefore from the ICR.
§ 1915.1124(k)(2)(ii)—Medical Surveillance.	At least every two years thereafter for each employee who continues to meet the criteria of § 1915.1024(k)(1)(i)(A), (B), or (D).	Replaced ''(D)'' with ''(C)'' in paragraph (k)(2)(ii).
§ 1915.1124(k)(3)(ii)(A)—Medical Surveillance.	A medical and work history, with emphasis on past and present airborne exposure to or dermal contact with beryllium, smoking history, and any history of respiratory system dysfunction.	Revised paragraph (k)(3)(ii)(A) to remove ''airborne'' and ''or dermal contact with'' from the text.
§ 1915.1124(k)(4)(i)—Information Provided to the PLHCP.	A description of the employee's former and current duties that relate to the employee's airborne exposure and dermal contact with beryllium.	Revised paragraph (k)(4)(i) to remove ''airborne'' and ''and dermal contact with'' from the text.
§ 1915.1024(k)(7)—Medical Surveillance— Referral to the CBD Diagnostic Center.	The employer must provide an evaluation at no cost to the employee at a CBD diagnostic center that is mutually agreed upon by the employer and the employee. The examination must be provided within 30 days of either of the events in § 1915.1024(k)(7)(i)(A) or (B).	Revised an initial consultation with the CBD diagnostic center.
		The employer must provide an evaluation at no cost to the employee at a CBD diagnostic center that is mutually agreed upon by the employer and the employee. The evaluation at the CBD diagnostic center must be scheduled within 30 days, and must occur within a reasonable time, of:

TABLE VI.2—COLLECTION OF INFORMATION REQUIREMENTS BEING REVISED IN THE BERYLLIUM STANDARD FOR SHIPYARDS—Continued

Section number and title	Currently approved collection of information requirements	Action taken
		Added a new requirement in paragraph (k)(7)(ii) that the evaluation must include any tests deemed appropriate by the examining physician at the CBD diagnostic center, such as pulmonary function testing (as outlined by the American Thoracic Society criteria), bronchoalveolar lavage (BAL), and transbronchial biopsy. If any of the tests deemed appropriate by the examining physician are not available at the CBD diagnostic center, they may be performed at another location that is mutually agreed upon by the employer and the employee. As result of the changes, OSHA renumbered the subordinate paragraphs in (k)(7).
§ 1915.1024(m)(2)—Warning labels	Consistent with the HCS (29 CFR 1910.1200), the employer must label each bag and container of clothing, equipment, and materials contaminated with beryllium, and must, at a minimum, include the following on the label: DANGER CONTAINS BERYLLIUM MAY CAUSE CANCER CAUSES DAMAGE TO LUNGS AVOID CREATING DUST DO NOT GET ON SKIN	Removed this requirement from the beryllium standard for construction and therefore from the ICR.
§ 1926.1124(m)(3)(i)—Employee information and training.	For each employee who has, or can reasonably be expected to have, airborne exposure to or dermal contact with beryllium.	Removed ''airborne'' and ''and dermal contact with'' from paragraph (m)(3)(i).
§ 1915.1024(n)(1)(ii)(F)—Recordkeeping —Air Monitoring Data.	The name, social security number, and job classification of each employee represented by the monitoring, indicating which employees were actually monitored.	Removed the requirement to collect and record social security numbers, as follows: The name and job classification of each employee represented by the monitoring, indicating which employees were actually monitored.
§ 1915.1024(n)(3)(ii)(B)—Recordkeeping—Medical Surveillance.	The record must include the following information about the employee: Name, social security number, and job classification.	Remove the requirement to collect and record social security numbers, as follows: Name and job classification.
§ 1915.1024(n)(4)(i)—Recordkeeping—Training.	At the completion of any training required by this standard, the employer must prepare a record that indicates the name, social security number, and job classification of each employee trained, the date the training was completed, and the topic of the training.	Remove the requirement to collect and record social security numbers, as follows: At the completion of any training required by this standard, the employer must prepare a record that indicates the name and job classification of each employee trained, the date the training was completed, and the topic of the training.

4. *OMB Control Number:* 1218–0272.

5. *Affected Public:* Business or other-for-profit. This standard applies to employers in the shipyards industry who have employees that may have occupational exposures to any form of beryllium, including compounds and mixtures, except those articles and materials exempted by paragraphs (a)(2) and (3) of the standard.

6. *Number of Respondents:* 696.

7. *Frequency of Responses:* On occasion, quarterly, semi-annually, annual, biannual.

8. *Number of Reponses:* 10,794.

9. *Average Time per Response:* Varies.

10. *Estimated Annual Total Burden Hours:* 6,609.

11. *Estimated Annual Total Cost (Capital-operation and maintenance):* $2,057,856.

VII. Federalism

OSHA reviewed this final rule in accordance with the Executive order on Federalism (E.O. 13132, 64 FR 43255, August 10, 1999), which requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when clear constitutional and statutory authority exists and the problem is national in scope. E.O. 13132 provides for preemption of State law only with the expressed consent of Congress. Any such preemption is to be limited to the extent possible.

Under Section 18 of the OSH Act, Congress expressly provides that States and U.S. territories may adopt, with Federal approval, a plan for the development and enforcement of occupational safety and health

standards. OSHA refers to such States and territories as ''State Plans'' (29 U.S.C. 667). Occupational safety and health standards developed by State Plans must be at least as effective in providing safe and healthful employment and places of employment as the Federal standards. Subject to these requirements, State Plans are free to develop and enforce under State law their own requirements for safety and health standards.

OSHA previously concluded that promulgation of the beryllium standard complies with E.O. 13132 (82 FR at 2633), so this final rule complies with E.O. 13132. In States without OSHA-approved State Plans, Congress expressly provides for OSHA standards to preempt State occupational safety and health standards in areas addressed by the Federal standards. In these States, this final rule limits State policy options in the same manner as every standard promulgated by OSHA. In States with OSHA-approved State Plans, this rulemaking does not significantly limit State policy options.

VIII. State Plans

When federal OSHA promulgates a new standard or more stringent amendment to an existing standard, the states and U.S. Territories with their own OSHA-approved occupational safety and health plans (State Plans) must promulgate a state standard adopting such new Federal standard, or more stringent amendment to an existing Federal standard, or an at least as effective equivalent thereof, within six months of promulgation of the new Federal standard or more stringent amendment. The state may demonstrate that a standard change is not necessary because the state standard is already the same or at least as effective as the Federal standard change. Because a state may include standards and standard provisions that are equally or more stringent than Federal standards, it would generally be unnecessary for a state to revoke a standard when the comparable Federal standard is revoked or made less stringent. To avoid delays in worker protection, the effective date of the state standard and any of its delayed provisions must be the date of state promulgation or the Federal effective date, whichever is later. The Assistant Secretary may permit a longer time period if the state makes a timely demonstration that good cause exists for extending the time limitation (29 CFR 1953.5(a)).

Of the 28 states and territories with OSHA-approved State Plans, 22 cover public and private-sector employees: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. The remaining six states and territories cover only state and local government employees: Connecticut, Illinois, Maine, New Jersey, New York, and the Virgin Islands.

As discussed in detail in Section III, Summary and Explanation of the Final Rule, while many of the revised provisions in this final rule provide equivalent protection to the provisions of the 2017 standards, changes made by this final rule will clarify certain provisions and simplify or improve employer compliance, for example, by clarifying the medical definitions and medical surveillance provisions and aligning them with the general industry standard. In the July 2020 general industry final rule adopting many of the same clarifying revisions, OSHA determined, in part based on comments received, that these revisions enhance employee safety by ensuring provisions are not misinterpreted (85 FR 42595). Accordingly, OSHA determined that it was appropriate to require states to adopt the changes made by that final rule.

OSHA received no comments with respect to State Plans in this rulemaking. After considering all of the changes made by this final rule and the record as a whole, OSHA believes that this final rule also enhances employee safety, in part, by revising confusing provisions. Therefore, OSHA has determined that, within six months of the rule's promulgation date, State Plans must review their state standards and adopt amendments to those standards that are at least as effective as the amendments to the beryllium construction and shipyard standard finalized herein, as required by 29 CFR 1953.5(a), unless a State Plan demonstrates that such amendments are not necessary because their existing standards are already at least as effective at protecting workers as this final rule.

IX. Unfunded Mandates Reform Act

OSHA reviewed this final rule according to the Unfunded Mandates Reform Act of 1995 (''UMRA''; 2 U.S.C. 1501 *et seq.*) and Executive Order 13132 (64 FR 43255 (August 4, 1999)). As discussed above in Section IV (''Final Economic Analysis'') of this preamble, the agency has determined that this final rule would not impose significant additional costs on any private- or public-sector entity. Further, OSHA previously concluded that the rule would not impose a federal mandate on the private sector in excess of $100 million (adjusted annually for inflation) in expenditures in any one year (82 FR at 2634). Accordingly, this final rule will not require significant additional expenditures by either public or private employers.

As noted above under Section VIII, (''State-Plans''), the agency's standards do not apply to State and local governments except in states that have elected voluntarily to adopt a State Plan approved by the agency. Consequently, this final rule does not meet the definition of a ''Federal intergovernmental mandate'' (see Section 421(5) of the UMRA (2 U.S.C. 658(5))). Therefore, for the purposes of the UMRA, the agency certifies that this final rule does not mandate that state, local, or tribal governments adopt new, unfunded regulatory obligations of, or increase expenditures by the private sector by, more than $100 million in any year.

X. Environmental Impacts

OSHA has reviewed this final rule according to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR part 1500), and the Department of Labor's NEPA procedures (29 CFR part 11). OSHA has determined that this final rule will have no significant impact on air, water, or soil quality; plant or animal life; the use of land; or aspects of the external environment.

XI. Consultation and Coordination With Indian Tribal Governments

OSHA reviewed this final rule in accordance with E.O. 13175 (65 FR 67249) and determined that it does not have ''tribal implications'' as defined in that order. This final rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 29 CFR Parts 1915 and 1926

Beryllium, Cancer, Chemicals, Hazardous substances, Health, Occupational safety and health.

Authority and Signature

This document was prepared under the direction of Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Washington, DC 20210.

The agency issues the sections under the following authorities: 29 U.S.C. 653, 655, 657; 40 U.S.C. 3704; 33 U.S.C. 941; Secretary of Labor's Order 1–2012 (77 FR 3912 (January 25, 2012)); and 29 CFR part 1911.

Signed at Washington, DC, on August 13, 2020.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

Amendments to Standards

For the reasons set forth in the preamble, chapter XVII of title 29, parts 1915 and 1926, of the Code of Federal Regulations is amended as follows:

PART 1915—OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR SHIPYARD EMPLOYMENT

■ 1. The authority citation for part 1915 continues to read as follows:

Authority: 33 U.S.C. 941; 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754); 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), 4–2010 (75 FR 55355), or 1–2012 (77 FR 3912); 29 CFR part 1911; and 5 U.S.C. 553, as applicable.

■ 2. Amend § 1915.1024 by:
■ a. In paragraph (b), add a definition for ''Beryllium sensitization'' in alphabetical order, revise the definitions for ''CBD diagnostic center,'' ''Chronic beryllium disease (CBD),'' and ''Confirmed positive,'' and remove the definitions of ''Emergency'' and ''High-efficiency particulate air (HEPA) filter.''
■ b. Revise paragraph (f)(1)(i)(A).
■ c. Remove paragraphs (f)(1)(i)(B), (C), (D), (E), and (H).
■ d. Redesignate paragraphs (f)(1)(i)(F) and (G) as paragraphs (f)(1)(i)(B) and (C).
■ e. In newly redesignated paragraph (f)(1)(i)(C), remove the word ''and'' at the end of the paragraph;
■ f. Add new paragraphs (f)(1)(i)(D) and (E).
■ g. Revise paragraphs (f)(1)(ii)(B), (f)(2), and (g)(1)(iii).
■ h. Remove paragraph (g)(1)(iv).
■ i. Redesignate paragraph (g)(1)(v) as paragraph (g)(1)(iv).
■ j. Revise paragraphs (h)(1) and (2) and (h)(3)(ii).
■ k. Remove paragraph (h)(3)(iii).
■ l. Remove and reserve paragraph (i).
■ m. Revise paragraphs (j) and (k)(1)(i)(B).
■ n. Remove paragraph (k)(1)(i)(C).
■ o. Redesignate paragraph (k)(1)(i)(D) as paragraph (k)(1)(i)(C).
■ p. Revise paragraphs (k)(2)(i)(B), (k)(2)(ii), (k)(3)(ii)(A), (k)(4)(i), and (k)(7)(i) introductory text.
■ q. Redesignate paragraphs (k)(7)(ii) through (v) as paragraphs (k)(7)(iii) through (vi).
■ r. Add a new paragraph (k)(7)(ii).
■ s. Revise paragraph (m)(1)(ii).
■ t. Remove paragraph (m)(3).
■ u. Redesignate paragraph (m)(4) as paragraph (m)(3).
■ v. Revise newly redesignated paragraphs (m)(3)(i) introductory text and (m)(3)(ii)(A).
■ w. Remove newly redesignated paragraph (m)(3)(ii)(D).
■ x. Further redesignate newly redesignated paragraphs (m)(3)(ii)(E) through (I) as paragraphs (m)(3)(ii)(D) through (H).
■ z. Revise newly redesignated paragraphs (m)(3)(ii)(D) and (m)(3)(iv) and paragraphs (n)(1)(ii)(F), (n)(3)(ii)(A), and (n)(4)(i).

The revisions and additions read as follows:

§ 1915.1024 Beryllium.

* * * * *

(b) * * *

Beryllium sensitization means a response in the immune system of a specific individual who has been exposed to beryllium. There are no associated physical or clinical symptoms and no illness or disability with beryllium sensitization alone, but the response that occurs through beryllium sensitization can enable the immune system to recognize and react to beryllium. While not every beryllium-sensitized person will develop chronic beryllium disease (CBD), beryllium sensitization is essential for development of CBD.

CBD diagnostic center means a medical diagnostic center that has a pulmonologist or pulmonary specialist on staff and on-site facilities to perform a clinical evaluation for the presence of chronic beryllium disease (CBD). The CBD diagnostic center must have the capacity to perform pulmonary function testing (as outlined by the American Thoracic Society criteria), bronchoalveolar lavage (BAL), and transbronchial biopsy. The CBD diagnostic center must also have the capacity to transfer BAL samples to a laboratory for appropriate diagnostic testing within 24 hours. The pulmonologist or pulmonary specialist must be able to interpret the biopsy pathology and the BAL diagnostic test results.

Chronic beryllium disease (CBD) means a chronic granulomatous lung disease caused by inhalation of airborne beryllium by an individual who is beryllium-sensitized.

Confirmed positive means the person tested has had two abnormal BeLPT test results, an abnormal and a borderline test result, or three borderline test results from tests conducted within a 3-year period. It also means the result of a more reliable and accurate test indicating a person has been identified as having beryllium sensitization.

* * * * *

(f) * * *

(1) * * *

(i) * * *

(A) A list of operations and job titles reasonably expected to involve exposure to beryllium;

* * * * *

(D) Procedures used to ensure the integrity of each containment used to minimize exposures to employees outside of the containment; and

(E) Procedures for removing, cleaning, and maintaining personal protective clothing and equipment in accordance with paragraph (h) of this standard.

(ii) * * *

(B) The employer is notified that an employee is eligible for medical removal in accordance with paragraph (l)(1) of this standard, referred for evaluation at a CBD diagnostic center, or shows signs or symptoms associated with exposure to beryllium; or

* * * * *

(2) *Engineering and work practice controls.* The employer must use engineering and work practice controls to reduce and maintain employee airborne exposure to beryllium to or below the TWA PEL and STEL, unless the employer can demonstrate that such controls are not feasible. Wherever the employer demonstrates that it is not feasible to reduce airborne exposure to or below the PELs with engineering and work practice controls, the employer must implement and maintain engineering and work practice controls to reduce airborne exposure to the lowest levels feasible and supplement these controls by using respiratory protection in accordance with paragraph (g) of this standard.

* * * * *

(g) * * *

(1) * * *

(iii) During operations for which an employer has implemented all feasible engineering and work practice controls when such controls are not sufficient to reduce airborne exposure to or below the TWA PEL or STEL; and

* * * * *

(h) * * *

(1) *Provision and use.* Where airborne exposure exceeds, or can reasonably be expected to exceed, the TWA PEL or STEL, the employer must provide at no cost, and ensure that each employee uses, appropriate personal protective

clothing and equipment in accordance with the written exposure control plan required under paragraph (f)(1) of this standard and OSHA's Personal Protective Equipment standards for shipyards (subpart I of this part).

(2) *Removal of personal protective clothing and equipment.* (i) The employer must ensure that each employee removes all personal protective clothing and equipment required by this standard at the end of the work shift or at the completion of all tasks involving beryllium, whichever comes first.

(ii) The employer must ensure that personal protective clothing and equipment required by this standard is not removed in a manner that disperses beryllium into the air, and is removed as specified in the written exposure control plan required by paragraph (f)(1) of this standard.

(iii) The employer must ensure that no employee with reasonably expected exposure above the TWA PEL or STEL removes personal protective clothing and equipment required by this standard from the workplace unless it has been cleaned in accordance with paragraph (h)(3)(ii) of this standard.

(3) * * *

(ii) The employer must ensure that beryllium is not removed from personal protective clothing and equipment required by this standard by blowing, shaking, or any other means that disperses beryllium into the air.

* * * * *

(j) *Housekeeping.* (1) When cleaning dust resulting from operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL, the employer must ensure the use of methods that minimize the likelihood and level of airborne exposure.

(2) The employer must not allow dry sweeping or brushing for cleaning up dust resulting from operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL unless methods that minimize the likelihood and level of airborne exposure are not safe or effective.

(3) The employer must not allow the use of compressed air for cleaning where the use of compressed air causes, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL.

(4) Where employees use dry sweeping, brushing, or compressed air to clean, the employer must provide, and ensure that each employee uses, respiratory protection and personal protective clothing and equipment in accordance with paragraphs (g) and (h) of this standard.

(5) The employer must ensure that cleaning equipment is handled and maintained in a manner that minimizes the likelihood and level of airborne exposure and the re-entrainment of airborne beryllium in the workplace.

(k) * * *

(1) * * *

(i) * * *

(B) Who shows signs or symptoms of CBD or other beryllium-related health effects; or

* * * * *

(2) * * *

(i) * * *

(B) An employee meets the criteria of paragraph (k)(1)(i)(B) of this standard.

(ii) At least every two years thereafter for each employee who continues to meet the criteria of paragraph (k)(1)(i)(A), (B), or (C) of this standard.

* * * * *

(3) * * *

(ii) * * *

(A) A medical and work history, with emphasis on past and present exposure to beryllium, smoking history, and any history of respiratory system dysfunction;

* * * * *

(4) * * *

(i) A description of the employee's former and current duties that relate to the employee's exposure to beryllium;

* * * * *

(7) * * *

(i) The employer must provide an evaluation at no cost to the employee at a CBD diagnostic center that is mutually agreed upon by the employer and the employee. The evaluation at the CBD diagnostic center must be scheduled within 30 days, and must occur within a reasonable time, of:

* * * * *

(ii) The evaluation must include any tests deemed appropriate by the examining physician at the CBD diagnostic center, such as pulmonary function testing (as outlined by the American Thoracic Society criteria), bronchoalveolar lavage (BAL), and transbronchial biopsy. If any of the tests deemed appropriate by the examining physician are not available at the CBD diagnostic center, they may be performed at another location that is mutually agreed upon by the employer and the employee.

* * * * *

(m) * * *

(1) * * *

(ii) Employers must include beryllium in the hazard communication program established to comply with the HCS. Employers must ensure that each employee has access to labels on containers of beryllium and to safety data sheets, and is trained in accordance with the requirements of the HCS (29 CFR 1910.1200) and paragraph (m)(3) of this standard.

* * * * *

(3) * * *

(i) For each employee who has, or can reasonably be expected to have, airborne exposure to beryllium;

* * * * *

(ii) * * *

(A) The health hazards associated with exposure to beryllium, including the signs and symptoms of CBD;

* * * * *

(D) Measures employees can take to protect themselves from exposure to beryllium;

* * * * *

(iv) The employer must make a copy of this standard and its appendices readily available at no cost to each employee and designated employee representative(s).

(n) * * *

(1) * * *

(ii) * * *

(F) The name and job classification of each employee represented by the monitoring, indicating which employees were actually monitored.

* * * * *

(3) * * *

(ii) * * *

(A) Name and job classification;

* * * * *

(4) * * *

(i) At the completion of any training required by this standard, the employer must prepare a record that indicates the name and job classification of each employee trained, the date the training was completed, and the topic of the training.

* * * * *

PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

Subpart Z—Toxic and Hazardous Substances

■ 3. The authority citation for part 1926, subpart Z, continues to read as follows:

Authority: 40 U.S.C. 3704; 29 U.S.C. 653, 655, 657; and Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), 4–2010 (75 FR 55355), or 1–2012 (77 FR 3912) as applicable; and 29 CFR part 1911.

Section 1926.1102 not issued under 29 U.S.C. 655 or 29 CFR part 1911; also issued under 5 U.S.C. 553.

■ 4. Amend § 1926.1124 by:

■ a. In paragraph (b), add a definition for ''Beryllium sensitization'' in alphabetical order, revise the definitions for ''CBD diagnostic center,'' ''Chronic beryllium disease (CBD),'' and ''Confirmed positive,'' and remove the definitions of ''Emergency'' and ''High-efficiency particulate air (HEPA) filter.''
■ b. Revise paragraph (f)(1)(i)(A).
■ c. Remove paragraphs (f)(1)(i)(B), (C), (D), (E), and (H).
■ d. Redesignate paragraphs (f)(1)(i)(F), (G), and (I) as paragraphs (f)(1)(i)(B), (C), and (D).
■ e. Remove the period at the end of newly redesignated paragraph (f)(1)(i)(D) and add a semicolon in its place.
■ f. Add new paragraphs (f)(1)(i)(E) and (F).
■ g. Revise paragraphs (f)(1)(ii)(B), (f)(2), and (g)(1)(iii).
■ h. Remove paragraph (g)(1)(iv).
■ i. Redesignate paragraph (g)(1)(v) as paragraph (g)(1)(iv).
■ j. Revise paragraphs (h)(1) and (2) and (h)(3)(ii).
■ k. Remove paragraph (h)(3)(iii).
■ l. Remove and reserve paragraph (i).
■ m. Revise paragraphs (j) and (k)(1)(i)(B).
■ n. Remove paragraph (k)(1)(i)(C).
■ o. Redesignate paragraph (k)(1)(i)(D) as paragraph (k)(1)(i)(C).
■ p. Revise paragraphs (k)(2)(i)(B), (k)(2)(ii), (k)(3)(ii)(A), (k)(4)(i), and (k)(7)(i) introductory text.
■ q. Redesignate paragraphs (k)(7)(ii) through (v) as paragraphs (k)(7)(iii) through (vi).
■ r. Add a new paragraph (k)(7)(ii).
■ s. Remove paragraph (m)(2).
■ t. Redesignate paragraph (m)(3) as paragraph (m)(2).
■ u. Revise newly redesignated paragraphs (m)(2)(i) introductory text and (m)(2)(ii)(A).
■ v. Remove newly redesignated paragraph (m)(2)(ii)(D).
■ w. Further redesignate newly redesignated paragraphs (m)(2)(ii)(E) through (I) as paragraphs (m)(2)(ii)(D) through (H).
■ x. Revise newly redesignated paragraphs (m)(2)(ii)(D) and (m)(2)(iv) and paragraphs (n)(1)(ii)(F), (n)(3)(ii)(A), and (n)(4)(i).

The revisions and additions read as follows:

§ 1926.1124 Beryllium.

* * * * *

(b) * * *

Beryllium sensitization means a response in the immune system of a specific individual who has been exposed to beryllium. There are no associated physical or clinical symptoms and no illness or disability with beryllium sensitization alone, but the response that occurs through beryllium sensitization can enable the immune system to recognize and react to beryllium. While not every beryllium-sensitized person will develop chronic beryllium disease (CBD), beryllium sensitization is essential for development of CBD.

CBD diagnostic center means a medical diagnostic center that has a pulmonologist or pulmonary specialist on staff and on-site facilities to perform a clinical evaluation for the presence of chronic beryllium disease (CBD). The CBD diagnostic center must have the capacity to perform pulmonary function testing (as outlined by the American Thoracic Society criteria), bronchoalveolar lavage (BAL), and transbronchial biopsy. The CBD diagnostic center must also have the capacity to transfer BAL samples to a laboratory for appropriate diagnostic testing within 24 hours. The pulmonologist or pulmonary specialist must be able to interpret the biopsy pathology and the BAL diagnostic test results.

Chronic beryllium disease (CBD) means a chronic granulomatous lung disease caused by inhalation of airborne beryllium by an individual who is beryllium-sensitized.

* * * * *

Confirmed positive means the person tested has had two abnormal BeLPT test results, an abnormal and a borderline test result, or three borderline test results from tests conducted within a 3-year period. It also means the result of a more reliable and accurate test indicating a person has been identified as having beryllium sensitization.

* * * * *

(f) * * *

(1) * * *

(i) * * *

(A) A list of operations and job titles reasonably expected to involve exposure to beryllium;

* * * * *

(E) Procedures used to ensure the integrity of each containment used to minimize exposures to employees outside the containment; and

(F) Procedures for removing, cleaning, and maintaining personal protective clothing and equipment in accordance with paragraph (h) of this standard.

(ii) * * *

(B) The employer is notified that an employee is eligible for medical removal in accordance with paragraph (l)(1) of this standard, referred for evaluation at a CBD diagnostic center, or shows signs or symptoms associated with exposure to beryllium; or

* * * * *

(2) *Engineering and work practice controls.* The employer must use engineering and work practice controls to reduce and maintain employee airborne exposure to beryllium to or below the TWA PEL and STEL, unless the employer can demonstrate that such controls are not feasible. Wherever the employer demonstrates that it is not feasible to reduce airborne exposure to or below the PELs with engineering and work practice controls, the employer must implement and maintain engineering and work practice controls to reduce airborne exposure to the lowest levels feasible and supplement these controls by using respiratory protection in accordance with paragraph (g) of this standard.

* * * * *

(g) * * *

(1) * * *

(iii) During operations for which an employer has implemented all feasible engineering and work practice controls when such controls are not sufficient to reduce airborne exposure to or below the TWA PEL or STEL; and

* * * * *

(h) * * *

(1) *Provision and use.* Where airborne exposure exceeds, or can reasonably be expected to exceed, the TWA PEL or STEL, the employer must provide at no cost, and ensure that each employee uses, appropriate personal protective clothing and equipment in accordance with the written exposure control plan required under paragraph (f)(1) of this standard and OSHA's Personal Protective and Life Saving Equipment standards for construction (subpart E of this part).

(2) *Removal of personal protective clothing and equipment.* (i) The employer must ensure that each employee removes all personal protective clothing and equipment required by this standard at the end of the work shift or at the completion of all tasks involving beryllium, whichever comes first.

(ii) The employer must ensure that personal protective clothing and equipment required by this standard is not removed in a manner that disperses beryllium into the air, and is removed as specified in the written exposure control plan required by paragraph (f)(1) of this standard.

(iii) The employer must ensure that no employee with reasonably expected exposure above the TWA PEL or STEL removes personal protective clothing and equipment required by this

standard from the workplace unless it has been cleaned in accordance with paragraph (h)(3)(ii) of this standard.

(3) * * *

(ii) The employer must ensure that beryllium is not removed from personal protective clothing and equipment required by this standard by blowing, shaking, or any other means that disperses beryllium into the air.

* * * * *

(j) *Housekeeping.* (1) When cleaning up dust resulting from operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL, the employer must ensure the use of methods that minimize the likelihood and level of airborne exposure.

(2) The employer must not allow dry sweeping or brushing for cleaning up dust resulting from operations that cause, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL unless methods that minimize the likelihood and level of airborne exposure are not safe or effective.

(3) The employer must not allow the use of compressed air for cleaning where the use of compressed air causes, or can reasonably be expected to cause, airborne exposure above the TWA PEL or STEL.

(4) Where employees use dry sweeping, brushing, or compressed air to clean, the employer must provide, and ensure that each employee uses, respiratory protection and personal protective clothing and equipment in accordance with paragraphs (g) and (h) of this standard.

(5) The employer must ensure that cleaning equipment is handled and maintained in a manner that minimizes the likelihood and level of airborne exposure and the re-entrainment of airborne beryllium in the workplace.

(k) * * *

(1) * * *

(i) * * *

(B) Who shows signs or symptoms of CBD or other beryllium-related health effects; or

* * * * *

(2) * * *

(i) * * *

(B) An employee meets the criteria of paragraph (k)(1)(i)(B) of this standard.

(ii) At least every two years thereafter for each employee who continues to meet the criteria of paragraph (k)(1)(i)(A), (B), or (C) of this standard.

* * * * *

(3) * * *

(ii) * * *

(A) A medical and work history, with emphasis on past and present exposure to beryllium, smoking history, and any history of respiratory system dysfunction;

* * * * *

(4) * * *

(i) A description of the employee's former and current duties that relate to the employee's exposure to beryllium;

* * * * *

(7) * * *

(i) The employer must provide an evaluation at no cost to the employee at a CBD diagnostic center that is mutually agreed upon by the employer and the employee. The evaluation at the CBD diagnostic center must be scheduled within 30 days, and must occur within a reasonable time, of:

* * * * *

(ii) The evaluation must include any tests deemed appropriate by the examining physician at the CBD diagnostic center, such as pulmonary function testing (as outlined by the American Thoracic Society criteria), bronchoalveolar lavage (BAL), and transbronchial biopsy. If any of the tests deemed appropriate by the examining physician are not available at the CBD diagnostic center, they may be performed at another location that is mutually agreed upon by the employer and the employee.

* * * * *

(m) * * *

(2) * * *

(i) For each employee who has, or can reasonably be expected to have, airborne exposure to beryllium:

* * * * *

(ii) * * *

(A) The health hazards associated with exposure to beryllium, including the signs and symptoms of CBD;

* * * * *

(D) Measures employees can take to protect themselves from exposure to beryllium;

* * * * *

(iv) The employer must make a copy of this standard and its appendices readily available at no cost to each employee and designated employee representative(s).

(n) * * *

(1) * * *

(ii) * * *

(F) The name and job classification of each employee represented by the monitoring, indicating which employees were actually monitored.

* * * * *

(3) * * *

(ii) * * *

(A) Name and job classification;

* * * * *

(4) * * *

(i) At the completion of any training required by this standard, the employer must prepare a record that indicates the name and job classification of each employee trained, the date the training was completed, and the topic of the training.

* * * * *

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Part III

Securities and Exchange Commission

17 CFR Parts 210, 230, 239, et al.
Amendments to Financial Disclosures About Acquired and Disposed Businesses; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 230, 239, 240, 249, 270 and 274

[Release No. 33–10786; 34–88914; IC–33872; File No. S7–05–19]

RIN 3235–AL77

Amendments to Financial Disclosures About Acquired and Disposed Businesses

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to our rules and forms to improve their application, assist registrants in making more meaningful determinations of whether a subsidiary or an acquired or disposed business is significant, and to improve the disclosure requirements for financial statements relating to acquisitions and dispositions of businesses, including real estate operations and investment companies. The changes are intended to improve for investors the financial information about acquired or disposed businesses, facilitate more timely access to capital, and reduce the complexity and costs to prepare the disclosure.

DATES: *Effective Date:* The final rules are effective on January 1, 2021.

Compliance Dates: See Section II.F. for further information on transitioning to the final rules.

FOR FURTHER INFORMATION CONTACT: Todd E. Hardiman, Associate Chief Accountant, at (202) 551–3516, Jessica Barberich, Associate Chief Accountant, at (202) 551–3782, or Craig Olinger, Senior Advisor to the Chief Accountant, at (202) 551–3400, or Steven G. Hearne, Senior Special Counsel, at (202) 551–3430, in the Division of Corporation Finance; Joel Cavanaugh, Senior Counsel, at (202) 551–3173, Jenson Wayne, Assistant Chief Accountant, at (202) 551–6918, or Mark T. Uyeda, Senior Special Counsel, at (202) 551–6792, in the Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to:

Commission reference	CFR citation (17 CFR)
Regulation S–X	§§ 210.1–01 through 210.13–02.
Rule 1–02(w)	§ 210.1–02(w).
Rule 3–05	§ 210.3–05.
Rule 3–06	§ 210.3–06.
Rule 3–09	§ 210.3–09.
Rule 3–14	§ 210.3–14.
Rule 3–18	§ 210.3–18.
Rule 5–01	§ 210.5–01.
Rule 6–01	§ 210.6–01.
Rule 6–02	§ 210.6–02.
Rule 6–03	§ 210.6–03.
Article 8:	
Rule 8–01	§ 210.8–01.
Rule 8–03	§ 210.8–03.
Rule 8–04	§ 210.8–04.
Rule 8–05	§ 210.8–05.
Rule 8–06	§ 210.8–06.
Article 11:	
Rule 11–01	§ 210.11–01.
Rule 11–02	§ 210.11–02.
Rule 11–03	§ 210.11–03.
Securities Act of 1933 (Securities Act): [1]	
Securities Act Rule 405	§ 230.405.
Form S–11	§ 239.18.
Form N–2	§§ 239.14 and 274.11a–1.
Form N–14	§ 239.23.
Form 1–A	§ 239.90.
Securities Exchange Act of 1934 (Exchange Act): [2]	
Exchange Act Rule 12b–2	§ 240.12b–2.
Form 8–K	§ 249.308.
Form 10–K	§ 249.310.
Investment Company Act of 1940 (Investment Company Act): [3]	
Rule 8b–2	§ 270.8b–2.

We also are adding 17 CFR 210.6–11 (new ''Rule 6–11'') to Regulation S–X.

Table of Contents

[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 78a *et seq.*

[3] 15 U.S.C. 80a–1 *et seq.*

I. Introduction and Background

On May 3, 2019, the Commission proposed amendments to improve for investors the financial information about acquired and disposed businesses, facilitate more timely access to capital, and reduce the complexity and costs to prepare the disclosure.[4] Specifically, the Commission proposed amendments to the requirements for financial statements relating to acquisitions and dispositions of businesses, including real estate operations, in Regulation S–X Rule 3–05,[5] *Financial statements of businesses acquired or to be acquired;* Rule 3–14, *Special instructions for real estate operations to be acquired;* Article 11, *Pro Forma Financial Information;* and other related rules and forms.[6] The proposed amendments resulted from an ongoing, comprehensive evaluation of our disclosure requirements.[7] The Commission also proposed new Rule 6–11 and amendments to Form N–14 to specifically govern financial reporting for acquisitions involving investment companies.

Under Rule 3–05, a registrant that acquires a business[8] other than a real estate operation[9] is generally required to provide separate audited annual and unaudited interim pre-acquisition financial statements of the business if it is significant to the registrant (''Rule 3–05 Financial Statements''). Recognizing that certain acquisitions have a greater impact on a registrant than others, Rule 3–05 addresses the reporting requirements for businesses acquired or to be acquired based on the ''significant subsidiary'' definition in Rule 1–02(w) using a sliding scale approach.[10] A registrant that has acquired, or proposes to acquire, a significant real estate operation[11] similarly must file separate audited annual and unaudited interim abbreviated income statements with respect to such operations (''Rule 3–14 Financial Statements'').[12] Additionally, registrants required to file Rule 3–05 Financial Statements or Rule 3–14 Financial Statements also are required to file unaudited pro forma financial information as prescribed by Article 11.[13] The pro forma financial information is based on the historical financial statements of the registrant and the acquired or disposed business, and generally includes adjustments intended to show how the acquisition or disposition might have affected those financial statements had the transaction occurred at an earlier time.

Form 8–K generally requires registrants to file Rule 3–05 Financial Statements, Rule 3–14 Financial Statements, and related pro forma financial information within 75 days after consummation of the acquisition.[14] A similar 75-day filing period applies to registration statements and proxy statements for acquired or to be acquired businesses requiring Rule 3–05 Financial Statements,[15] but not for acquired or to be acquired businesses requiring Rule 3–14 Financial Statements.

In addition, certain registration statements[16] and proxy statements

[4] *See Amendments to Financial Disclosures about Acquired and Disposed Businesses,* Release No. 33–10635 (May 3, 2019) [84 FR 24600 (May 28, 2019)] (''Proposing Release'').

[5] Unless otherwise noted, references in this release to ''Rule'' or ''Rules'' are to the rules under Regulation S–X.

[6] The Commission also proposed related amendments to Regulation S–X with respect to the definition of ''significant subsidiary'' in Rule 1–02(w); Rule 3–06, *Financial statements covering a period of nine to twelve months;* and Article 8, *Smaller Reporting Companies.* In addition, the Commission proposed amendments to Form 8–K for current reports, Form 10–K for annual and transition reports, and the definition of ''significant subsidiary'' in Exchange Act Rule 12b-2, Securities Act Rule 405, and Rule 8b-2 under the Investment Company Act.

[7] The staff, under its Disclosure Effectiveness Initiative, is reviewing the disclosure requirements in Regulation S–X and in 17 CFR 229.10 through 229.1305 (''Regulation S–K'') and is considering ways to improve the disclosure regime for the benefit of both companies and investors. The goal is to comprehensively review the requirements and make recommendations on how to update them to facilitate timely, material disclosure by companies and shareholders' access to that information.

[8] Rule 3–05 requires disclosure if the ''business combination has occurred or is probable.'' *See* 17 CFR 210.3–05(a). Registrants determine whether a ''business'' has been acquired by applying Rule 11–01(d) of Regulation S–X. The definition of ''business'' in Regulation S–X focuses primarily on whether the nature of the revenue-producing activity of the acquired business will remain generally the same as before the transaction. This determination is separate and distinct from a determination made under the applicable accounting standards.

[9] Rule 3–05 also applies to registrants that are registered investment companies and business development companies.

[10] *Instructions for the Presentation and Preparation of Pro Forma Financial Information and Requirements for Financial Statements of Businesses Acquired or To Be Acquired,* Release No. 33–6413 (Jun. 24, 1982) [47 FR 29832 (Jul. 9, 1982)] (''Rule 3–05 Adopting Release'').

[11] Neither Regulation S–X nor any other Securities Act or Exchange Act rule provides a definition of a ''real estate operation'' or an explanation of what is meant by the reference to ''properties'' in Rule 3–14.

[12] *See* Rule 3–14. Rule 3–14 was adopted as part of the Commission's effort to establish a centralized set of instructions in Regulation S–X and is based on the disclosure requirements in Item 6(b) for Form S–11 as adopted in 1961. *See Uniform Instructions as to Financial Statements—Regulation S–X,* Release No. 33–6234 (Sept. 2, 1980) [45 FR 63682 (Sept. 25, 1980)]. Rule 3–14 Financial Statements are abbreviated because the rule requires that they exclude historical items that are not comparable to the proposed future operations of the real estate operation such as mortgage interest, leasehold rental, depreciation, corporate expenses, and federal and state income taxes. Additionally, Rule 3–14 generally only requires one year of Rule 3–14 Financial Statements.

[13] *See* Rules 11–01 and 11–02. Pro forma financial information typically includes a pro forma balance sheet as of the end of the most recent period for which a consolidated balance sheet of the registrant is required and pro forma statements of comprehensive income for the registrant's most recent fiscal year and for the period from the most recent fiscal year end to the most recent interim date for which a balance sheet is required.

[14] Item 2.01 of Form 8–K requires that registrants make certain disclosures upon the acquisition or disposition of a significant amount of assets, including assets that constitute a business, within four business days after the consummation of the transaction. It does not require reporting for probable acquisitions or dispositions. Item 9.01 of Form 8–K provides that the required financial statements and pro forma financial information for the acquired business (including a real estate operation) may be filed not later than 71 calendar days after the initial report on Form 8–K is required to be filed, providing approximately 75 calendar days to file the acquired business financial statements and related pro forma financial information. A registrant may need to update the periods presented in Form 8–K in certain subsequently filed registration statements and proxy statements. *See* 17 CFR 210.3–12.

[15] Rule 3–05(b)(4) and Rule 11–01(c) provide that registration statements not subject to the provisions of 17 CFR 230.419 and proxy statements need not include separate financial statements of the acquired or to be acquired business and related pro forma financial information if the business does not exceed any of the conditions of significance in the definition of ''significant subsidiary'' in Rule 1–02(w) at the 50 percent level, and either (A) the consummation of the acquisition has not yet occurred; or (B) the date of the final prospectus or prospectus supplement relating to an offering as filed with the Commission pursuant to 17 CFR 230.424(b) or the mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business combination, and the financial statements have not previously been filed by the registrant. A similar provision applies to smaller reporting companies, but it is linked to the effective date of the registration statement instead of the date of the final prospectus or prospectus supplement. *See* Rule 8–04(c)(4).

[16] This additional requirement does not apply to all registration statements, such as registration statements filed on 17 CFR 239.16b (''Form S–8'').

require audited financial statements and unaudited pro forma financial information for the substantial majority of individually insignificant consummated and probable acquisitions since the date of the most recent audited balance sheet if a significance test exceeds 50 percent for any combination of acquisitions subject to Rule 3–05.[17]

Commenters broadly supported the objectives of the proposed rules or were generally in favor of the proposals.[18] While commenters were largely supportive of the proposals, we also received recommendations for modifying or further considering aspects of the proposed amendments that commenters believed could be clarified and improved.[19] After reviewing and considering the public comments and recommendations, we are adopting the amendments largely as proposed. As we discuss further below, in certain cases we are adopting the proposed rules with modifications that are intended to address comments received.

II. Discussion of Final Amendments[20]

We are amending the requirements in Rule 1–02(w), Rule 3–05, Rule 3–14, Article 11, and related rules and forms. The amendments generally:

- Update the significance tests used under these and other rules to generally improve their application and assist registrants in making more meaningful significance determinations;
- Expand the use of pro forma financial information in measuring significance;
- Conform, to the extent applicable, the significance threshold and tests for a disposed business to those used for an acquired business;
- Require the financial statements of the acquired business to cover only up to the two most recent fiscal years;
- Permit disclosure of abbreviated financial statements for certain acquisitions of a component of an entity;
- Permit the use of, or reconciliation to, International Financial Reporting Standards as issued by the International Accounting Standards Board (''IFRS–IASB'') in certain circumstances;
- No longer require separate acquired business financial statements once the business has been included in the registrant's post-acquisition audited annual financial statements for either nine months or a complete fiscal year, depending on significance;
- Modify and enhance the required disclosure for the aggregate effect of acquisitions for which financial statements are not required or are not yet required;
- Align Rule 3–14 with Rule 3–05 where no unique industry considerations exist;
- Clarify the application of Rule 3–14 regarding the determination of significance, the need for interim income statements, special provisions for blind pool offerings,[21] and the scope of the rule's requirements;
- Amend the pro forma financial information requirements to improve the content and relevance of such information;
- Clarify when financial statements and pro forma financial information are required, and update the language used in our rules to take into account concepts that have developed since adoption of the rules over 30 years ago; and
- Make corresponding changes to the smaller reporting company requirements in Article 8 of Regulation S–X.

In addition, we are amending regulatory requirements specific to investment companies registered under the Investment Company Act and business development companies[22] (collectively, ''investment companies'') as discussed in more detail in Section II.E. below.

A. Amendments to the Definition of ''Significant Subsidiary'' and Generally Applicable Financial Statement Requirements for Acquired Businesses

The ''significant subsidiary'' definition in Rule 1–02(w) includes investment, asset, and income tests that are applied when determining if a subsidiary is deemed significant for the purposes of certain Regulation S–X and Regulation S–K requirements as well as certain Securities and Exchange Act rules and forms.[23] Whether an acquisition is significant under Rule 3–05 is determined by applying these tests,[24] which generally can be described as follows:

[17] *See* Rule 3–05(b)(2)(i). Smaller reporting companies provide the same disclosure under Rule 8–04(c)(3).

[18] Comment letters related to the Proposing Release are available at *https://www.sec.gov/comments/s7-05-19/s70519.htm*.

[19] In addition, the SEC's Small Business Capital Formation Advisory Committee (''SBCFAC'') adopted a recommendation generally supportive of the proposed rules subject to their specific recommendations. *See* U.S. Securities & Exchange Commission Small Business Capital Formation Advisory Committee, Recommendation on the Commission's Proposal to Amend Financial Disclosure Requirements Relating to Acquisitions and Dispositions of Businesses (Aug. 23, 2019) (''SBCFAC Recommendations''), available at *https://www.sec.gov/spotlight/sbcfac/recommendations-rule-3-05-and-accelerated-filer-definition.pdf*.

[20] Generally, the final amendments will not affect the financial statements related to the acquisition of a business that is the subject of a proxy statement or registration statement on 17 CFR 239.25 (''Form S–4'') or 17 CFR 239.34 (''Form F–4''); however, in certain circumstances application of the amended significance tests may affect whether the financial statements of a subject business that is not an Exchange Act reporting company are required to be included in such a proxy statement or registration statement. The final amendments will apply to pro forma financial information provided pursuant to Article 11 and financial information for acquisitions and dispositions otherwise required to be disclosed pursuant to Rule 3–05 or Rule 3–14. These amendments also do not affect the requirements in 17 CFR 210.3–02 (''Rule 3–02'') or Rule 8–01 relating to predecessor companies.

[21] *See* Section II.C.6 below for a description of a blind pool offering.

[22] ''Business development company'' is defined in Section 2(a)(48) of the Investment Company Act, 15 U.S.C. 80a–2(a)(48).

[23] In addition to its use in Rule 3–05 and Rule 3–14, the Rule 1–02(w) definition of ''significant subsidiary'' is used in the following rules:

- 17 CFR 210.9–03, which requires bank holding companies and banks to reflect on their balance sheets certain loans and indebtedness of their significant subsidiaries;
- 17 CFR 210.11–01(b), which specifies when a business combination or disposition of a business shall be considered significant;
- 17 CFR 210.3–09, 17 CFR 210.4–08(g) (''4–08(g)''), and Item 17(c)(2) of 17 CFR 249.220f (''Form 20–F''), which rely on the significance tests to determine the financial statements and summarized financial information required for the registrant's equity method investees;
- 17 CFR 229.601(b)(21) and Instruction 8 as to Exhibits of Form 20–F, to determine the subsidiaries that must be included in the list of subsidiaries required as an exhibit;
- Item 17(b)(7) of Form S–4, to determine the financial statements required for domestic target companies being acquired that do not meet the requirements to use 17 CFR 239.34 (''Form S–3'');
- Item 17(b)(5) of Form F–4, to determine the financial statements required for foreign companies being acquired that do not meet the requirements to use 17 CFR 239.34 (''Form F–3'');
- Item 4.C of Form 20–F, which requires a detailed list of the registrant's significant subsidiaries;
- 17 CFR 229.304(a)(1) and (2), Item 9(d) of 17 CFR 240.14a–101 (''Schedule 14A''), Item 4.01 of Form 8–K, Item 4 of 17 CFR 239.93 (''Form 1–U''), and Item 16F of Form 20–F, which require disclosure about changes in the auditors of the registrant (or issuer, as applicable) or its significant subsidiaries;
- Item 3 of 17 CFR 249.308a (''Form 10–Q'') and Item 13 of Form 20–F, which require disclosure about defaults of the registrant and its significant subsidiaries and material arrearages/delinquencies in the payment of dividends on preferred stock of the registrant or any of its significant subsidiaries;
- 17 CFR 229.101(a)(1), which requires certain disclosures, such as bankruptcy, receivership or similar proceedings and the nature and results of any other material reclassification, merger, or consolidation, of the registrant and any of its significant subsidiaries;
- 17 CFR 229.103, which requires disclosure of certain legal proceedings, including bankruptcy and similar proceedings, for the registrant and any of its significant subsidiaries; and
- Item 4.A.4 of Form 20–F, which requires general disclosure about the development of and structural changes in the business of the registrant and its significant subsidiaries.

[24] Rule 3–05 provides for use of a 20 percent significance threshold, rather than the 10 percent threshold indicated in Rule 1–02(w). The

• ''Investment Test''—the registrant's and its other subsidiaries' investments in and advances to the acquired business are compared to the total assets of the registrant reflected in its most recent annual financial statements required to be filed at or prior to the acquisition date;
• ''Asset Test''—the registrant's and its other subsidiaries' proportionate share of the acquired business's total assets reflected in the business's most recent annual pre-acquisition financial statements is compared to the total assets of the registrant reflected in its most recent annual financial statements required to be filed at or prior to the acquisition date; and
• ''Income Test''—the registrant's and its other subsidiaries' equity in the income from continuing operations of the acquired business before income taxes, exclusive of amounts attributable to any noncontrolling interests, as reflected in the business's most recent annual pre-acquisition financial statements, is compared to the same measure reflected in the registrant's most recent annual financial statements required to be filed at or prior to the acquisition date.

1. Significance Tests

We are amending the significance tests provided in Rule 1–02(w) to improve their application and to assist registrants in making more meaningful determinations of whether a subsidiary or an acquired or disposed business is significant. Specifically, we are revising the Investment Test and the Income Test and making other conforming changes. The Commission did not propose to substantively revise the Asset Test; however, a number of non-substantive revisions to the significance tests generally were proposed and are being adopted.[25] The final amendments also provide that, for acquisitions, intercompany transactions with the acquired business must be eliminated from the registrant's and its subsidiaries' consolidated total assets when computing the Asset Test.

a. Investment Test

The Investment Test compares the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary to the total assets of the registrant and its subsidiaries consolidated reflected at the end of the most recently completed fiscal year, or in the case of an acquired business, in the registrant's most recent annual financial statements required to be filed at or prior to the acquisition date.

i. Proposed Amendments

The Commission proposed to revise the Investment Test to compare the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary to the aggregate worldwide market value of the registrant's voting and non-voting common equity (''aggregate worldwide market value''), when available, and to retain the existing test when the registrant does not have an aggregate worldwide market value.[26] As proposed, aggregate worldwide market value would be determined as of the last business day of the registrant's most recently completed fiscal year, which for acquisitions and dispositions would be at or prior to the date of acquisition or disposition. The Commission additionally proposed amendments relating to contingent consideration [27] and combinations between entities or businesses under common control.[28]

The Commission proposed the use of aggregate worldwide market value in the Investment Test to address a measurement mismatch: The comparison of the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary,[29] which for an acquisition or disposition is typically the purchase or sales price and is generally consistent with fair value, to the registrant's total assets measured at book value. Using aggregate worldwide market value instead of total assets was intended to address this mismatch for acquisitions and dispositions by comparing measures that are generally consistent with fair value, thereby providing a more meaningful measure of significance.

ii. Comments

Commenters generally supported the proposal to revise the Investment Test.[30] Many commenters expressly supported the proposed use of aggregate worldwide market value of the registrant's voting and non-voting common equity, when available.[31] Some commenters who supported the use of aggregate worldwide market value recommended measuring it closer to the date of the acquisition or disposition because of the potential fluctuation and

Commission raised the threshold in Rule 3–05 from 10 percent to 20 percent in 1996 in order to reduce compliance burdens in response to concerns that the requirement to obtain audited financial statements for a business acquisition may have caused companies to forgo public offerings and to undertake private or offshore offerings. *See Streamlining Disclosure Requirements Relating to Significant Business Acquisitions,* Release No. 33–7355 (Oct. 10, 1996) [61 FR 54509 (Oct. 18, 1996)] (''1996 Streamlining Release''). As a result of this amendment, the significance thresholds in Rule 3–05 have diverged from those used for Rule 3–14 and for dispositions since that time.

[25] For example, the final amendments label the conditions as the ''Investment Test,'' the ''Asset Test,'' and the ''Income Test'' and clarify that the significance tests compare the ''tested'' subsidiary's amounts to the registrant's.

[26] The value under the proposed rule would have differed from the value currently used by registrants to determine accelerated filer status under Exchange Act Rule 12b–2 because it would include the value of common equity held by affiliates and it would be determined as of the last business day of the registrant's most recently completed fiscal year. By contrast, Exchange Act Rule 12b–2 looks to the value of common equity held by non-affiliates and is determined as of the last business day of the registrant's most recently completed second fiscal quarter. *See* Exchange Act Rule 12b–2.

[27] The Commission proposed to require that the ''investment in'' the tested subsidiary in an acquisition include the fair value of contingent consideration required to be recognized at fair value by the registrant at the acquisition date under U.S. Generally Accepted Accounting Principles (''U.S. GAAP'') or IFRS–IASB, as applicable. If recognition at fair value is not required, the proposed amendment would require all contingent consideration to be included, except sales-based milestones and royalties, unless the likelihood of payment is remote. For similar reasons, the Commission proposed that the ''investment in'' the tested subsidiary in a disposition equal the fair value of the consideration, which would include contingent consideration, for the disposed subsidiary when comparing it to the registrant's aggregate worldwide market value or the carrying value of the disposed subsidiary when comparing it to the registrant's total assets.

[28] The Commission proposed that the Investment Test would be met for a combination between entities or businesses under common control when either net book value of the tested subsidiary exceeds 10 percent of the registrants' and its subsidiaries' consolidated total assets or the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding.

[29] Rules 3–05 and 3–14 use the conditions in Rule 1–02(w) when establishing the test for registrants to determine whether financial statements are required for businesses acquired or to be acquired. While we recognize that acquired businesses are often not subsidiaries, we use the term ''tested subsidiary'' throughout this release, rather than ''tested business'' or another term, when referring to the conditions in Rule 1–02(w) in connection with the determination in Rule 3–05 and Rule 3–14.

[30] *See, e.g.,* letters from Bass Berry & Sims PLC (''Bass Berry''), Cravath, Swaine & Moore LLP (''Cravath''), Deloitte & Touche LLP (''DT''), Eli Lilly and Company (''Eli Lilly''), Institute of Management Accountants (''IMA''), KPMG LLP (''KPMG''), PNC Financial Services Group, Inc. (''PNC''), Securities Industry and Financial Markets Association (''SIFMA''), and The Williams Companies, Inc. (''Williams''). We received no comments specific to our proposals to provide further instructions on a registrant's and its other subsidiaries' ''investments in'' the tested subsidiary for acquisitions and dispositions or to clarify the applicability of the Investment Test to combinations between entities under common control.

[31] *See, e.g.,* letters from Ball Corporation (''Ball''), CFA Institute (''CFA''), Cravath, Davis Polk and Wardwell LLP (''Davis Polk''), DT, Eli Lilly, Financial Executives International (''FEI''), KPMG, MTBC, Inc. (''MTBC''), RSM US LLP (''RSM''), SIFMA, Shearman and Sterling LLP (''Shearman''), and Williams. *See also* SBCFAC Recommendations.

volatility of the stock price.[32] Other commenters recommended extending the use of a fair value measure to initial public offerings, such as by allowing issuers to estimate their aggregate worldwide market value at the anticipated offering date.[33]

A number of commenters, however, expressed concern relating to the use of aggregate worldwide market value.[34] One of these commenters suggested that aggregate worldwide market value would introduce market volatility into the test.[35] Other commenters suggested that aggregate worldwide market value would not reflect fair value when significant amounts of stock are held by affiliates, the registrant is highly leveraged or its capital structure is complicated.[36] Two commenters supported the use of aggregate worldwide market value for acquisitions and dispositions, but expressed concern about its use for measuring significance of equity method investees because it introduces a historical cost versus fair value disparity (*e.g.,* comparing investments in and advances to the equity method investee to the registrant's aggregate worldwide market value).[37]

Some commenters recommended using the ''enterprise value'' of the registrant as a more accurate reflection of the fair value of the entities,[38] despite acknowledging a lack of agreed-upon definition of the term [39] or that enterprise value may necessitate adjustment to the numerator of the Investment Test to reflect leverage.[40] These commenters recommended a variety of potential definitions for enterprise value or adjustments to equity market value that could be made to calculate enterprise value.[41] Some commenters offered other alternatives, such as using the lower of the existing Investment Test denominator (the registrant's consolidated total assets) or aggregate worldwide market value.[42] One commenter expressed concern that the proposed Investment Test could encourage certain transactions that, in the long-term, may not be in the best interest of an acquirer's shareholders.[43]

In response to the Commission's proposal to require that the registrant's and its other subsidiaries' ''investments in'' the tested subsidiary include contingent consideration, some commenters supported including the fair value of contingent consideration when it is required to be measured at fair value under U.S. GAAP [44] but expressed opposition or concern about including contingent consideration when the acquired business will be accounted for as an asset acquisition under U.S. GAAP.[45] Other commenters recommended permitting registrants to determine significance using the fair value of the contingent consideration arrangement when fair value is not required by U.S. GAAP or IFRS–IASB, as applicable,[46] or extending the proposed sales-based milestones and royalties exception.[47] One commenter more broadly recommended not requiring the inclusion of contingent consideration that is not required to be recognized under applicable accounting standards.[48] However, another commenter expressed concern that the exclusion of sales-based milestones and royalties from the Investment Test for acquisitions for which U.S. GAAP does not require contingent consideration to be measured at fair value may result in under-identification of acquisitions that would materially affect the registrant's financial statements.[49]

iii. Final Amendments

We are adopting amendments to the Investment Test, with modifications from what was proposed in response to comments received.

Aggregate Worldwide Market Value

We are adopting amendments to the Investment Test, substantially as proposed, to compare the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary to the aggregate worldwide market value of the registrant's voting and non-voting common equity, when available,[50] but expressly limiting this amendment to acquisitions and dispositions.[51] As proposed, we are retaining the existing test for acquisitions and dispositions in circumstances where the registrant does not have an aggregate worldwide market value. We are also retaining the existing test when used for the additional purposes for which the Rule 1–02(w) definition is applicable.[52]

[32] *See, e.g.,* letters from BDO USA LLP (''BDO''), Center for Audit Quality (''CAQ''), CFA, Cravath, Crowe LLP (''Crowe''), Davis Polk, DT, Ernst & Young LLP (''EY''), Grant Thornton LLP (''GT''), IMA, Liberty Global plc (''Liberty''), MTBC, KPMG, RSM, Sullivan & Cromwell LLP (''S&C''), and Shearman. Commenters recommended a variety of alternatives including particular dates, ranges of dates or averages linked to the announcement, agreement or transaction dates, the most recently completed fiscal quarter, or confidential submission or filing dates of registration statements. *See, e.g.,* BDO, CAQ, Crowe, Davis Polk, GT, RSM, S&C, SIFMA, and Shearman.

[33] *See, e.g.,* letters from BDO, Crowe, EY, and RSM. *See also* letters from Cravath and Davis Polk suggesting additional accommodations for initial public offerings.

[34] *See* letters from The Allstate Corporation (''Allstate''), Affiliated Managers Group, Inc. (''AMG''), Bass Berry, Council of Institutional Investors (''CII''), Davis Polk, Denbury Resources Inc. (''Denbury''), DT, GT, IMA, and Liberty.

[35] *See* letter from AMG.

[36] *See* letters from Allstate, Bass Berry, DT, and GT. *But see* letter from CFA (recommending using a lower significance threshold or supplementing the revised test in such circumstances).

[37] *See* letters from DT and Williams. DT recommended that the Commission consider any potential impact of such changes on Rules 3–09 and 4–08(g) and other existing rules and staff guidance, while Williams recommended expressly retaining the existing requirement when evaluating equity method investments for significance under Rule 4–08(g).

[38] *See* letters from Bass Berry, Cravath, Davis Polk, Denbury, IMA, Liberty, and Shearman. Liberty went further and suggested that an Investment Test using enterprise value obviates the need for other significance tests.

[39] *See* letters from IMA and Shearman.

[40] *See* letter from Shearman. The commenter noted that if enterprise value is used, the numerator would also need to be revised to account for leverage by using the sum of the purchase price paid and the amount of debt, net of cash and cash equivalents, assumed.

[41] *See* letters from Bass Berry, Davis Polk, IMA, and Shearman. Bass Berry recommended defining ''enterprise value'' as ''(a) the equity value of the registrant (that is, the aggregate worldwide market value of the registrant's common equity as set forth above), plus (b) the value of the registrant's indebtedness, minority interests and preferred stock . . . , less (c) the cash and cash equivalents of the registrant as of the end of its most recent fiscal year.'' Cravath recommended using the sum of the investments in and advances to the tested subsidiary, plus total debt to be assumed compared to the sum of the aggregate worldwide market value plus total debt without eliminating cash. Shearman noted that the basic definition takes the fair value of the equity and adds total debt and subtracts cash and cash equivalents and suggested if the Commission were to use ''net debt,'' it would also need to adjust the purchase price to the sum of the purchase price paid and the amount of net debt assumed. IMA recommended that the Commission include the registrant's common and preferred stock, as well as its debt (including finance lease obligations) and that a registrant be permitted to use either the carrying amount of debt and/or preferred stock without a readily-determinable fair value or the carrying amount of debt, preferred stock and the residual equity. Davis Polk recommended ''the addition of the principal amount of the acquirer's outstanding debt to its equity market value.''

[42] *See* letters from Allstate and New York City Bar Association, Committee on Securities Regulation (''NYCBA—Sec.'').

[43] *See* letter from CII. *See also infra* at note 454 and accompanying text.

[44] *See, e.g.,* letters from Allstate, AMG, Pfizer, Inc. (''Pfizer''), and SIFMA.

[45] *See, e.g.,* letters from Pfizer, and SIFMA.

[46] *See* letter from IMA.

[47] *See* letters from IMA and SIFMA. *See also* Section II.A.1.a. of the Proposing Release.

[48] *See* letter from Cravath.

[49] *See* letter from GT. Separately, GT also recommended clarifying whether all contingent consideration should be included in the numerator if the likelihood of payment of all contingent consideration or any part thereof is more than remote.

[50] As with the proposed rule, the value under the final rule differs from the value currently used by registrants to determine accelerated filer status under Exchange Act Rule 12b–2. *See supra* note 26.

[51] *See* Section II.A.1.c.iii below for a discussion about retaining the existing Investment Test in other circumstances. The final rules reorganize and renumber proposed Rule 1–02(w)(1)(i) to effect these changes.

[52] *See* Rule 1–02(w)(1)(i)(C) and the discussion on Conforming Changes *supra* Section II.A.1.c.

In an acquisition or disposition, the registrant's and its other subsidiaries' ''investments in'' [53] the tested subsidiary are generally the consideration transferred or received (*i.e.,* the purchase or sales price) for the net assets acquired or sold. For acquisitions and dispositions, we believe that aggregate worldwide market value more closely aligns with the purchase or sale price used in the numerator of the Investment Test and provides a measure that is readily available and objectively determined by the market. Use of aggregate worldwide market value in these circumstances will address the mismatch whereby purchase or sale price is a measure of net assets generally consistent with fair value while the registrant's total assets to which it is currently compared reflects gross assets measured at book value.[54]

We are not adopting the suggestion of some commenters to use ''enterprise value'' for the Investment Test. The use of aggregate worldwide market value, unlike ''enterprise value,'' will avoid the need to define a term that does not have an agreed-upon definition. Moreover, it avoids having to establish additional adjustments to the ''investments in and advances to'' the tested subsidiary in order to convert the Investment Test numerator from essentially an equity value to an enterprise value, which we believe would be necessary if an enterprise value denominator were used. We also are not adopting the suggestion to use the lower of the existing Investment Test denominator (*i.e.,* the registrant's consolidated total assets) or aggregate worldwide market value. While we note the observation that a company with substantial assets that is highly leveraged may have a relatively small market capitalization, the suggested ''lower of'' standard is not linked to leverage nor do we believe the existence of leverage necessarily precludes the need for disclosure about acquired and disposed businesses.

In response to commenters' suggestions and concerns regarding market volatility, we are modifying the proposal to require registrants to use the average of aggregate worldwide market value calculated daily for the last five trading days of the registrant's most recently completed month ending prior to the earlier of the registrant's announcement date or agreement date of the acquisition or disposition. We are persuaded by commenters who suggested that market volatility and changes in market value unrelated to the acquisition could affect the determination of aggregate worldwide market value. We believe that using a more recent measurement period that is averaged to moderate daily variability more accurately reflects aggregate worldwide market value for purposes of computing significance based on the purchase or sale price while retaining a readily available and easily determinable measure of aggregate worldwide market value.

As proposed, the final rules will continue to require use of the total assets of the registrant and its subsidiaries consolidated when a registrant does not have an aggregate worldwide market value. We did not modify the final rule to permit, as suggested by some commenters, the estimation of aggregate worldwide market value when no such market value exists because we believe such an approach could introduce, rather than eliminate, complexity, and would be inconsistent with our intent of requiring that the determination, where possible, be based on readily available and easily and objectively determinable amounts that exist at the earlier of the announcement or agreement date.[55]

Contingent Consideration

We are amending the Investment Test, substantially as proposed, to clarify that for acquisitions, the registrant's and its other subsidiaries' ''investments in'' [56] the tested subsidiary is the consideration transferred, adjusted to exclude the registrant's and its subsidiaries' proportionate interest in the carrying value of assets transferred by the registrant and its subsidiaries consolidated to the tested subsidiary that will remain with the combined entity after the acquisition. The amendments further indicate that the registrant's and its other subsidiaries' ''investments in'' the tested subsidiary shall include the fair value of contingent consideration if required to be recognized at fair value by the registrant at the acquisition date under U.S. GAAP or IFRS–IASB, as applicable; however if recognition at fair value is not required, it shall include all contingent consideration, except contingent consideration for which the likelihood of payment is remote. We believe inclusion of contingent consideration provides a more accurate measure of an acquired business's relative significance. We were not persuaded by commenters that contingent consideration should be excluded from the Investment Test when the acquired business (as defined in Rule 11–01(d)) will be accounted for as an asset acquisition under U.S. GAAP. Contingent consideration can be a material component of the consideration provided to acquire a Rule 11–01(d) business and its exclusion from the significance tests could result in the under-identification of acquisitions for which financial statements are necessary to reasonably inform investors.

The proposed amendment would have permitted the exclusion of contingent consideration in the form of sales-based milestones and royalties from the Investment Test when recognition of contingent consideration at fair value is not required under U.S. GAAP or IFRS–IASB, as applicable. The proposal was intended to promote ease of calculation while maintaining the objective of the test as a reliable indicator of relative significance; however, commenter feedback made evident that there are a wide variety of contingent consideration arrangements with variable terms that require estimation beyond sales-based milestones and royalties. Rather than expanding the exclusion to encompass these other arrangements, we are persuaded by the commenter who observed that the exclusion of such consideration from the significance tests when the likelihood of their payment was more than remote could result in under-identification of acquisitions that would materially affect the registrant's financial statements. Therefore, the final amendments do not provide for any such exception.[57]

[53] The Investment Test uses the phrase ''investments in and advances to.'' In this way, the numerator of the Investment Test includes two parts: ''investments in'' and ''advances to.'' Our references to ''investments in'' in this release are intended to focus the particular discussion on the first part of the numerator of the Investment Test. Any such reference should not be read to suggest the numerator of the Investment Test excludes the second part, ''advances to.''

[54] The book value of the registrant's total assets may not fully reflect the registrant's current fair value. For example, the Investment Test uses the carrying value of a registrant's total assets as of the most recent annual balance sheet date, which represents a combination of fair value for certain assets (*e.g.,* financial instruments) and historical cost for other assets (*e.g.,* property, plant and equipment and intangible assets). The test further excludes the value of certain assets not permitted to be recognized (*e.g.,* certain internally developed intangible assets) and is not reduced by the value of liabilities.

[55] For example, a public float approach similar to that in 17 CFR 229.10(f)(1) (''Item 10(f)(1) of Regulation S–K'') relies on an estimated public offering price measured relative to the filing date, which could cause the estimate to already encompass the value of the tested business when the acquisition has already occurred or when the anticipated offering or filing date occurs after the earlier of the announcement or agreement date.

[56] *See supra* note 53.

[57] In order to further clarify the requirements related to the amount of contingent consideration

Continued

We are not persuaded by the suggestion to permit registrants to determine significance of an acquisition using the fair value of the contingent consideration arrangement when fair value is not required by U.S. GAAP or IFRS–IASB, as applicable, as a means to mitigate the risk that an acquisition may be deemed significant for arrangements for which there is a wide range of possible outcomes in the eventual amount of contingent consideration that may be owed. We note that the standard we are adopting is one employed in practice today. To the extent that unique facts and circumstances may trigger significance when financial statements are not reasonably necessary to inform investors, we believe such a situation is best addressed through 17 CFR 210.3–13 (''Rule 3–13'').[58]

Other Amendments

The final amendments provide, as proposed, that the registrant's and its other subsidiaries' ''investments in'' the tested subsidiary exclude the registrant's and its other subsidiaries' proportionate interest in the carrying value of assets transferred by the registrant to the tested subsidiary that will remain with the combined entity after the acquisition. The final amendments also provide, as proposed, that in a disposition, the registrant's and its other subsidiaries' ''investments in'' the tested subsidiary equal the fair value of the consideration (which includes contingent consideration) for the disposed subsidiary when comparing it to the registrant's aggregate worldwide market value or, when the registrant has no such aggregate worldwide market value, the carrying value of the disposed subsidiary when comparing it to the registrant's total assets. The final amendments additionally provide, as proposed, that the Investment Test is met when either net book value of the tested subsidiary exceeds 10 percent of the registrant's and its subsidiaries' consolidated total assets or the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated for combinations between entities or businesses under common control.[59]

b. Income Test

The Income Test compares the registrant's equity in the tested subsidiary's income from continuing operations before income taxes exclusive of amounts attributable to any noncontrolling interests to such income of the registrant for the most recently completed fiscal year. In the case of an acquisition, the Income Test similarly compares the registrant's equity in the income from continuing operations of the acquired business before income taxes, exclusive of amounts attributable to any noncontrolling interests, as reflected in the business's most recent annual pre-acquisition financial statements, to the same measure of the registrant reflected in its most recent annual financial statements required to be filed at or prior to the acquisition date.

i. Proposed Amendments

The Commission proposed to revise the Income Test to reduce the anomalous results that may occur by relying solely on net income[60] and to reduce complexity and preparation costs without sacrificing material information for investors. The Commission proposed to:

- Add a new revenue component to the test;
- Revise the net income component to use income or loss from continuing operations *after* income taxes, instead of *before* income taxes;
- Calculate the net income component using absolute values;
- Revise the Income Test to use the average of the absolute value of net income when the existing 10 percent threshold in Computational Note 2 to Rule 1–02(w) is met and the proposed revenue component does not apply; and
- Make additional clarifications and simplifications.[61]

The proposed revenue component would compare the registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total revenues (after intercompany eliminations) to such consolidated total revenues of the registrant for the most recently completed fiscal year. Under the proposal, where the registrant and its subsidiaries consolidated and the tested subsidiary have recurring annual revenue,[62] the tested subsidiary must meet both the new revenue component and the net income component, and in the case of the application of the test in Rule 3–05, could use the lower percentage of the revenue component and the net income component to determine the number of periods for which Rule 3–05 Financial Statements are required.

ii. Comments

Commenters broadly supported the revisions to the Income Test and made various recommendations to improve specific components of the Income Test.[63]

Revenue Component

Commenters broadly supported the addition of a revenue component to the Income Test.[64] One commenter recommended establishing significance when registrants meet either revenue or net income.[65] Another commenter noted that the inclusion of the revenue component would reduce instances of anomalous significance results, but noted that using a lower of revenue or net income approach could result in under-identification of acquisitions expected to have a material future impact and suggested considering the use of a lower revenue threshold.[66]

to include in the Investment Test when recognition at fair value is not required under U.S. GAAP or IFRS–IASB, as applicable, the final rules modify the proposed language, which provided for inclusion of ''all contingent consideration unless the likelihood of payment is remote,'' to require inclusion of ''all contingent consideration, except contingent consideration for which the likelihood of payment is remote.''

[58] *See* Rule 3–13 of Regulation S–X, which provides that the Commission may, upon the request of the registrant, and where consistent with the protection of investors, permit the omission of one or more required financial statements or the filing in substitution therefor of appropriate statements of comparable character. The Commission has delegated authority to the staff in the Division of Corporation Finance to grant requests for relief under Rule 3–13.

[59] The addition of net book value to the test recognizes that such combinations may be effected by transferring net assets, rather than exchanging shares, and that the resulting accounting by the entity who receives net assets or equity interests (*i.e.,* the receiving entity) typically recognizes the combination using the parent's historical carrying value of the transferred entity or business. *See, e.g.,* FASB ASC 805–50–30–5.

[60] Net income can include infrequent expenses, gains, or losses that can distort the determination of relative significance.

[61] Specifically, the Commission proposed to clarify that the Income Test may be determined using the acquired business's revenues less the expenses permitted to be omitted by proposed Rules 3–05(e) and 3–05(f) under certain conditions and to make additional non-substantive amendments to the net income component in order to simplify the description and application.

[62] Where a registrant or tested subsidiary does not have recurring annual revenues, the revenue component is less likely to produce a meaningful assessment and therefore only the net income component would apply.

[63] *See, e.g.,* letters from Bass Berry, Cravath, DT, Eli Lilly, IMA, KPMG, PNC, SIFMA, and Williams. We received no comments on the additional clarifications and simplifications.

[64] *See, e.g.,* letters from AMG, Ball, Bass Berry, BDO, Cravath, Eli Lilly, FEI, GT, Liberty, NYCBA—Sec., Pfizer, PricewaterhouseCoopers LLP (''PWC''), SIFMA, Shearman, and Williams. *See also* SBCFAC Recommendations. Some of these commenters suggested further accommodations for equity method investees. *See, e.g.,* letters from GT and AMG.

[65] *See* letter from CFA.

[66] *See* letter from GT. In contrast, one commenter explicitly supported using the same percentage thresholds for the revenue component and the income component and indicated its belief that

Another commenter suggested requiring only the revenue component, and not the income component, for smaller reporting companies.[67]

Recurring Annual Revenues

A number of commenters, particularly accounting and auditing firms, expressed concern that the term ''recurring annual revenues'' may not be clear and requested additional guidance as to the meaning.[68] One commenter recommended using ''two or more years of revenue'' as an alternative.[69]

Income Taxes

A few commenters supported the proposal to use income from continuing operations *after* income taxes because it would simplify the calculation and would permit registrants to use information directly from the income statement.[70] However, many other commenters recommended that the Commission continue to use income or loss from continuing operations *before* income taxes in the Income Test.[71] While using after-tax amounts may simplify the determinations, these commenters expressed concern that after-tax numbers could distort the significance determination due to factors such as the tax status of the entity (such as for a pass-through entity) [72] or the volatility of income taxes (due to changes in tax laws or valuation allowances).[73]

Income Averaging and Use of Absolute Values

Commenters generally supported the revisions relating to income averaging calculations [74] and the use of absolute values.[75] Some commenters recommended further revisions, such as using three-year averaging or permitting five-year averaging for all registrants regardless of recurring revenue.[76]

iii. Final Amendments

As discussed in more detail below, we are adopting the amendments to the Income Test substantially as proposed, but with some modifications to improve its application and to assist registrants in making more meaningful significance determinations.

Revenue Component

As proposed, we are revising the Income Test to add a revenue component in order to reduce the anomalous result that registrants with marginal or break-even net income or loss in a recent fiscal year may be more likely to have tested subsidiaries deemed significant where they otherwise would not. This anomalous result is particularly relevant where it would require Rule 3–05 Financial Statements for acquisitions that otherwise would not be considered material to investors. To satisfy the Income Test under the final amendments, the tested subsidiary must meet both the revenue component and the net income component when the revenue component applies, and for purposes of the application of Rule 3–05, may use the lower of the revenue component and the net income component to determine the number of periods for which Rule 3–05 Financial Statements are required. The new revenue component compares a registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total revenues (after intercompany eliminations) to such consolidated total revenues of the registrant for the most recently completed fiscal year. We are modifying the description of the tested subsidiary's consolidated total revenue to clarify that consolidated total revenue refers to consolidated total revenue from continuing operations (after intercompany eliminations).[77]

Revenue is an important indicator of the operations of a business and generally has less variability than net income. For example, expenses related to historical capitalization that will no longer be incurred (*e.g.,* interest expense) as well as infrequent expenses, such as those for litigation or impairment, can affect net income, but not revenue. The effect of historical expenses that will no longer be incurred and infrequent expenses on an income-based test may be to either deem as insignificant an acquired business that is expected to have a material future impact on the registrant or deem as significant an acquired business that is not expected to have a material future impact on the registrant. While we considered other metrics, we believe the addition of ''revenue'' is a more appropriate indicator to help avoid anomalous results, and therefore, we added a revenue component to the net income component of the Income Test rather than have separate tests based on revenue and net income.[78] By revising the Income Test to require that the registrant exceed both the revenue and net income components when the revenue component applies, we believe the test will more accurately determine whether a tested subsidiary is significant to the registrant. This will also reduce the frequency of immaterial acquisitions being deemed significant for purposes of Rule 3–05.

We are not adopting the recommendation to use a lower significance threshold for the revenue component to mitigate the potential risk that use of a lower of revenue or net income approach could result in under-identification of significant subsidiaries, and in particular of acquisitions expected to have a material future impact on the registrant. The risk of under-identification is not unique to a ''lower of'' approach, but rather is inherent in basing the requirement to provide financial information on percentage threshold tests. We believe under-identification risk is mitigated, however, because even if the Income Test is not satisfied, the definition of ''significant subsidiary'' could be met by satisfying either the Asset Test or the Investment Test. Further, to simplify compliance, the significant subsidiary percentage threshold historically has been the same for all tests included in the ''significant subsidiary'' definition, notwithstanding that the threshold has been changed from time to time. In light of these considerations, we do not find a compelling reason at this time to differentiate the threshold for the revenue component of the Income Test from the threshold used in the net income component of the Income Test and in the Asset and Investment Tests.

We also are not adopting the recommendation to apply only the

there was no meaningful risk that the income component of the Income Test would under-identify material transactions. *See* letter from Cravath.

[67] *See* letter from MTBC.

[68] *See, e.g.,* letters from BDO, CAQ, Cravath, Crowe, DT, EY, GT, KPMG, MTBC, PWC, RSM, and SIFMA.

[69] *See* letter from MTBC.

[70] *See* letters from Ball and Eli Lilly.

[71] *See, e.g.,* letters from AMG, BDO, CAQ, Cravath, Crowe, EY, FEI, GT, KPMG, Pfizer, PWC, Ira Rosner (''Rosner''), RSM, Shearman, and Williams.

[72] *See, e.g.,* letters from AMG, BDO, CAQ, Cravath, Crowe, EY, GT, KPMG, PWC, Rosner, RSM, and Williams.

[73] *See, e.g.,* letters from CAQ, EY, FEI, KPMG, Pfizer, PWC, and RSM.

[74] *See* letters from AMG, BDO, and Pfizer.

[75] *See* letters from AMG, Eli Lilly, IMA, and Pfizer.

[76] *See, e.g.,* letters from AMG, BDO, and IMA.

[77] *See* Rule 1–02(w)(1)(iii).

[78] Prior to 1974, the ''significant subsidiary'' definition included a revenue test, but not a net income test. In 1974, the Commission added a separate net income test. In 1981, the Commission eliminated the revenue test and retained the net income test noting in part that ''. . . the presentation of additional financial disclosures of an affiliated entity may not be meaningful if the affiliate has a high sales volume but a relatively low profit margin'' and observing that in such circumstances, the affiliate has little financial effect on the operating results of the consolidated group. *See Separate Financial Statements Required by Regulation S–X,* Rels. No. 33–6359 (Nov. 6, 1981) [46 FR 56171 (Nov. 16, 1981)].

revenue component, and not the income component, for smaller reporting companies. We continue to believe both components taken together are important indicators in determining the need for financial information about acquired and disposed businesses.

Recurring Annual Revenue

Under the proposed amendments, where either a registrant and its subsidiaries consolidated or the tested subsidiary did not have recurring annual revenue, the new revenue component would not have been available to determine the number of periods for which Rule 3–05 Financial Statements are required. However, we are persuaded by commenters who noted that the term ''recurring annual revenue,'' as proposed, was not sufficiently clear to determine when the revenue component would apply and may have inappropriately suggested that there would be discretion in determining the amount of revenue to be included. The revenue component is unlikely to produce a meaningful assessment where the registrant or the tested subsidiary does not have material revenue over the course of time. We are therefore modifying the Income Test consistent with a comment we received, to provide that the revenue component does not apply if either the registrant and its subsidiaries consolidated or the tested subsidiary did not have material revenue in each of the two most recently completed fiscal years. We believe the amendment will allow registrants to determine more easily whether the revenue component applies, and when it does apply, will clarify that all revenues must be included.

Income Taxes

The Commission proposed to calculate income or loss from continuing operations *after* income taxes, permitting a registrant to use line item disclosure from its financial statements, to simplify the determination. We are persuaded by commenters that using *after* tax information may result in significance determinations that are less consistent and meaningful because they could be distorted due to factors such as the tax status of the entity or the volatility of income taxes. We are therefore not adopting the proposed amendment to calculate income or loss from continuing operations *after* income taxes and are retaining the requirement to use income or loss from continuing operations *before* income taxes.

Income Averaging and Use of Absolute Values

We are adopting amendments, as proposed, to clarify the net income component by inserting references to the absolute value of equity in the tested subsidiary's consolidated income or loss from continuing operations, which we believe will mitigate the potential for misinterpretation that may result from inclusion of a negative amount in the computation. We are also adopting as proposed the use of absolute values for calculating average net income. As noted above, commenters generally supported the improvements to income averaging calculations [79] and the use of absolute values.[80]

Additional Clarifications and Simplifications

We are additionally amending Rules 3–05(b)(3) and 11–01(b)(3) as proposed to clarify that the Income Test may be determined using the acquired business's revenues less the expenses permitted to be omitted by new Rules 3–05(e) and 3–05(f) if the business meets the conditions in those rules, as well as making additional non-substantive amendments to the net income component in order to simplify the description of the test. Specifically, we are replacing, as proposed, the phrase ''exclusive of amounts attributable to any noncontrolling interests'' in the net income component with the phrase ''attributable to the controlling interests.''

We are also revising Rule 1–02(w) to remove the Computational Note designation but retaining the substance of the notes in the rule and making conforming amendments consistent with the amendments to the revised Income Test. Additionally, we are revising Rule 1–02(w)(1)(iii)(B)(*3*) to clarify that the rule is not intended to modify the existing Rule 3–05(a)(3) requirement that acquisitions of a group of related businesses must be treated as if they are a single acquisition. Finally, we are moving the Note to Rule 1–02(w) into the rule itself.

c. Conforming Changes

i. Proposed Amendments

As noted above, several of our rules and forms require disclosure related to ''significant subsidiaries'' or otherwise rely on the significance tests in Rule 1–02(w) to determine the disclosure required.[81] The Commission's proposed amendments to Rule 1–02(w) would update the definition and the tests therein, but would nonetheless result in these tests continuing to apply consistently across these applications. The term ''significant subsidiary'' is also defined in Securities Act Rule 405, Exchange Act Rule 12b–2, and Investment Company Act Rule 8b–2. The Securities Act Rule 405 and Exchange Act Rule 12b–2 definitions historically have been generally consistent with the Rule 1–02(w) definition. Accordingly, the Commission proposed to conform the definitions of ''significant subsidiary'' in Securities Act Rule 405 and Exchange Act Rule 12b–2 to the amended definition in Rule 1–02(w).[82]

ii. Comments

With the exception of equity method investments, commenters did not address the specific proposed conforming changes. Some commenters suggested that the use of aggregate worldwide market value in the proposed Investment Test could introduce a new historical cost versus fair value disparity when evaluating equity method investments under Rules 3–09 and 17 CFR 210.4–08(g) (''4–08(g)'') because the registrant's and its other subsidiaries' ''investments in and advances to'' the investee may not be equivalent to a fair value amount when the investee is not newly acquired.[83] In expressing support for the addition of a revenue component to the Income Test when testing the significance of equity method investees under Rules 3–09 and 4–08(g), one of these commenters

[79] *See* letters from AMG, BDO, and Pfizer. We are not adopting one commenter's recommendation to use a three-year average. The five-year average is a longstanding standard and it is not clear that a three-year average would yield a more meaningful outcome. We also are not adopting the recommendation to extend the use of income averaging when the revenue component applies. Under existing requirements, income averaging is required when its conditions for use are met. However, those conditions also limit its use to mitigating anomalous results. We believe the adoption of a revenue component will mitigate anomalous results more effectively while simplifying the Income Test, and that use of income averaging to mitigate anomalous results should therefore be necessary only when the revenue component does not apply.

[80] *See* letters from AMG, Eli Lilly, IMA, and Pfizer.

[81] *See supra* note 23.

[82] In the Proposing Release, the Commission proposed to exclude from the definition of ''significant subsidiary'' in Securities Act Rule 405 and Exchange Act Rule 12b–2 the proposed amendments to Rule 1–02(w) that would be applicable only to disclosure requirements under Regulation S–X, specifically proposed Rule 1–02(w)(1)(iii)(B)(*3*). Unlike these other rules, the definition of ''significant subsidiary'' in Rule 8b–2 historically has differed from the Rule 1–02(w) definition. As proposed, we also are conforming the Rule 8b–2 definition of ''significant subsidiary'' to the new definition added to Rule 1–02(w)(2) that is specifically tailored for investment companies. *See* Section II.E below.

[83] *See, e.g.,* letters from AMG, DT, and Williams.

suggested several changes to the manner in which the revenue component would be calculated for equity method investees under Rules 3–09 and 4–08(g).[84] Another commenter noted that for equity method investees, whose revenues are not consolidated in the registrant's financial statements, the results of the proposed revenue component of the Income Test may not be meaningful.[85]

iii. Final Amendments

We are adopting the conforming amendments substantially as proposed with certain modifications in response to comments. The amendments are intended to reflect more accurately the relative significance to a registrant of a tested subsidiary and to reduce anomalous results in the application of the definition of ''significant subsidiary.'' As discussed in the Proposing Release, by maintaining the historical conformity between the ''significant subsidiary'' definitions, these amendments will avoid unnecessary regulatory complexity through consistent application of significance determinations made at the acquisition date and those made post-acquisition when the acquired business is a subsidiary of the registrant.[86] In a change from the proposal and in order to simplify and maintain uniformity of the definition throughout our rules, the amendments to Securities Act Rule 405 and Exchange Act Rule 12b–2 will fully conform with the definition in Rule 1–02(w), including Rule 1–02(w)(1)(iii)(B)(*3*).

We are persuaded by commenters that using the registrant's aggregate worldwide market value instead of the registrant's total assets in the Investment Test would have inadvertently introduced a mismatch when evaluating equity method investments under Rules 3–09 and 4–08(g) because the registrant's and its other subsidiaries' ''investments in and advances to'' the investee may not be equivalent to a fair value amount when the investee is not newly acquired. Because a registrant's and its other subsidiaries' ''investments in and advances to'' would not necessarily be equivalent to fair value for purposes other than acquisitions or dispositions, we are also persuaded that the registrant's aggregate worldwide market value should not be used in place of the registrant's total assets for the additional purposes for which the ''significant subsidiary'' definition is used.[87] Accordingly, we are retaining the comparison to the registrant's total assets used in the existing Investment Test for testing significance of equity method investees under Rules 3–09 and 4–08(g), as well as for the additional purposes for which the definition is used.[88]

We are not adopting any modifications to the proposed Income Test in response to comments received related to its application under Rules 3–09 and 4–08(g) to investments accounted for using the equity method. We added the revenue component for acquisitions and dispositions of businesses to mitigate anomalous results produced by the current test based only on net income. We believe the revenue component can serve a similar role related to the application of Rules 3–09 and 4–08(g) to equity method investments.[89] Additionally, using a test based on an amount that is not consolidated is not unprecedented for investments accounted for using the equity method. As the Commission has noted, the Asset Test applies to Rule 4–08(g), even though the total assets of the equity method investee are not consolidated by the registrant.[90] Further, we believe the fact that significance is not determined on the basis of a single test and that Rule 4–08(g) disclosure about equity method investees is required if significance is met either individually or on an aggregated basis by any combination of investees at the 10 percent level will help mitigate any potential adverse effects and help to provide an appropriate level of financial information about equity method investees.[91]

2. Audited Financial Statements for Significant Acquisitions

Depending on the relative significance of the acquired or to be acquired business, Rule 3–05 Financial Statements may be required for up to three years.[92]

a. Proposed Amendments

The Commission proposed to revise Rule 3–05 to require only up to two years of Rule 3–05 Financial Statements. The Commission also proposed to revise Rule 3–05 for acquisitions where a significance test exceeds 20 percent, but none exceeds 40 percent, to require financial statements for the ''most recent'' interim period specified in 17 CFR 210.3–01 and 210.3–02 (''Rules 3–01 and 3–02'') rather than ''any'' interim period. This proposed revision would eliminate the need to provide a comparative interim period when only one year of audited Rule 3–05 Financial Statements is required.

b. Comments

Commenters broadly supported the proposals,[93] with no commenters opposing the changes.

[84] *See* letter from AMG. Specifically, the commenter recommended modifying the denominator of the revenue component to include all of the equity method investee's GAAP revenue such that the revenue component would compare the registrant's ''proportionate share'' of the equity method investee's revenue to the sum of the registrant's GAAP revenue and 100 percent of the equity method investee's GAAP revenue, without which the commenter suggested the proposal would produce incongruous comparisons. The commenter further recommended guidance on how to calculate ''proportionate share'' to address situations where a registrant may receive a share of revenue from an equity method investee that is different from the percentage of equity that the registrant may own and requested that the guidance include some level of discretion to allow registrants to use a method reasonably calculated to reflect the economic benefit the registrant receives relative to the equity method investee's GAAP revenue.

[85] *See* letter from GT.

[86] *See* Proposing Release at Section II.A.1.

[87] *See supra* note 23.

[88] *Id.*

[89] The staff considers this additional factor when exercising its delegated authority under Rule 3–13 when a registrant makes a request to omit Rule 3–09 financial statements on the basis that the current income test produces an anomalous result.

[90] *See Request for Comment on the Effectiveness of Financial Disclosures About Entities Other Than the Registrant,* Release No. 33–9929 (Sept. 25, 2015) [80 FR 59083 (Oct. 1, 2015)] at note 51 (''In 1994, Rule 3–09 was revised to eliminate the asset test; however, the test was retained for Rule 4–08(g) to ensure a minimum level of financial information about an investee when the investment test was small, but a registrant's proportionate interest in the Investee's assets was material, as might be the case for a highly-leveraged Investee. *See Financial Statements of Significant Foreign Equity Investees and Acquired Foreign Businesses of Domestic Issuers and Financial Schedules,* Release No. 33–7118 (Dec. 13, 1994) [59 FR 65632].'').

[91] We are not persuaded to provide additional guidance on determining ''proportionate interest'' for the revenue component. We observe that ''proportionate interest'' is required to determine basis difference under U.S. GAAP or IFRS–IASB, as applicable, as well as the equity in the income of the investee. We believe proportionate interest used for those purposes will inform its use for the revenue component. Similarly, we are not persuaded that the equity method investee's revenue should be added to the registrant's revenue as it is not part of that revenue.

[92] Rule 3–05 Financial Statements are required for the most recent fiscal year and any required interim periods if any of the Rule 3–05 significance tests exceeds 20 percent, but none exceeds 40 percent, a second year is required if any test exceeds 40 percent, but none exceeds 50 percent, and a third year is generally required if any of the tests exceeds 50 percent. Rule 3–05 contains an additional requirement for certain registration statements and proxy statements related to the aggregate effect of individually insignificant businesses, which may trigger a requirement for Rule 3–05 Financial Statements for a business for which none of the significance tests exceeds 20 percent. *See* 17 CFR 210.3–05(b)(2). A smaller reporting company is subject to similar requirements under Rule 8–04 of Regulation S–X, but financial statements are only required for up to two fiscal years.

[93] *See, e.g.,* letters from Ball, Bass Berry, CFA, Cravath, Eli Lilly, FEI, Liberty, National Association of Real Estate Investment Trusts (''NAREIT''),

Continued

c. Final Amendments

We are adopting the amendments as proposed to revise Rule 3–05 to require up to two years of Rule 3–05 Financial Statements. Unlike the historical financial statements of the registrant upon which investors rely to make investment decisions about the registrant, Rule 3–05 Financial Statements are used, along with pro forma financial information, to discern how the acquired business may affect the registrant. Due to their age, the third year of Rule 3–05 Financial Statements is less likely to be indicative of the current financial condition, changes in financial condition, and results of operations of the acquired business. Such financial statements also do not reflect the changes in the acquired business or combined entity that occur post-acquisition or the accounting required by the registrant's comprehensive basis of accounting. Moreover, the requirement to prepare and obtain an audit of the third year of pre-acquisition financial statements can add significant incremental cost and time to the preparation of the disclosure. Such burdens are further exacerbated if a change in the acquired business's management or independent auditor has occurred, which may also delay a registrant's time to market and access to capital.

We are additionally amending Rule 3–05 as proposed for acquisitions where a significance test exceeds 20 percent, but none exceeds 40 percent, to require financial statements for the ''most recent'' interim period specified in Rules 3–01 and 3–02 rather than ''any'' interim period. The revision eliminates the need to provide a comparative interim period when only one year of audited Rule 3–05 Financial Statements is required. In these circumstances, we believe that the most recent interim period provides the most relevant and material information to investors. Requiring a comparative interim period when there is no requirement for a corresponding comparative annual period would have limited utility for investors and imposes an additional burden on registrants to prepare such information.

In adopting these changes, we note that regardless of the number of years presented, if trends depicted in Rule 3–05 Financial Statements are not indicative or are otherwise incomplete, 17 CFR 210.4–01(a) (''Rule 4–01(a)'') requires that a registrant provide ''such further material information as is necessary to make the required statements, in light of the circumstances under which they are made, not misleading.''

3. Financial Statements for Net Assets That Constitute a Business

Registrants frequently acquire a component of an entity that is a business as defined in Rule 11–01(d) but does not constitute a separate entity, subsidiary, or division, such as a product line or a line of business contained in more than one subsidiary of the selling entity. These businesses may not have separate financial statements or maintain separate and distinct accounts necessary to prepare Rule 3–05 Financial Statements because they often represent only a small portion of the selling entity. In these circumstances, making relevant allocations of the selling entity's corporate overhead, interest, and income tax expenses necessary to provide Rule 3–05 Financial Statements may be impracticable and Commission staff has permitted registrants to instead provide audited abbreviated financial statements of the acquired business in the form of statements of assets acquired and liabilities assumed and statements of revenues and expenses.[94]

a. Proposed Amendments

The Commission proposed Rule 3–05(e) to permit registrants to provide audited abbreviated financial statements in the form of statements of assets acquired and liabilities assumed, and statements of revenues and expenses (exclusive of corporate overhead, interest and income tax expenses) if the acquired business met certain qualifying and presentation conditions.[95] More specifically, under proposed Rule 3–05(e), a registrant would be permitted to present audited abbreviated financial statements of an acquired or to be acquired business [96] if:

- The business constitutes less than substantially all of the assets and liabilities of the seller and was not a separate entity, subsidiary, segment, or division during the periods for which the acquired business financial statements would be required;
- Separate financial statements for the business have not previously been prepared; and
- The seller has not maintained the distinct and separate accounts necessary to present financial statements that include the omitted expenses and it is impracticable to prepare such financial statements.

Under proposed Rule 3–05(e), if the acquired or to be acquired business satisfies the above conditions, the audited abbreviated financial statements must also conform to certain presentation conditions, including:

- Interest expense may only be excluded from the statements if the debt to which the interest expense relates will not be assumed by the registrant or its subsidiaries consolidated;
- The statements of revenues and expenses do not omit selling, distribution, marketing, general and administrative, and research and development expenses incurred by or on behalf of the acquired business during the periods to be presented; and
- The notes to the financial statements include certain additional disclosures.[97]

b. Comments

Commenters generally supported permitting abbreviated financial statements,[98] although one commenter recommended that the Commission consider whether abbreviated financial statements satisfy investors' needs when the acquired business is a significant portion of the selling entity.[99] This commenter recommended the Commission provide a threshold on what constitutes ''substantially all'' [100] and questioned whether using a ''small

Nasdaq, Inc. (''Nasdaq''), NYCBA—Sec., S&C, and SIFMA. *See also* SBCFAC Recommendations.

[94] Commission staff has exercised delegated authority pursuant to Rule 3–13 in these circumstances. In addition, Commission staff has provided informal guidance to address practical questions related to these and other financial reporting issues in the Division of Corporation Finance's Financial Reporting Manual (''FRM''), available at *https://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.pdf* (last updated Dec. 1, 2017). The FRM is not a rule, regulation or statement of the Commission and the Commission has neither approved nor disapproved its content. *See* FRM at Section 2065 *Acquisition of Selected Parts of an Entity may Result in Less than Full Financial Statements* (''FRM 2065'').

[95] The proposal did not specifically label the conditions as ''qualifying conditions'' and ''presentation conditions.'' However, we are using these labels, in part, to clarify the requirements and, in part, to simplify the comparison between the final amendments and the proposed amendments.

[96] Neither the proposal nor the rules we are adopting affect the requirements in Rule 3–02 or 17 CFR 210.8–01 relating to predecessors.

[97] Specifically, the additional disclosure would include: The type of omitted expenses and the reasons why they are excluded from the financial statements; information about the business's operating, investing, and financing cash flows, to the extent available; an explanation of the impracticability of preparing financial statements that include the omitted expenses; and a description of how the financial statements presented are not indicative of the financial condition or results of operations of the acquired business going forward because of the omitted expenses.

[98] *See, e.g.,* letters from BDO, CAQ, Cravath, Debevoise & Plimpton LLP (''Debevoise''), DT, Eli Lilly, EY, FEI, GT, IMA, PWC, RSM, and S&C.

[99] *See* letter from GT.

[100] *Id.* GT noted that absent any threshold, there would likely be diversity in how registrants interpret this phrase.

portion of the selling entity'' might be a better standard than ''less than substantially all of the assets and liabilities of the seller.'' [101] Another commenter recommended requiring registrants to indicate how abbreviated financial statement information is integrated into the pro forma financial information and suggested that the Commission clarify what type of auditor assurance would be provided for abbreviated financial statement information.[102]

Some commenters sought additional clarification of the terms, such as defining ''separate entity,'' ''subsidiary,'' ''segment,'' and ''division'' in the context of an acquisition.[103] Other commenters questioned the use of ''impracticable'' recommending further clarification or a reduced standard.[104] One commenter sought clarification on the meaning of ''previously prepared.'' [105] Another commenter requested that the Commission clarify the nature of expenses to be included in the abbreviated financial statements by describing those that may be omitted or those that must be presented, but not both, noting that it is unclear whether the identified expenses are intended to be all-inclusive.[106]

Some commenters sought clarification of when carve-out financial statements of an acquired business would be appropriate.[107] One commenter suggested that in the absence of clarification, the more comprehensive carve-out financial statements may be less commonly used,[108] while another commenter recommended that the Commission codify certain staff practices [109] as they relate to presenting carve-out financial statements.[110]

c. Final Amendments

We are adopting amendments to our rules to permit registrants to provide audited annual and unaudited interim abbreviated financial statements substantially as proposed, with certain modifications described below. Recognizing the difficulty registrants face in obtaining and the cost of preparing Rule 3–05 Financial Statements in these circumstances, we believe permitting abbreviated financial statements coupled with the additional required disclosures appropriately balances the cost of preparing the financial disclosures with the protection of investors.

The following chart compares our proposal to the final rules.

	Proposed	Adopted
Qualifying conditions	The business constitutes less than substantially all of the assets and liabilities of the seller.	The total assets and total revenues (both after intercompany eliminations) of the acquired or to be acquired business constitute 20 percent or less of such corresponding amounts of the seller and its subsidiaries consolidated as of and for the most recently completed fiscal year.
	The business was not a separate entity, subsidiary, segment, or division during the periods for which the acquired business financial statements would be required.	The acquired business was not a separate entity, subsidiary, operating segment (as defined in U.S. GAAP or IFRS–IASB, as applicable), or division during the periods for which the acquired business financial statements would be required.
	Separate financial statements for the business have not previously been prepared.	No substantive change.
	The seller has not maintained the distinct and separate accounts necessary to present financial statements that include the omitted expenses and it is impracticable to prepare such financial statements.	No substantive change.
Presentation requirements ...	The balance sheet may be a statement of assets acquired and liabilities assumed.	No substantive change.
	The statement of comprehensive income may be a statement of revenues and expenses (exclusive of corporate overhead, interest and income tax expenses) if certain presentation requirements are met.	No substantive change. The title of the statement of comprehensive income must be appropriately modified to indicate it omits certain expenses.
	Corporate overhead expenses may be excluded from the statement of comprehensive income provided that the statement does not omit selling, distribution, marketing, general and administrative, and research and development expenses incurred by or on behalf of the acquired business during the periods to be presented.	The statement of comprehensive income must include expenses incurred by or on behalf of the acquired business during the pre-acquisition financial statement periods to be presented including, but not limited to, costs of sales or services, selling, distribution, marketing, general and administrative, depreciation and amortization, and research and development, but may otherwise omit corporate overhead expenses.

[101] *See* letter from GT. This commenter noted that in the Proposing Release the Commission had recognized that there could be challenges in making allocations of the selling entity's corporate overhead, interest, and taxes when the acquired business constitutes only a small portion of the selling entity. However, the commenter stated its view that the language in the proposed rule would allow registrants that acquire a significant portion of the selling entity to present abbreviated financial statements, as long as such business does not meet any of the other conditions outlined in the proposal.

[102] *See* letter from CFA.

[103] *See, e.g.,* letters from CAQ, Crowe, DT, PWC, and RSM.

[104] *See, e.g.,* letters from Debevoise, EY and GT.

[105] *See* letter from GT.

[106] *See* letter from DT. Another commenter recommended that the Commission also permit registrants to exclude any remaining amounts classified as other income or other expense, subject to the same or similar requirements. *See* letter from IMA.

[107] *See* letters from BDO, CAQ, Crowe, DT, EY, GT, PWC, and RSM. Neither our proposal nor the final rule addresses carve-out financial statements. ''Carve-out financial statements'' is a generic term used to describe separate financial statements that are derived from the financial statements of a larger parent company. They are often differentiated from abbreviated financial statements in that reasonable allocations of corporate overhead expenses can be made such that the underlying preparation issues involve the scope of the businesses to be included in the historical financial statements, not whether financial statements can be prepared.

[108] *See* letter from DT.

[109] *See* FRM *supra* note 94 at Section 2065; Staff Accounting Bulletin No. 1.B., *Allocation Of Expenses And Related Disclosure In Financial Statements Of Subsidiaries, Divisions Or Lesser Business Components Of Another Entity.*

[110] *See* letter from GT.

	Proposed	Adopted
	Interest expense may be excluded from the statements if the debt to which the interest expense relates will not be assumed by the registrant or its subsidiaries consolidated.	No substantive change.
	Income tax expense may be omitted	No substantive change.
	The notes to the financial statements include the following additional disclosures:.	No substantive change.
	(i) The type of omitted expenses and the reason(s) why they are excluded from the financial statements;.	
	(ii) An explanation of the impracticability of preparing financial statements that include the omitted expenses;.	
	(iii) A description of how the financial statements presented are not indicative of the financial condition or results of operations of the acquired business going forward because of the omitted expenses; and.	
	(iv) Information about the business's operating, investing and financing cash flows, to the extent available.	

We are persuaded by commenter feedback that a condition focused on whether the acquired business is a small portion of the selling entity would be a more appropriate standard than ''less than substantially all of the assets and liabilities of the seller'' for permitting the use of abbreviated financial statements. A ''small portion of the selling entity'' standard would help ensure that abbreviated financial statements are not used when the component of the selling entity acquired is sufficiently large such that presentation of the seller's financial statements, along with pro forma financial information that removes the portion of the seller not acquired, would best inform investors about the business acquired. We are also persuaded that absent any threshold, there would likely be divergence in how registrants interpret ''small portion of the selling entity.'' [111] Accordingly, we are adopting amendments to replace the proposed ''less than substantially all of the assets and liabilities of the seller'' condition for use of abbreviated financial statements with a condition that ''the total assets and total revenues (both after intercompany eliminations) of the acquired or to be acquired business constitute 20 percent or less of such corresponding amounts of the seller and its subsidiaries consolidated as of and for the most recently completed fiscal year.'' [112] We believe that 20 percent or less is an appropriate level for identifying when the acquired business is a small portion of the selling entity because, at that level, it is reasonable to expect that expenses would not be fully allocated and that comparisons of total assets and total revenues will be sufficient for this purpose.[113] A 20 percent threshold also is generally consistent with the staff's granting of relief pursuant to Rule 3–13 in such situations. In situations where an acquired business exceeds the 20 percent threshold but the registrant nonetheless confronts unique challenges in making the relevant allocations necessary to provide Rule 3–05 Financial Statements, the registrant could continue to seek relief pursuant to Rule 3–13.

Of the various terms recommended by commenters for definition or clarification, we were persuaded that the term ''segment'' should be further refined to clarify that it refers to an ''operating segment (as defined in U.S. GAAP or IFRS–IASB, as applicable)'' rather than, for example, a reportable segment. We note that many of the other terms cited by commenters have long been associated with the historical practice of using abbreviated financial statements and we believe their meanings are generally understood. To the extent registrants have unique circumstances relating to the application of these terms in the context of a transaction, the registrant could seek relief pursuant to Rule 3–13. We are therefore not persuaded that further clarification is necessary in order to implement proposed Rule 3–05(e).

We believe that the qualifying conditions for use of abbreviated financial statements included in the final rule are appropriate to delineate the circumstances for their permitted use and provide an appropriate balance between investor protection and capital access. As noted above, one commenter requested clarity on the expenses to be included in abbreviated financial statements. In response to this comment, we have sought to improve the description of required expenses by:

- Reorganizing the rule text into ''qualifying conditions'' and ''presentation requirements'' and shortening the introductory paragraph; [114]
- Clarifying that the expenses required in the statement of comprehensive income must include expenses incurred by or on behalf of the acquired business during the pre-acquisition financial statement periods to be presented, but may otherwise omit corporate overhead expense, interest expense for debt that will not be assumed by the registrant or its subsidiaries consolidated, and income tax expense; and
- Adding cost of sales or services and depreciation and amortization expense to the list of expenses that must be included in abbreviated financial statements and clarifying that it is an illustrative list.[115]

As previously noted, neither our proposal nor the final rule address ''carve-out financial statements.'' Given that carve-out financial statements are not addressed by this release and because issues relating to carve-out financial statements may require unique judgments that involve the balance between investor protection and capital access, we believe questions relating to carve-out financial statements are best addressed on the basis of their unique facts and circumstances through the staff consultation process.[116]

[111] *See* letter from GT.

[112] *See* amended Rule 3–05(e)(1)(i).

[113] A comparison of pre-tax income will not ordinarily be meaningful because pre-tax income will seldom be readily determinable for acquisitions of this nature.

[114] *See* amended Rule 3–05(e).

[115] The title of the statement of comprehensive income must be appropriately modified to indicate it omits certain expenses.

[116] *See* Rule 3–13, *supra* note 58.

4. Financial Statements of a Business That Includes Oil and Gas Producing Activities

Rule 3–05 applies to acquisitions of a significant business [117] that includes oil and gas producing activities.[118] However, Rule 3–05 does not specify industry-specific disclosures regarding such activities. In the absence of specific requirements, registrants generally provide certain industry-specific disclosures specified in FASB ASC Topic 932 *Extractive Activities—Oil and Gas* (''ASC 932 Disclosures'') [119] on an unaudited basis for each full year of operations presented for the acquired business.

Rule 3–05 also does not specify the form and content of Rule 3–05 Financial Statements when the acquired business generates substantially all of its revenues from oil and gas producing activities. Often, this type of business represents a component of an entity, but does not constitute a separate entity, subsidiary, operating segment (as defined in U.S. GAAP or IFRS–IASB, as applicable), or division for which separate financial statements exist and for which historical depreciation, depletion and amortization expense is likely not meaningful to an understanding of the potential effects of the acquired business on the registrant.[120] In these circumstances when certain criteria are met, Commission staff, pursuant to Rule 3–13 and delegated authority, has permitted registrants to provide abbreviated financial statements that consist of income statements modified to exclude expenses that are not expected to be comparable to future operations.[121]

a. Proposed Amendments

The Commission proposed Rule 3–05(f) to codify the reporting practices for oil and gas producing activities by requiring certain ASC 932 Disclosures on an unaudited basis for each full year of operations presented for the acquired business. In addition, where the oil and gas producing business represents a component of an entity that does not constitute a separate entity, subsidiary, segment, or division for which separate financial statements exist and for which historical depreciation, depletion and amortization expense is likely not meaningful to an understanding of the potential effects of the acquired business on the registrant, the Commission proposed to permit registrants to provide abbreviated financial statements that consist of income statements modified to exclude expenses not comparable to future operations.

b. Comments

One commenter specifically supported the codification of current practices relating to a business that includes oil and gas producing activities as proposed [122] while another commenter supported the proposal generally but suggested removing one of the conditions.[123] No commenters opposed the proposed amendments.

c. Final Amendments

We are adopting the amendments substantially as proposed. Specifically, for a significant acquired business that includes *significant oil- and gas-producing activities* (as defined in the FASB ASC Master Glossary),[124] Rule 3–05 Financial Statements must include certain ASC 932 Disclosures, which may be presented as unaudited supplementary information for each full year of operations presented for the acquired business.[125] Additionally, Rule 3–05 Financial Statements may consist of only audited statements of revenues and expenses that exclude depreciation, depletion and amortization expense, corporate overhead expense, income taxes, and interest expense that are not comparable to the proposed future operations if: (1) Substantially all of the revenues of the business are generated from *oil-and gas-producing activities* (as defined in § 210.4–10(a)(16)), and (2) the qualifying conditions for abbreviated financial statements described in Section II.A.3.c above are met.[126] In these circumstances, the footnote disclosures described in Section II.A.3.c above must also be provided.[127] As discussed in the Proposing Release, we believe that codifying these practices provides clarity for registrants regarding the application of Commission rules in these circumstances, which we believe will facilitate compliance to the benefit of both registrants and investors.[128]

5. Timing and Terminology of Financial Statement Requirements

a. Proposed Amendments

The Commission proposed several revisions to Rule 3–05 and Article 11 to clarify when Rule 3–05 Financial Statements and pro forma financial information are required and to update the language in the rules to take into account concepts that have developed since their original adoption over 30 years ago.

b. Comments

Commenters were generally supportive of the proposed changes.[129] Some commenters sought clarification that the ''applicable independence standards'' in the proposed requirement that financial statements be ''prepared in accordance with this regulation (including the independence standards in § 210.2–01 or, alternatively if the business is not a registrant, the applicable independence standards)'' would be those related to the auditing standards under which the required financial statements of the acquired or to-be-acquired business were audited.[130]

[117] *See* Rule 11–01(d).

[118] *See* the definition of ''oil and gas producing activities'' at 17 CFR 210.4–10(a)(16).

[119] *See* FASB ASC Topic 932 *Extractive Activities—Oil and Gas,* 932–235–50–3 through 50–11 and 932–235–50–29 through 50–36, and FRM *supra* note 94 at Section 2065.12. These supplemental disclosures are a subset of those required in the financial statements of publicly traded companies with significant oil- and gas-producing activities and provide additional context for those financial statements.

[120] Historical depreciation, depletion and amortization expense is frequently not maintained at the property level and does not reflect the acquiring company's basis in the properties.

[121] *See* FRM *supra* note 94 at Section 2065.6, 2065.11, and 2065.12. Permitting registrants in these circumstances to substitute abbreviated income statements that omit expenses not comparable to future operations is consistent with the financial statement requirements specified in Rule 3–14 for acquired real estate operations. Rule 3–14 specifies that Rule 3–14 Financial Statements must omit depreciation expenses not comparable to future operations.

[122] *See* letter from KPMG. KPMG also suggested permitting abbreviated financial statements for businesses that service oil and gas fields (*e.g.,* the acquisition of a midstream facility or storage facility).

[123] *See* letter from Cravath. Cravath recommended removing the condition that the business ''was not a separate entity, subsidiary, segment, or division.''

[124] We are adopting this definition of *significant oil- and gas-producing activities* to be consistent with current practice. Accordingly, the FASB's threshold for determining when ASC 932 Disclosures of unaudited supplemental information is required will be applied in determining specified disclosures in ASC 932–235–50 for purposes of Rule 3–05 Financial Statements, even if the acquired business is not a publicly-traded company.

[125] *See* ASC 932–235–50–3 through 50–11 and ASC 932–235–50–29 through 50–36.

[126] We were not persuaded by the commenter suggesting the condition that the business ''was not a separate entity, subsidiary, segment, or division'' should be removed. We believe this condition can be indicative of circumstances where reasonable allocations necessary to prepare financial statements can be made.

[127] The amendments revise proposed Rule 3–05(f) to simplify its text and to reference the applicable qualifying and presentation conditions of amended Rule 3–05(e).

[128] *See* Section II.A.4 of the Proposing Release.

[129] *See, e.g.,* letters from Cravath and Eli Lily.

[130] *See* letters from CAQ, Crowe, and RSM. *See also* letters from KPMG (recommending ''independence standards would be those applicable under the auditing standards used to perform the audit of the acquired or to be acquired business'') and Deloitte (recommending

Continued

One commenter further recommended clarifying whether the reference to ''filed'' in the phrase in proposed Rule 11–01(b)(3) ''most recent annual consolidated financial statements filed at or prior to the date of acquisition or disposition'' is the same as ''required to be filed'' and how the phrase ''most recent annual financial statements of each such business'' applies to nonpublic acquired or to-be-acquired businesses.[131] Another commenter recommended that the timing of the pro forma financial information be accelerated to a date closer to when the deal is announced to the public.[132] Another commenter recommended that the ''significant subsidiary'' definition should explicitly state that the amounts used for testing should be derived from ''consolidated'' financial statements of the tested subsidiary and of the registrant.[133]

c. Final Amendments

We are adopting the amendments substantially as proposed with some additional changes reflecting the suggestions of commenters and our further consideration of the proposals. Specifically, we are amending Rule 3–05 and Article 11, as proposed, to:

- Specify that financial statements are required if a business acquisition has occurred during the most recent fiscal year or subsequent interim period for which a balance sheet is required by 17 CFR 210.3–01 of Regulation S–X (''Rule 3–01''), or if a business acquisition has occurred or is probable after the date that the most recent balance sheet has been filed; [134] and
- Provide in Rules 3–05(b)(3) and 11–01(b)(3)(i)(C) that a registrant may continue to determine significance using amounts reported in its Form 10–K for the most recent fiscal year when the registrant has filed its Form 10–K after the acquisition consummation date, but before the date the registrant is required to file financial statements of the acquired business on Form 8–K.[135]

We additionally are updating the terminology and language used by revising Rule 3–05 and Article 11, as proposed, to:

- Clarify that ''financial statements'' need not include related schedules specified in 17 CFR 210.12 (''Article 12''); [136]
- Clarify that a ''business'' that is a real estate operation is subject to Rule 3–14 instead of Rule 3–05;
- Clarify in Rule 3–05(a)(2)(ii) that Rule 3–05 applies when the fair value option is used in lieu of the equity method to account for an acquisition because the disclosure required by U.S. GAAP on a post-acquisition basis, and related disclosure provided pursuant to Rules 3–09 and 4–08(g), includes summarized financial information or separate financial statements of the business after the acquisition;
- Replace the term ''furnish'' with ''file'' to make clear that the information required by Rule 3–05 and Article 11 must be filed with the Commission; [137]
- Clarify that references to ''Regulation S–X'' in Rule 3–05, Rule 3–14, and Rule 6–11 include the independence standards in 17 CFR 210.2–01 (''Rule 2–01'') unless the business is not a registrant, in which case the applicable independence standards would apply;
- Replace references to the terms ''business combination'' and ''combination between entities under common control'' with the term ''business acquisition'' to make clear that Rule 3–05 and Article 11 are not limited to ''business combinations'' as that term is used in U.S. GAAP and IFRS–IASB; [138] and
- Replace the term ''majority-owned'' with the term ''subsidiaries consolidated,'' as that term more accurately conveys which subsidiaries are required to be included in the registrant's financial statements.[139]

Finally, we are adopting the following clarifying amendments, as proposed, to Rules 1–02(w), 3–05, Form 8–K and Article 11 to:

- Replace the reference to ''total assets'' of the tested subsidiary in the Asset Test with the tested subsidiary's ''consolidated total assets'' as that term conveys more accurately the amount to be used in the Asset Test; [140]
- Replace the term ''shall'' with clearer language, such as by indicating when a registrant ''must'' file or disclose certain information;
- Revise proposed Rule 11–01(b)(3) to:
  - Simplify its organization;
  - Clarify that it does not apply to the continuous real estate offerings described in new Rule 11–01(b)(4); [141]
  - Replace the reference to ''filed'' with ''required to be filed'' to more clearly reflect existing practice; [142]
  - Remove the reference to related real estate operations for combined pre-acquisition financial statements; [143] and
  - Clarify what financial statements of a nonpublic acquired or to-be-acquired business must be used in the significance determination; [144]

clarification as to whether ''applicable independence standards'' refers to any independence standards other than those described in either Article 2, *Qualifications and Reports of Accountants,* or the independence standards of the AICPA).

[131] *See* letter from Deloitte.

[132] *See* letter from CFA (recommending four business days after the occurrence of the event with the ability to extend the deadline to a maximum of 30 days in order to balance the compliance burden with the imperative of timely disclosure to the market). Item 9.01 of Form 8–K currently permits up to approximately 75 days after consummation of an acquisition.

[133] *See* letter from Eli Lily.

[134] We are amending Rule 3–05(a)(1) to clarify when financial statements are required and to conform the language in those requirements with the current requirements in Rule 11–01(a). Additionally, in conforming Rule 3–05(a)(1) with Rule 11–01(a), the explanation that the acquisition of a business encompasses the acquisition of an interest in a business accounted for by the equity method was moved from Rule 3–05(a)(1)(i) to Rule 3–05(a)(2)(ii).

[135] Pursuant to Rule 3–13, registrants have been permitted to omit Rule 3–05 Financial Statements if an acquired business is not significant using these amounts. We are establishing by rule that registrants are permitted, rather than required, to use the Form 10–K filed after consummation to measure significance in this circumstance to avoid creating an incentive for registrants to delay the filing of their Form 10–K.

[136] Item 9.01(a)(2) of Form 8–K already provides that supporting schedules of financial statements need not be filed and the staff further applies this approach to acquired business financial statements required in registration statements and proxy statements. *See* FRM *supra* note 94 at Section 2005.2.

[137] Throughout Rule 3–05 and Article 11, the regulatory text indicates that financial statements ''shall be furnished.'' *See* Rule 3–05(a)(1), (b)(1), (b)(2)(i), (ii), (iii), and (iv), and (b)(4)(ii) and (iii), Rule 11–01(a) and Instruction 2 to Rule 11–02(b). At the time the Commission adopted Rule 3–05, the Commission made no distinction between ''furnished'' and ''filed.'' *See* Rule 3–05 Adopting Release.

[138] We similarly are adopting a conforming amendment to the Instruction to Item 9.01 of Form 8–K.

[139] Rule 3–05 uses the term ''subsidiaries consolidated'' to conform to the term used elsewhere in Regulation S–X. *See, e.g.,* Rule 1–02(w), Rule 3–01, and Rule 3–02. We additionally are replacing the term in Item 2.01 of Form 8–K.

[140] Consistent with a comment we received, we are adopting this change to clarify that all amounts used in the significant subsidiary tests that are derived from financial statements of the tested subsidiary and the registrant should be based on consolidated amounts. *See supra* note 133. The Investment Test and Income Test, as proposed, already specified the requirement to use consolidated amounts.

[141] *See* Section II.C.6. Proposed Rule 3–14(b)(2)(iii) was relocated and relabeled as Rule 11–01(b)(4).

[142] Use of ''required to be filed'' would also clarify that the 15-day extension provided by Form 12b–25 does not serve to revert the significance determination to an earlier year during the 15-day extension.

[143] The reference to related real estate operations is not necessary in this context because only a modified Investment Test is required for significance testing of these acquisitions.

[144] The amended rules replace the phrase ''most recent annual financial statements of each such business'' with ''the business's pre-acquisition or pre-disposition financial statements for the same fiscal year as the registrant or, if the fiscal years differ, the business's most recent fiscal year that would be required if the business had the same filer status as the registrant.''

• Revise Instruction 4 to Item 2.01 of Form 8–K to include the same clarification of the scope of Rule 3–05 with regards to interests in businesses that will be accounted for under the equity method or, in lieu of the equity method, the fair value option; [145] and

• Conform technical terminology inconsistencies throughout the rules.[146]

We are not adopting modifications to clarify, as requested by commenters, the ''applicable independence standards'' in the proposed requirement that financial statements be ''prepared in accordance with this regulation (including the independence standards in § 210.2–01 or, alternatively if the business is not a registrant, the applicable independence standards)'' because the independence standards applicable for a particular audit are not necessarily linked to the auditing standards used for such an audit. For example, for purposes of auditing non-issuer Rule 3–05 or Rule 3–14 Financial Statements, an auditor may follow AICPA auditing and independence standards but also may elect to perform the audit under PCAOB auditing standards. Our amendments are not intended to change practice by referring to ''applicable independence standards,'' but rather to acknowledge that for an acquired or to be acquired business that is a non-issuer, an auditor is not required to follow the independence standards in Rule 2–01 for purposes of auditing Rule 3–05 and Rule 3–14 Financial Statements. As a result, if the acquired or to be acquired business is not an issuer, the auditor should look to the applicable ethics and independence standards that would apply in issuing the audit report for such business in satisfying the audit requirement for purposes of the Rule 3–05 and Rule 3–14 Financial Statements.

We are also not adopting requirements to accelerate the timing of providing pro forma financial information, as one commenter suggested. For acquisitions, pro forma financial information is based on the audited financial statements of the acquired business for periods prior to the acquisition of the business by the registrant. In these circumstances, our requirements provide additional time for registrants to obtain acquired business pre-acquisition historical financial statements, which we believe should also continue to extend to pro forma financial information.[147]

6. Foreign Businesses

Regulation S–X permits the use of IFRS–IASB without reconciliation to U.S. GAAP in financial statements of foreign private issuers.[148] Rule 3–05 similarly permits the use of IFRS–IASB in financial statements of foreign businesses. However, if Rule 3–05 Financial Statements of a foreign business are prepared on a basis of accounting other than U.S. GAAP or IFRS–IASB, such as home-country GAAP, the Rule 3–05 Financial Statements are required to be reconciled to U.S. GAAP even if the registrant is a foreign private issuer that prepares its financial statements in accordance with IFRS–IASB.[149]

Further, while the definitions of ''foreign private issuer'' [150] and ''foreign business'' [151] have similarities, they have different ownership requirements such that a business could qualify to be a ''foreign private issuer'' if it were a registrant, but not qualify to be a ''foreign business'' when it is acquired by a registrant. In this circumstance, a registrant acquiring such a business is not permitted to present Rule 3–05 Financial Statements of the acquired business prepared in accordance with IFRS–IASB, even when those financial statements are already available and even though the acquired business could present IFRS–IASB financial statements if it were a registrant. Instead, the Rule 3–05 Financial Statements must be prepared in accordance with U.S. GAAP.[152]

a. Proposed Amendments

The Commission proposed to permit Rule 3–05 Financial Statements for an acquired foreign business prepared using home country GAAP to be reconciled to IFRS–IASB rather than U.S. GAAP if the registrant is a foreign private issuer that prepares its financial statements using IFRS–IASB. The Commission also proposed to permit Rule 3–05 Financial Statements to be prepared in accordance with IFRS–IASB without reconciliation to U.S. GAAP if the acquired business would be a foreign private issuer if it were a registrant.

b. Comments

Commenters generally supported the proposal,[153] with some recommending providing additional relief by allowing reconciliation to IFRS–IASB rather than U.S. GAAP for a business that prepares its financial statements using home-country GAAP and does not meet the definition of a foreign business but that would be a foreign private issuer if it were a registrant.[154] One commenter additionally suggested that the Commission provide guidance on the applicability of IFRS 1, *First-time Adoption of IFRS,*[155] and accommodations under Form 20–F when reconciling to IFRS–IASB.[156]

[145] Item 2.01 of Form 8–K does not explicitly clarify the treatment of interests in businesses that will be accounted for under the equity method or, in lieu of the equity method, the fair value option. However, the determination of whether an acquisition involves a business is consistent between Item 2.01 of Form 8–K and Rule 3–05, because both Instruction 4 to Item 2.01 of Form 8–K and Rule 3–05(a)(2)(ii) refer to the same definition of a business in Rule 11–01(d), and the requirements of Item 2.01 of Form 8–K are linked to the requirements of Rule 3–05 through Item 9.01 of Form 8–K. This amendment conforms Item 2.01 of Form 8–K to include the additional clarification from Rule 3–05.

[146] For example, proposed Rule 3–05(c) has been amended to include a reference to the definition of a foreign business in Rule 1–02(l) to be consistent with proposed Rule 3–05(d) which already included the reference.

[147] *See, e.g.,* Item 9.01 of Form 8–K.

[148] *See* 17 CFR 210.4–01.

[149] *See* Item 17 of Form 20–F and *Financial Statements of Significant Foreign Equity Investees and Acquired Foreign Businesses of Domestic Issuers and Financial Schedules,* Release No. 33–7118 (Dec. 13, 1994) [59 FR 65632 (Dec. 20, 1994)] (''1994 Acquired Foreign Business Release'').

[150] *See* Securities Act Rule 405. The term ''foreign private issuer'' means any foreign issuer, other than a foreign government, that does not meet the following criteria as of the last business day of its most recently completed second fiscal quarter: (i) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and (ii) Any of the following: (a) The majority of the executive officers or directors are United States citizens or residents; (b) More than 50 percent of the assets of the issuer are located in the United States; or (c) The business of the issuer is administered principally in the United States.

[151] *See* 17 CFR 210.1–02(l). The term ''foreign business'' means a business that is majority owned by persons who are not citizens or residents of the United States and is not organized under the laws of the United States or any state thereof, and either: (1) More than 50 percent of its assets are located outside the United States; or (2) The majority of its executive officers and directors are not United States citizens or residents.

[152] Alternatively, the Rule 3–05 Financial Statements may be prepared in accordance with a basis of accounting other than U.S. GAAP provided a reconciliation to U.S. GAAP under Item 18 of Form 20–F is included. *See* 1994 Acquired Foreign Business Release.

[153] *See, e.g.,* letters from Chris Barnard (''Barnard''), Cravath, DT, NAREIT, Nasdaq, and PWC.

[154] *See, e.g.,* letters from BDO, CAQ, DT, EY, KPMG, and RSM. Some of these commenters recommended simplifying the rules by expanding proposed Rule 3–05(c) and eliminating proposed Rule 3–05(d). *See, e.g.,* letters from CAQ, EY, KPMG, and RSM.

[155] IFRS 1 provides recognition, measurement, and disclosure requirements, as well as certain transitional exceptions, for entities that present IFRS–IASB financial statements for the first time.

[156] *See* letter from DT. DT indicated that certain accommodations offered under Form 20–F, Item 17, such as to not remove the effects of inflation accounting pursuant to Item 17(c)(2)(iv)(2) when the conditions of IAS 29, *Reporting in Hyperinflationary Economies,* are not met, or to not reconcile the effects of proportionate consolidation for investments in joint ventures pursuant to Item 17(c)(2)(vii), may be inconsistent with IFRS- IASB requirements.

Irrespective of the GAAP being applied or reconciled to, some commenters recommended that the Commission consider permitting required audit reports on the financial statements of acquired foreign businesses to be prepared in accordance with International Standards on Auditing (''ISAs'') issued by the International Auditing and Assurance Standards Board.[157]

c. Final Amendments

We are adopting the amendments substantially as proposed, but with some modifications after consideration of the comments received. We are amending the rules in order to increase the consistency between the basis of accounting used by acquired businesses and foreign private issuers, as well as to permit acquired businesses and registrants to avoid unnecessary costs, such as one-time presentations of the U.S. GAAP reconciling information where such information would not be material to investors.

Specifically, we are adopting the proposed amendments to Rule 3–05(c) to permit foreign private issuers that prepare their financial statements using IFRS–IASB to reconcile Rule 3–05 Financial Statements of foreign businesses prepared using home country GAAP to IFRS–IASB rather than U.S. GAAP because this will provide more comparable information and better facilitate analysis of the financial statements. The reconciliation to IFRS–IASB is required generally to follow the form and content requirements in Item 17(c) of Form 20–F.

Additionally, we are adopting, as proposed, Rule 3–05(d) to permit Rule 3–05 Financial Statements to be prepared in accordance with IFRS–IASB without reconciliation to U.S. GAAP [158] if the acquired business would qualify as a foreign private issuer if it were a registrant. As discussed in the Proposing Release, we believe financial statements prepared in accordance with IFRS–IASB provide sufficient information for investors for this purpose.[159] In circumstances where the registrant presents its financial statements in U.S. GAAP, the pro forma financial information reflecting the acquisition will continue to be required to be presented in U.S. GAAP.

After considering comments received on the proposals, we are modifying the proposed amendments to additionally permit an acquired business that would qualify as a foreign private issuer if it were a registrant to reconcile to IFRS–IASB rather than U.S. GAAP when the registrant is a foreign private issuer that uses IFRS–IASB. We agree with commenters that reconciliation to IFRS–IASB will provide more comparable information and better facilitate analysis of the financial statements in this circumstance as well.

In response to comments, we are adopting two additional modifications to the proposed amendments to clarify that:

- IFRS 1, *First-time Adoption of IFRS,* will be applicable when reconciling to IFRS–IASB; and
- Form 20–F accommodations that are inconsistent with IFRS–IASB will not be available when reconciling to IFRS–IASB.

We believe it is appropriate to specify that IFRS 1 will be applicable when reconciling Rule 3–05 Financial Statements to IFRS–IASB, because a business that is reconciling to IFRS–IASB for the first time will face many of the same challenges in determining the relevant financial statement amounts as it would if it were directly presenting its financial statements under IFRS–IASB for the first time. Similarly, we believe it is appropriate to specify that Form 20–F accommodations that are inconsistent with IFRS–IASB will not be available when reconciling to IFRS–IASB. These accommodations, such as to not remove the effects of inflation accounting when the conditions of IAS 29 are not met or to not reconcile the effects of proportionate consolidation in joint ventures,[160] were adopted in the context of reconciling to U.S. GAAP rather than IFRS–IASB. They were also adopted when the range of accounting practices around the world was wider than it is today and before IFRS–IASB was established in its current form. We believe that use of accommodations that are inconsistent with IFRS–IASB would not result in sufficient information for investors in this context.

We are not combining proposed Rule 3–05(c) and 3–05(d) as suggested by some commenters. Rule 3–05(c) addresses the financial statement requirements for an acquired business that meets the definition of a foreign business. Rule 3–05(d) addresses the financial statement requirements for an acquired business that does not meet the definition of a foreign business but that would be a foreign private issuer if it were a registrant. We believe that separate paragraphs will permit registrants to more easily determine which requirements apply to their acquired businesses. Separate paragraphs will also help to clarify that foreign businesses under Rule 3–05(c) may apply the other applicable accommodations in Form 20–F while the businesses that fall under Rule 3–05(d) cannot.[161]

Finally, we are not adopting revisions to accept ISAs in audit reports on Rule 3–05 Financial Statements of foreign businesses as suggested by some commenters. Use of ISAs in Commission filings would involve broader considerations than Rule 3–05 Financial Statements, potentially including the appropriateness of their use for audits of foreign private issuer financial statements. We believe such an approach would require a thorough evaluation of the appropriateness of the use of ISAs and is beyond the scope of these amendments.

7. Smaller Reporting Companies and Issuers Relying on Regulation A

Rule 8–04 provides smaller reporting company disclosure requirements for the financial statements of businesses acquired or to be acquired. Part F/S of Form 1–A (''Part F/S'') [162] directs an issuer relying on 17 CFR 230.251 through 230.263 [163] to present financial statements of businesses acquired or to be acquired,[164] as specified by Rule 8–04, but permits the periods presented to be the shorter of those applicable to issuers relying on Regulation A and the periods specified by Article 8.[165]

a. Proposed Amendments

The Commission proposed to revise Rule 8–04 to reference to Rule 3–05 for the requirements relating to the financial statements of businesses acquired or to be acquired, other than for form and content requirements for such financial statements, which would continue to be prepared in accordance with 17 CFR 210.8–02 (''Rule 8–02'') and Rule 8–03.[166]

[157] *See* letters from Barnard, BDO, KPMG, and PWC.

[158] Under the rule, acquired foreign business financial statements may use IFRS–IASB without reconciliation to U.S. GAAP, even when the registrant prepares its financial statement using U.S. GAAP.

[159] See Section II.A.6.a. of the Proposing Release.

[160] *See supra* note 156.

[161] For example, foreign businesses under Rule 3–05(c) may apply the age of financial statement requirements in Item 8 of Form 20–F, and may apply the accommodation in Item 17(c)(2)(v) of Form 20–F that allows them to not reconcile their financial statements to U.S. GAAP if the significance of the foreign business is below 30 percent.

[162] 17 CFR 239.90.

[163] Regulation A—Conditional Small Issues Exemption (''Regulation A'').

[164] *See* paragraph (b)(7)(iii) of Part F/S of Form 1–A.

[165] *See* paragraph (b)(7) of Part F/S of Form 1–A.

[166] Rule 3–05(b)(1) currently requires financial statements specified in Rule 3–01 and 3–02 for the

Additionally, because Part F/S of Form 1–A refers to Rule 8–04, the proposed revisions to Rule 8–04 would apply to issuers relying on Regulation A. As a result, under the proposed amendments, smaller reporting companies would continue to be required to provide up to two years of acquired business historical financial statements and issuers relying on Regulation A would continue to be permitted to present the shorter of the periods applicable under Regulation A and the periods specified by Article 8.[167]

b. Comments

A few commenters provided comments specifically related to smaller reporting companies and smaller issuers.[168] One commenter expressly supported the proposal to conform the rules applicable to smaller reporting companies to the generally applicable rules.[169] Other commenters offered specific recommendations relating to smaller registrants [170] or generally suggested the Commission consider whether issuers relying on Regulation A warrant different treatment.[171]

c. Final Amendments

We are adopting the amendments substantially as proposed. We are revising Rule 8–04 to reference to Rule 3–05 for the requirements relating to the financial statements of businesses acquired or to be acquired, other than for form and content requirements for such financial statements, which would continue to be prepared in accordance with Rules 8–02 and 8–03. These revisions should ease compliance burdens and clarify the application of our rules for smaller reporting companies and issuers relying on Regulation A by focusing them on the more complete and better understood provisions of Rule 3–05. They will also expressly permit smaller reporting companies and issuers relying on Regulation A to omit historical acquired business financial statements if the acquired business has been included in the registrant's results for either nine months or a complete fiscal year, depending on significance.

We are also revising Rule 8–01 as proposed, to add a paragraph expressly permitting application of Rule 3–06 to the preparation of financial statements of smaller reporting companies and issuers relying on Regulation A [172] and to amend the instruction in Item 9.01 of Form 8–K to include references to Rule 8–04 in order to conform the instruction to the text of Item 9.01, which already addresses the rules applicable to smaller reporting companies.

We considered whether issuers relying on Regulation A should be treated differently or whether smaller registrants should be subject to further differentiated requirements, such as only complying with the revenue component of the Income Test, as one commenter suggested. We determined not to further differentiate disclosure for issuers relying on Regulation A and smaller reporting companies because we think the rules as adopted result in important investor information that we do not believe should be further reduced or modified.[173] We believe that existing accommodations should offset some of the burden associated with the disclosures that would be required by the rules. For example, Rule 8–01(b) provides, with limited exceptions, that smaller reporting companies electing to prepare their financial statements with the form and content required by Article 8 need not apply the other form and content requirements in Regulation S–X, and Form 1–A Part F/S provides that, in certain circumstances, financial statements of businesses acquired or to be acquired may be unaudited, may be for shorter periods than provided in Rule 8–04, and need not be updated if the most recent annual or interim balance sheet is not older than nine months. Further, as discussed below, the final rules contain a number of provisions that, while applicable to issuers of all sizes, should help ease the burden of providing the required financial information for smaller reporting companies and issuers relying on Regulation A.[174]

As revised, Rule 8–04 continues to require up to two years of acquired business historical financial statements. Additionally, and in accordance with current practice, the revised rule expressly permits smaller reporting companies to omit such financial statements if the acquired business has been included in the registrant's results for a complete fiscal year.[175] We are also adding references to Rule 8–04 in Rule 3–06 and to Rule 3–06 in Article 8, as proposed, to expressly permit smaller reporting companies to file audited financial statements covering a period of nine to 12 months to satisfy the requirement for filing financial statements for a period of one year for an acquired business.

The amendments also provide that a smaller reporting company is eligible to exclude acquired business financial statements from a registration statement if the business acquisition was consummated no more than 74 days prior to the date of the relevant final prospectus or prospectus supplement, rather than 74 days prior to the effective date of the registration statement as under current Rule 8–04(c)(4).[176] We believe it is appropriate to consistently look to the date of the final prospectus or prospectus supplement for registrants,[177] as Rule 3–05 currently

business to be acquired. Similarly, Rule 3–05(b)(2) also references Rule 3–01 and 3–02. Under the proposal, smaller reporting companies would apply Rule 3–05 but would substitute Rule 8–02 and Rule 8–03, as applicable, wherever Rule 3–05 references Rule 3–01 and 3–02. In this way, the proposal was intended to apply the election permitted for smaller reporting companies to prepare their financial statements in accordance with the form and content requirements in Article 8 rather than the other form and content requirements specified elsewhere in Regulation S–X (subject to the exceptions noted in Rule 8–01 Preliminary Note 2 to Article 8) to businesses acquired by smaller reporting companies.

[167] Additionally, the proposed revisions would have expressly permitted smaller reporting companies and issuers relying on Regulation A to omit such financial statements if the acquired business has been included in the registrant's results for a complete fiscal year. *See* further discussion of omission of Rule 3–05 Financial Statements in Section II.B.1 above. We also proposed to add references to Rule 8–04 in Rule 3–06 and to Rule 3–06 in Note 6 to Article 8 to expressly permit smaller reporting companies and issuers relying on Regulation A to file financial statements covering a period of nine to 12 months to satisfy the requirement for filing financial statements for a period of one year for an acquired business.

[168] *See, e.g.,* letters from BDO, EY, MTBC, and RSM. *See also* SBCFAC Recommendations.

[169] *See* letter from BDO.

[170] *See* letter from MTBC (recommending that smaller registrants only apply the revenue component of the Income Test).

[171] *See* SBCFAC Recommendations (recommending that the Commission continue to look at ''Regulation A companies and whether they warrant different treatment under these rules'').

[172] In addition, we are revising Rule 8–01 to remove the reference to the instruction relating to pro forma presentation requirements. *See* Section II.D.3. In a non-substantive change from our proposal, we are also renaming Rule 8–01 ''General Requirements for Article 8'' and re-designating Notes 1 through 5 of Rule 8–01 as paragraphs (a) through (e).

[173] For example, we believe it is important that smaller reporting companies and issuers relying on Regulation A be required to provide pro forma financial information when consummation of other transactions has occurred or is probable for which disclosure of pro forma financial information would be material to investors. *See Section* II.D.3. We also note that significance tests are not one-size-fits-all tests, but instead contemplate the unique facts and circumstances of a registrant or issuer because they measure significance of the acquired or disposed business relative to the registrant or issuer.

[174] For example, we believe the significance tests we are adopting will provide more meaningful indicators of significance and mitigate anomalous significance results.

[175] *See* further discussion of omission of Rule 3–05 Financial Statements in Section B.1. above.

[176] *See* proposed Rule 3–05(b)(4)(i)(B).

[177] *See* 1996 Streamlining Release *supra* note 24 (noting that the date of an offering is specified as

Continued

does, because that date could be later than the effective date, particularly in the case of a delayed offering, which some smaller reporting companies are now permitted to conduct.[178] We are also making conforming changes to Rule 8–05 for smaller reporting companies to be consistent with the changes we are making to Article 11.[179]

B. Amendments Relating to Rule 3–05 Financial Statements Included in Registration Statements and Proxy Statements

1. Omission of Rule 3–05 Financial Statements for Businesses That Have Been Included in the Registrant's Financial Statements

Rule 3–05(b)(4)(iii) generally permits Rule 3–05 Financial Statements to be omitted once the operating results of the acquired business have been reflected in the audited consolidated financial statements of the registrant for a complete fiscal year. However, Rule 3–05 Financial Statements are required to be included when they have not been previously filed, or when the Rule 3–05 Financial Statements have been previously filed but the acquired business is of major significance to the registrant.

If Rule 3–05 Financial Statements have not been previously filed, they must be provided even if the acquired business is included in post-acquisition audited results. The staff has historically not objected, however, to registrants reducing the Rule 3–05 Financial Statement periods presented by the equivalent period that the acquired business is included in the registrant's post-acquisition audited results.[180]

Registrants must also continue to present Rule 3–05 Financial Statements that have been previously filed if the acquired business is of such significance to the registrant that omission of those Rule 3–05 Financial Statements would materially impair an investor's ability to understand the historical financial results of the registrant. Rule 3–05 provides, as an example, that an acquired business meeting at least one of the significance tests set forth in Rule 1–02(w) at the 80 percent level at the date of the acquisition would require the registrant to continue to file the financial statements of the acquired business. Notwithstanding the rule's reference to materiality, in practice the rule is typically applied, consistent with this example, on the basis of quantitative significance determinations.[181]

a. Proposed Amendments

The Commission proposed to no longer require Rule 3–05 Financial Statements in registration statements and proxy statements once the acquired business is reflected in filed post-acquisition registrant financial statements for a complete fiscal year. The Commission also proposed to eliminate the ''major significance'' exception.

b. Comments

Commenters generally supported the proposed amendments.[182] One commenter, however, encouraged the Commission to seek additional input and consider whether the proposed amendments would provide investors with sufficient information and whether additional financial statements may be necessary above a certain significance threshold.[183]

A number of commenters recommended permitting registrants to exclude separate financial statements once the acquired business has been included in the post-acquisition audited financial statements for at least nine months.[184] Commenters analogized to the Rule 3–06 requirements, noting that Rule 3–06 only requires nine months of pre-acquisition audited financial statements for an acquisition that exceeds 20 percent, but does not exceed 40 percent, significance.[185] In expressing support for using nine months, one of these commenters noted that the Commission could consider a requirement to disclose any material information impacting any pre-acquisition period that would otherwise be required absent the use of Rule 3–06 to supplement required financial statements.[186]

c. Final Amendments

We are adopting revisions substantially as proposed with some modifications in response to comments received. Specifically, we are adopting the proposed elimination of the requirement to include Rule 3–05 Financial Statements in registration statements and proxy statements once the acquired business is reflected in filed post-acquisition registrant financial statements. However, in response to comments, we are modifying the requisite time period.

We are persuaded by commenters that our proposal unnecessarily perpetuates existing differences in the length of reporting periods that exist between Rule 3–05 and Rule 3–06 for an acquisition that is at least 20 percent, but not more than 40 percent, significant. One condition in Rule 3–05 for omitting Rule 3–05 Financial Statements is that the acquired business has been included in the registrant's post-acquisition results for a complete fiscal year. However, Rule 3–06 permits the filing of Rule 3–05 Financial Statements covering a period of nine months to satisfy the Rule 3–05 requirement for filing financial statements for a period of one year. While these reporting periods relate to different circumstances, omission under Rule 3–05 as compared to inclusion

the date of the final prospectus or prospectus supplement relating to the offering).

[178] *See* General Instruction I.B.6 of Form S–3 and *Amendments to Smaller Reporting Company Definition*, Release No. 33–10513 (June 28, 2018) [83 FR 31992 (July 10, 2018)].

[179] *See* Section II.D.3 below.

[180] The staff's position has been limited to circumstances where there is no gap between the latest date of the pre-acquisition audited financial statements of the acquired business and the earliest date of the registrant's audited post-acquisition results. *See* FRM *supra* note 94 at Section 2030.4 ''Initial Registration Statements—Using Pre-Acquisition and Post-Acquisition Audited Results.''

[181] *See, e.g.,* FRM *supra* note 94 at Section 2040.2 '' 'Major Significance' and Previously Filed Acquiree Financial Statements.''

[182] *See, e.g.,* letters from Bass Berry, BDO, CAQ, Cravath, DT, Eli Lilly, FEI, KPMG, Pillsbury Winthrop Shaw Pittman, LLP, PWC, and Nasdaq.

[183] *See* letter from GT. This commenter cited an example where an initial public offering registrant consummates a very large acquisition in the year prior to the most recently completed fiscal year for which financial statements are being provided for the registrant. The commenter noted that while the registrant would be required to provide its historical financial statements for two years, the acquired business's financial statements would be limited to the period for which it is included in the registrant's post-acquisition results. The commenter further observed that, in its experience, disclosure pursuant to Regulation S–K, Item 303, *Management's discussion and analysis of financial condition and results of operations,* may not clearly isolate the effects of the acquisition on results of operations. The commenter suggested as an example that the Commission could consider requiring an initial public offering registrant to provide financial statements for the same number of periods as required in subsequent Securities Act and Exchange Act filings or for the same number of periods as the 50 percent threshold would require, prior to proceeding with a securities offering.

[184] *See, e.g.,* letters from BDO, CAQ, Crowe, DT, EY, GT, KPMG, PWC, and RSM.

[185] *See, e.g.,* letters from BDO and DT. One of these commenters further noted that staff practice as documented in FRM 2040.2 generally permits omission of previously filed acquired business financial information once it is included in the registrant's post-acquisition results for nine months. *See* letter from DT. The other commenter recommended allowing omission of pre-acquisition financial statements for businesses that exceed 20 percent, but do not exceed 40 percent, significance once they are included in the registrant's audited post-acquisition results for nine months and for businesses that exceed 40 percent significance once they are included in the registrant's post-acquisition results for a complete fiscal year. *See* letter from BDO.

[186] *See* letter from Crowe.

under Rule 3–06, we do not believe those circumstances are sufficiently different for acquisitions that are at least 20 percent, but not more than 40 percent, significant (*i.e.,* significant at the one year level) to warrant disclosures for different time periods. To provide consistency between the Rule 3–05 and Rule 3–06 requirements, the amendments will allow omission of pre-acquisition financial statements for businesses that exceed 20 percent but do not exceed 40 percent significance once they are included in the registrant's audited post-acquisition results for nine months (rather than the proposed complete fiscal year).[187]

Because Rule 3–06 limits the use of a nine month period to financial statements that would otherwise be required for a period of one year, the amendments retain the existing complete fiscal year Rule 3–05 requirement when Rule 3–05 Financial Statements for a period of two years are required (*i.e.,* significance exceeds 40 percent). Specifically, the amendments allow omission of pre-acquisition financial statements for businesses that exceed 40 percent significance once they are included in the registrant's post-acquisition results for a complete fiscal year.

These final amendments also eliminate the requirement that Rule 3–05 Financial Statements be provided when they have not been previously filed or when they have been previously filed but the acquired business is of major significance. This requirement can delay a registrant's offering and thereby its access to capital, while providing information that is often less meaningful to investors, because the utility of pre-acquisition periods diminishes over time after the acquired business is reflected in post-acquisition results, and because the post-acquisition results of the combined business are generally not comparable to the pre-acquisition results of the acquired business.[188] Similarly for financial information provided regarding acquisitions of ''major significance,'' the utility of pre-acquisition periods diminishes over time after the acquired business is reflected in post-acquisition results. Additionally, with electronic filing requirements, which were established after the ''major significance'' rule, previously filed financial information about the acquired business is readily accessible through the Commission's EDGAR filing system.

We believe inclusion of post-acquisition results in the registrant's audited financial statements for the requisite time period should generally provide investors with sufficient information to make informed investment decisions about the registrant. Further, even without the major significance requirement to include some, but not all, of the previously filed pre-acquisition financial statements of the acquired business, Regulation S–X provides that a registrant must provide ''such further material information as is necessary to make the required statements, in light of the circumstances under which they are made, not misleading.'' [189]

We are not persuaded that additional financial statements of acquired businesses should be provided in initial registration statements when an acquisition is reflected in post-acquisition audited results for nine months when the acquisition is significant at the one year level or included for a complete fiscal year when the acquisition is significant at the two year level. Pre-acquisition financial statements by their nature are less likely to be indicative of the current financial condition, changes in financial condition, and results of operations of the acquired business as they age. If, in an unusual circumstance, pre-acquisition financial statements are necessary for the protection of investors even though the acquired business has been included in the registrant's post-acquisition results for a complete fiscal year, then Rule 3–13 permits the Commission staff by delegated authority to require the filing of the pre-acquisition financial statements.

We also believe that rightsizing our acquired business financial statement requirements appropriately balances the need to provide investors with information necessary for making informed investment decisions with the goal of minimizing compliance costs that can delay or preclude access to public markets, particularly when going public may not have been contemplated at the time an acquisition occurred.[190]

2. Use of Pro Forma Financial Information To Measure Significance

A registrant is generally permitted to use pro forma, rather than historical, financial information to test significance of a subsequently acquired business if the registrant made a significant acquisition after the latest fiscal year-end and filed its Rule 3–05 Financial Statements and pro forma financial information on Form 8–K.[191] However, this Form 8–K filing requirement has the practical effect of precluding the use of pro forma financial information that gives effect to a significant acquisition subsequent to the latest fiscal year-end to test significance of a subsequently acquired business when determining Rule 3–05 disclosure requirements in initial registration statements. While Commission staff has considered the results of significance tests using pro forma financial information in considering whether to permit omission or substitution of acquired business financial statements in initial registration statements of registrants growing through acquisition, those circumstances have been limited.[192] Further, Regulation S–X does not provide for dispositions of significant businesses to be included in the pro forma financial information used for testing significance of a subsequently acquired or subsequently disposed business.

a. Proposed Amendments

For all filings that require Rule 3–05 Financial Statements and Rule 3–14 Financial Statements, the Commission proposed to expand the circumstances in which a registrant can use pro forma

[187] Rule 3–06 does not require incremental disclosure in order for the filing of financial statements covering a period of nine months to be deemed to satisfy a requirement for filing financial statements for a period of one year. Because our amendments seek to make Rule 3–05 more consistent with Rule 3–06, the final amendments do not include an incremental disclosure requirement within Rule 3–05 to disclose material information impacting any pre-acquisition period that would otherwise be required absent the use of amended Rules 3–05 and 3–06. However, we observe that existing requirements, such as those in Item 303 of Regulation S–K, *Management's discussion and analysis of financial condition and results of operations,* and Rule 4–01(a) would require such disclosure when it is material to the registrant, and we believe that information would be sufficient for this purpose.

[188] *See* FRM *supra* note 94 at Section 2030.4. The accommodation provided by Commission staff did not sufficiently ameliorate these effects and often resulted in financial statements of the acquired business that depicted partial, rather than complete, reporting periods that did not coincide with the end of either the acquired business's or the registrant's fiscal periods.

[189] *See* Rule 4–01(a).

[190] In adopting these changes, we note that Item 303 of Regulation S–K requires identification of known trends, demand, commitments, events and uncertainties and Rule 4–01(a) of Regulation S–X requires that a registrant provide ''such further material information as is necessary to make the required statements, in light of the circumstances under which they are made, not misleading.''

[191] *See* Rule 3–05(b)(3).

[192] Consistent with the staff's exercise of delegated authority in response to requests under Rule 3–13, Staff Accounting Bulletin No. 80, *Application of Rule 3–05 in Initial Public Offerings* (''SAB 80'') states that the staff will not object if significance is measured using the alternative method specified in SAB 80. The SAB 80 method is similar to Rule 3–05, but the accommodations in SAB 80 are complex and seldom used by registrants.

financial information for significance testing by permitting registrants to measure significance using filed pro forma financial information that only depicts significant business acquisitions and dispositions consummated after the latest fiscal year-end for which the registrant's financial statements are required to be filed, subject to certain conditions.

b. Comments

Commenters generally supported the amendments.[193] However, one commenter stated that once a registrant chooses to use pro forma financial information for significance testing, the registrant should be required to use the approach consistently until the next annual report on Form 10–K is filed,[194] consistent with current staff guidance.[195]

c. Final Amendments

We are adopting the amendments substantially as proposed, but with some modifications after consideration of the comments received. Specifically, for filings that require Rule 3–05 Financial Statements and Rule 3–14 Financial Statements, we are amending Rule 11–01(b)(3) to permit registrants to measure significance using filed pro forma financial information that only depicts significant business acquisitions and dispositions consummated after the latest fiscal year-end for which the registrant's financial statements are required to be filed, subject to the following conditions:

- The registrant has filed Rule 3–05 Financial Statements or Rule 3–14 Financial Statements for any such acquired business; [196] and
- The registrant has filed the pro forma financial information required by Article 11 for any such acquired or disposed business.[197]

We additionally are amending Rule 11–01(b)(3) as proposed to add a reference to Rule 11–02(b)(6)(i), but relocating it within amended Rule 11–01(b)(3), to clarify that when determining significance the pro forma financial information must be limited to the applicable amounts that combine the historical financial information of the registrant and the acquired business and Transaction Accounting Adjustments.[198] We also are amending Rule 11–01(b)(3) to indicate that the pro forma financial information that is used to measure significance may only give effect to the subsequently acquired or disposed business and may not give effect to Autonomous Entity Adjustments, Management's Adjustments, if any, or other transactions, such as the use of proceeds from an offering. Further, we are persuaded to modify the proposal to clarify that once a registrant uses pro forma financial information to measure significance, it must continue to use pro forma financial information to measure significance until the next annual report on Form 10–K or Form 20–F. This modification will codify current practice,[199] provide for a more relevant indicator of significance, and ensure greater consistency in the significance determinations.

We believe these amendments will provide registrants with the flexibility to more accurately determine the relative significance of an acquired or disposed business to the ongoing operations of the registrant, including for those filing an initial registration statement, without inadvertently delaying or accelerating the filing of pro forma financial information that might occur if we required use of such pro forma financial information to determine significance.

3. Disclosure Requirements for Individually Insignificant Acquisitions

Under the existing rules, audited historical pre-acquisition financial statements are generally not required if an acquired or to be acquired business: (1) Does not exceed 20 percent significance, or (2) does not exceed 50 percent significance and the acquisition has not yet occurred or the date of the final prospectus or prospectus supplement relating to an offering (as filed with the Commission pursuant to 17 CFR 230.424(b)) is no more than 74 days after consummation and the financial statements have not been previously filed.[200] However, if the aggregate impact of ''individually insignificant businesses'' [201] acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50 percent, audited historical pre-acquisition financial statements covering at least the substantial majority of the businesses acquired must be included in a registration statement or proxy statement.[202] Registrants also must provide related pro forma financial information based on the requirements of Article 11.[203]

a. Proposed Amendments

The Commission proposed amending Rule 3–05 to no longer require separate

[193] *See* letters from Cravath, Eli Lilly, FEI, GT, Nasdaq, and S&C.

[194] *See* letter from GT. GT additionally recommended that the Commission clarify in the final rules that pro forma financial information used to determine significance may be different from pro forma financial information that was previously filed if it gave effect to other transactions. They also recommended that the Commission clarify how pro forma financial information for previous acquisitions or dispositions be used for determining the significance of subsequent acquisitions or dispositions in connection with an initial registration statement, given that pre-acquisition financial statements and pro forma financial information for the previous transactions could not have been previously filed in the case of a confidential submission and the first public filing of an IPO registration statement.

[195] *See* FRM *supra* note 94 at Section 2025.3, which indicates registrants should use a consistent approach for determining significance until the filing of the next annual report on Form 10–K.

[196] We believe this condition clarifies that if the required Rule 3–05 Financial Statements and pro forma financial information for one or more significant business acquisitions consummated after the registrant's most recently completed fiscal year required to be filed are included in an initial registration statement, then those acquisitions may be included in the pro forma financial information used to measure significance of a business acquired subsequent to those acquisitions for purposes of determining whether Rule 3–05 Financial Statements of the subsequently acquired business, and related pro forma financial information, are required in the initial registration statement.

[197] We are revising Rule 3–05(b)(3) and Rule 3–14(b)(2) to replace the existing guidance with a specific reference to Rule 11–01(b)(3). We are also including in Rule 11–01(b)(3) the statement in the current rule that the tests may not be made by ''annualizing'' data.

[198] *See* Section II.D.1.c.

[199] *See supra* text accompanying note 195.

[200] *See* Rule 3–05(b)(4)(i).

[201] In the 1996 Streamlining Release (*see supra* note 24), Rule 3–05 was amended to permit the exclusion of historical financial statements for certain significant acquisitions that did not exceed 50 percent significance. *See* Rule 3–05(b)(4)(i). Commission staff has interpreted ''individually insignificant businesses'' to include: (a) Any acquisition consummated after the registrant's audited balance sheet date whose significance does not exceed 20 percent; (b) Any probable acquisition whose significance does not exceed 50 percent; and (c) Any consummated acquisition whose significance exceeds 20 percent, but does not exceed 50 percent, for which financial statements are not yet required by Rule 3–05(b)(4) because of the 75-day filing period. *See* FRM *supra* note 94 at Section 2035.2.

[202] *See* Rule 3–05(b)(2)(i). ''Substantial majority'' has been applied in practice to be the mathematical majority (*i.e.,* businesses constituting more than 50 percent of the relevant test (investment, asset or income) on which the businesses were determined to be significant in the aggregate) *See* FRM *supra* note 94 at Section 2035.3 ''Financial Statements Required—Mathematical Majority.''

[203] Rule 11–01(a) specifies conditions for which pro forma financial information must be presented. Those conditions do not explicitly discuss the aggregate significance of individually insignificant businesses, however they do include, ''consummation of a significant business combination or a combination of entities under common control [that] has occurred or is probable'' and ''consummation of other events or transactions has occurred or is probable for which disclosure of pro forma financial information would be material to investors.'' Further, Rule 11–01(c) links the requirement for pro forma financial information for a significant business acquisition to the presentation of separate financial statements of the acquired business. Taken together, these requirements provide that if separate financial statements of the substantial majority of individually insignificant businesses are presented, pro forma financial information depicting their effects must also be presented.

financial statements for the majority of the individually insignificant acquired businesses when the aggregate impact of businesses acquired or to be acquired since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are either not required or not yet required because of the registration (or proxy) statement grace period, exceeds 50 percent. In conjunction with this change, the proposed amendments would require registrants to provide pro forma financial information depicting the aggregate effects of all such businesses in all material respects. In addition, the proposed amendments would have required pre-acquisition historical financial statements only for those businesses whose individual significance exceeds 20 percent, but that are not yet required to file financial statements.

b. Comments

Commenters generally supported the proposal to no longer require Rule 3–05 Financial Statements for businesses whose individual significance does not exceed 20 percent.[204] One commenter recommended the Commission consider including both Rule 3–05 businesses and Rule 3–14 real estate operations when determining the aggregate impact for individually insignificant acquisitions and providing guidance on how to perform the aggregations.[205] Another commenter recommended against including them both together due to the difference in the types of transactions covered.[206]

Some commenters expressed concern that the new requirements could create burdens for registrants relating to the proposed requirements to file financial statements for multiple significant acquisitions or the proposed requirements to provide detailed financial information about individually insignificant acquisitions that may not be readily available or may not have been provided to the registrant during its due diligence.[207] Other commenters expressed concern that requiring pro forma financial information that depicts aggregate impacts in ''all material respects'' could lead to interpretive issues necessitating a definition or examples.[208] Some commenters also expressed concern that accountants may not be able to provide negative assurance to underwriters on the combined pro forma financial information where historical financial statements included in the pro forma financial information for individually insignificant acquisitions have not been reviewed or audited.[209] In contrast, one commenter suggested that the procedures required for auditors to provide negative assurance to underwriters on comfort letters are fairly limited and that the proposed changes should not materially impact the auditor's ability in this regard.[210]

c. Final Amendments

We are adopting the amendments substantially as proposed, but with some modifications after consideration of the comments received. The amendments to Rule 3–05 are intended to reduce the burdens of preparing disclosure about immaterial acquisitions and negotiating with sellers to timely provide historical financial statements, while the new requirement to provide pro forma financial information that shows the aggregate effect of the acquired businesses in all material respects should make it easier for investors to understand the overall effect of those acquisitions on the registrant. Under current rules, registrants often provided separate, audited historical financial statements for acquired businesses that were individually not material to the registrant, and pro forma financial information that did not fully depict the aggregate effect of the ''individually insignificant businesses'' because currently Article 11 only requires pro forma financial information for an acquisition for which Rule 3–05 Financial Statements are required.[211] The proposed amendments should address these anomalies, to the benefit of both registrants and investors.

Similar to existing requirements, and as proposed, amended Rule 3–05(b)(2)(iv) will require disclosure if the aggregate impact of businesses acquired or to be acquired since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are either not required by paragraph (b)(2)(i) or are not yet required based on paragraph (b)(4)(i), exceeds 50 percent for any condition.[212] In this way, the amendments clarify that ''individually insignificant businesses'' include: (a) Any acquisition consummated after the registrant's audited balance sheet date whose significance does not exceed 20 percent; (b) Any probable acquisition whose significance does not exceed 50 percent; and (c) Any consummated acquisition whose significance exceeds 20 percent, but does not exceed 50 percent, for which financial statements are not yet required by Rule 3–05(b)(4) because of the 75-day filing period.[213]

As proposed, the amended rule will require registrants to provide pre-acquisition historical financial statements only for those businesses whose individual significance exceeds 20 percent.[214] In conjunction with this change, the amended rule, also as proposed, will require registrants to provide pro forma financial information depicting the aggregate effects of all ''individually insignificant businesses'' in all material respects.[215] Further, we are revising Rule 11–01(c) to clarify that the exception that would otherwise permit pro forma financial information not to be provided when separate financial statements of the acquired

[204] *See, e.g.,* letters from Cravath, DT, Eli Lilly, FEI, and GT.

[205] *See* letter from GT.

[206] *See* letter from Cravath.

[207] *See* letters from GT and DT. *See also* letter from Cravath (recommending retaining an option permitting a registrant to include a majority of the acquired businesses in the pro forma presentation or alternatively only requiring historical pre-acquisition financial statements and pro forma financial information if the individually insignificant businesses together exceed 50 percent under the Income Test).

[208] *See* letters from GT and RSM.

[209] *See* letters from BDO, CAQ, Cravath, Crowe, DT, GT, and RSM. Some commenters noted that PCAOB AS 6101 would prohibit accountants from providing negative assurance on combined pro forma financial information for which historical financial statements have not been audited or reviewed. *See* letters from BDO, CAQ, Crowe, GT, and RSM.

[210] *See* letter from CFA.

[211] For example, if the aggregate of 16 individually insignificant acquisitions is 80 percent significant, with each at five percent, a registrant would be required to provide pre-acquisition audited historical financial statements for nine of the individually insignificant businesses. Thus, the pro forma financial information would only depict the effect of those nine acquisitions constituting 45 percent of the registrant's pre-acquisition assets or income.

[212] For clarity, we specifically describe the affected businesses in the final rule without reference to the term ''individually insignificant businesses.'' We also inserted ''for any condition'' to clarify that the aggregation is done separately for each condition (*e.g.* the investment, asset and income test); that is, the conditions are not combined when assessing whether the ''exceeds 50 percent'' threshold is met.

[213] This amendment is consistent with existing practice. *See* FRM *supra* note 94 at Section 2035.2.

[214] Registrants will have to negotiate the timely provision of historical balance sheet and income statement information for each acquisition necessary to present pro forma financial information depicting their aggregate effects in all material respects when aggregate significance exceeds 50 percent, but historical financial statements only for acquisitions that will be required to be reported on Form 8–K (*i.e.,* individual significance exceeds 20 percent). The amendments could accelerate reporting of historical financial statements for these acquisitions (*i.e.,* individual significance exceeds 20 percent) in certain registration statements and proxy statements if the combined acquisitions exceed 50 percent significance.

[215] *See* amended Rule 3–05(b)(2)(iv) and revisions to Rule 11–01(c).

business are not included in the filing does not apply where the aggregate impact is significant as determined by amended Rules 3–05(b)(2)(iv) or 3–14(b)(2)(i)(C). While several commenters suggested that this requirement could raise interpretive issues, we believe the concept of materiality is well established in our rules, and we are not persuaded at this time that additional guidance is necessary in order for registrants to make this determination.

After considering comments received, we are modifying the proposed rule to require registrants to include both Rule 3–05 businesses and Rule 3–14 real estate operations when determining the aggregate impact of the Investment Test for individually insignificant acquisitions. We are persuaded that such a modification is consistent with our objective of aligning Rule 3–14 with Rule 3–05 because unique industry considerations do not warrant differentiating Rule 3–05 businesses and Rule 3–14 real estate operations, particularly as the modification will apply only to registrants that acquire both Rule 3–05 businesses and Rule 3–14 real estate operations. The final amendments limit this modification to the Investment Test because the Asset Test and Income Test do not apply to Rule 3–14 real estate operations.

Consistent with the existing requirement, [216] we have modified the proposed amendments to Rule 3–05 to indicate that, in determining whether the Income Test condition (*i.e.* both the revenue component and the net income component) exceeds 50 percent, the businesses specified in Rule 3–05(b)(2)(iv) reporting losses must be aggregated separately from those reporting income. We also have modified the rule to clarify that if either group exceeds 50 percent, the disclosure requirements apply to all of the businesses subject to the aggregate test and must not be limited to either the businesses with losses or those with income.

We acknowledge that, consistent with existing requirements, the amended aggregate test applies to businesses acquired or to be acquired subsequent to the most recently completed fiscal year. Because some of those acquisitions may have already occurred upon the effective date of the amended rules, we are persuaded that the concern expressed by some commenters about the availability of information to comply with the amended aggregate test necessitates transition guidance.[217]

Separately, we acknowledge concerns expressed as to whether accountants will be able to provide negative assurance to underwriters on the combined pro forma financial information where historical financial statements included in the pro forma financial information for individually insignificant acquisitions have not been reviewed or audited. We recognize that, in some circumstances, accountants may need to perform additional work to be able to provide negative assurance. We also observe that the ''reasonable investigation'' and ''reasonable care'' provisions of Sections 11 and 12 of the Securities Act are also fact specific and depend on a variety of factors. Whether steps taken to provide the required disclosures satisfy ''reasonable investigation'' or ''reasonable care,'' or whether additional work is needed to provide negative assurance, should be determined by accountants and their clients based on facts and circumstances. Although accountants and their clients may need to take additional steps in certain circumstances, we believe those concerns are outweighed by the need to improve the usefulness of information provided to investors when the aggregate impact of the specified acquired or to be acquired businesses exceed 50 percent, rather than requiring audited financial statements that are not necessary to reasonably inform investors or pro forma financial information that is materially incomplete in its depiction of the aggregate impact.

C. Rule 3–14—Financial Statements of Real Estate Operations Acquired or To Be Acquired

Rule 3–14 differs from Rule 3–05, in part, because unique industry considerations for real estate operations warrant differentiated disclosure. If a registrant has acquired or, in certain circumstances, proposes to acquire one or more properties which in the aggregate are significant, Rule 3–14 requires the registrant to file only abbreviated income statements. If the real estate operation is not acquired from a related party, audited Rule 3–14 Financial Statements are required for only one year. In those circumstances where a registrant is permitted to provide one year of financial statements, Rule 3–14 also requires a registrant to describe with specificity the material factors it considered in assessing the real estate operation.[218]

The Commission proposed to further align Rule 3–14 with Rule 3–05 where no unique industry considerations exist because the rules have similar objectives. The Commission also proposed to clarify the application of Rule 3–14 regarding scope of the requirements,[219] determination of significance, need for interim income statements, and special provisions for blind pool offerings.[220]

1. Align Rule 3–14 With Rule 3–05

Under the current rules, Rule 3–14 and Rule 3–05 diverge in a number of areas. Rule 3–14 refers to acquisitions that are ''significant''; however, neither ''significant property'' nor ''significant real estate operation'' are defined in Regulation S–X. Current practice looks to the 10 percent significance threshold in the definition of ''significant subsidiary'' in Rule 1–02(w) when determining ''significance'' under Rule 3–14.[221] Additionally, Rule 3–14 Financial Statements are currently required when the registrant has acquired or proposes to acquire a group of properties that are significant in the aggregate. In practice, consummated and probable acquisitions since the date of the most recent audited balance sheet that are less than 10 percent significant are aggregated and, if the significance of the aggregated group exceeds 10 percent, Rule 3–14 Financial Statements are provided for each acquisition that is five percent or more significant and for

[216] *See* Computational Note 1 to Rule 1–02(w). *See also* FRM *supra* note 94 at Section 2035.5.

[217] *See* Section II.F.

[218] *See* Rules 3–14(a)(1)(ii) and 3–14(a)(1)(iii). The material factors include sources of revenue (including, but not limited to, competition in the rental market, comparative rents, and occupancy rates) and expense (including, but not limited to, utility rates, property tax rates, maintenance expenses, and capital improvements anticipated). The disclosure must also indicate that the registrant is not aware of any other material factors relating to the specific real estate operation that would cause the reported financial statements not to be indicative of future operating results. If the registrant does not meet the Rule 3–14(a)(1) conditions, three years of Rule 3–14 Financial Statements are required.

[219] In some circumstances, registrants acquire a real estate operation subject to a triple net lease with a single lessee. A triple net lease typically requires the lessee to pay costs normally associated with ownership of the property, such as property taxes, insurance, utilities, and maintenance costs. Under existing practice, registrants often provide audited financial statements of the lessee or guarantor of the lease, instead of the Rule 3–14 Financial Statements of the real estate operation, when the lessee is considered significant. The proposal did not, and these amendments do not, differentiate this type of acquisition or specify alternatives to Rule 3–14 for this type of acquisition, because the activity depicted in the Rule 3–14 Financial Statements is consistent with how the triple net lease arrangement may affect the registrant's results of operations. No commenters that commented on this topic recommended that the Commission require audited financial statements of the lessee or guarantor. *See* letters from EY, BDO, and GT.

[220] *See* Section II.C.6 below.

[221] *See* FRM *supra* note 94 at Section 2310.1 ''Registration Statements and Proxy Statements—Requirements.''

enough other acquisitions in order to cover the substantial majority of the group.[222] Additionally, Rule 3–14 requires registrants to provide three years of financial statements for significant acquisitions from related parties.

a. Proposed Amendments

The Commission proposed amendments to align Rule 3–14 with Rule 3–05 where no unique industry considerations warranted differentiated treatment. Specifically, the proposed amendments would have, among other things:

- Aligned thresholds in Rule 3–14 with the 20 percent significance threshold and 50 percent aggregate impact significance threshold in Rule 3–05;
- Eliminated the Rule 3–14 requirement to provide three years of Rule 3–14 Financial Statements for acquisitions from related parties;
- Applied Rule 3–06 to Rule 3–14 acquisitions;
- Included the same timing requirements for Rule 3–14 Financial Statements in registration statements and proxy statements as Rule 3–05; and
- Permitted Rule 3–14 Financial Statements to be omitted once the acquired real estate operation had been reflected in filed post-acquisition registrant financial statements for a complete fiscal year.

The Commission additionally proposed to align Rule 3–14 with the relevant proposed Rule 3–05 amendments discussed in Sections II.A. and II.B. above.

b. Comments

Commenters that specifically addressed Rule 3–14 generally supported the proposals.[223] However, some commenters noted that proposed Rule 3–14(c)(2)(iii) would require that the notes to the Rule 3–14 Financial Statements include information about the real estate operation's operating, investing and financing cash flows, to the extent available, and questioned whether such historical information would be comparable to proposed future operations and why such disclosure should be required since Rule 3–14 Financial Statements include only statements of revenues and expenses that may omit expenses not comparable to proposed future operations.[224]

c. Final Amendments

We are adopting the amendments as proposed. As discussed in the Proposing Release, we believe that further aligning Rule 3–14 with Rule 3–05 will reduce complexity by standardizing the requirements for acquired businesses overall while retaining the industry specific disclosure necessary for investors to make informed investment decisions.[225]

Specifically, we are adopting amendments as proposed regarding:

Significance Thresholds. We are aligning the Rule 3–14 significance threshold for individual acquisitions to the 20 percent threshold for acquired businesses in Rule 3–05.[226] We are also aligning the Rule 3–14 significance threshold for the aggregate impact of acquisitions to the 50 percent threshold in Rule 3–05. Aligning Rule 3–14 with Rule 3–05 will remove ambiguity by defining which businesses must be aggregated and the significance threshold that applies, and by clarifying that this requirement applies only to certain registration statements and proxy statements and not to Form 8–K.

Years of Required Financial Statements for Acquisitions from Related Parties.[227] We are aligning Rule 3–14 with Rule 3–05 by eliminating the specific requirement to provide three years of financial statements for acquisitions from related parties. Rule 3–05 does not differentiate the number of periods for which historical financial statements are required based on whether the seller is a related party or not, and we are not aware of any unique industry considerations that warrant different requirements for Rule 3–14.

Application of Rule 3–06. We are aligning the application of Rule 3–14 with Rule 3–05 by revising Rule 3–06 to permit the filing of financial statements covering a period of nine to 12 months to satisfy the requirement for filing financial statements for a period of one year for an acquired or to be acquired real estate operation. Existing Rule 3–06(b) provides that financial statements required under Rule 3–05 ''covering a period of 9 to 12 months shall be deemed to satisfy a requirement for filing financial statements for a period of 1 year,'' but it did not address acquired real estate operations under Rule 3–14.

Timing of filings. We are amending Rule 3–14 to include the same period for the filing of Rule 3–14 Financial Statements in registration statements and proxy statements as exists under Rule 3–05.[228]

Omission of Rule 3–14 Financial Statements for Real Estate Operations That Have Been Included in the Registrant's Financial Statements. We are aligning the application of Rule 3–14 with the amendments to Rule 3–05 by no longer requiring Rule 3–14 Financial Statements in registration statements and proxy statements once the acquired real estate operation is reflected in filed post-acquisition registrant financial statements for nine months.[229]

Additional Amendments. We are making additional amendments, as proposed, to align Rule 3–14 with Rule 3–05 where there are no unique industry considerations that suggest a business subject to Rule 3–14 should be treated differently than a business subject to Rule 3–05. Many of these amendments will not affect how registrants currently comply with Rule 3–14 because existing practice already analogizes to Rule 3–05 for guidance. Specifically, we are clarifying that:

- ''To be acquired'' real estate operations must be evaluated under the rule only if they are probable of acquisition;[230]

[222] *See* FRM *supra* note 94 at Section 2320.

[223] *See, e.g.,* letters from Barnard, Cravath, BDO, CAQ, Deloitte, EY, GT, KPMG, NAREIT, and RSM.

[224] *See* letters from BDO, CAQ, and RSM.

[225] *See* Section II.C.1 of the Proposing Release.

[226] The Commission raised the threshold in Rule 3–05 from 10 percent to 20 percent in 1996 in order to reduce compliance burdens in response to concerns that the requirement to obtain audited financial statements for a business acquisition may have caused companies to forgo public offerings and to undertake private or offshore offerings. *See* 1996 Streamlining Release *supra* note 24. As a result of this amendment, the significance thresholds in Rule 3–05 have diverged from those used for Rule 3–14 since that time.

[227] It is common for transactions in initial registration statements in the real estate industry to involve the combination of multiple entities with related or common ownership. In those circumstances, certain acquired entities may be designated as a predecessor of the registrant. For purposes of financial statements, an acquired business is designated as a predecessor when a registrant succeeds to substantially all of the business (or a separately identifiable line of business) of another entity (or group of entities) and the registrant's own operations before the succession appear insignificant relative to the operations assumed or acquired. *See* the definition of ''predecessor'' in Securities Act Rule 405. Financial statements specified in Rules 3–01 and 3–02 are required for acquisitions of a predecessor, including those from related parties, rather than Rule 3–05 or Rule 3–14 Financial Statements. These amendments will not affect those requirements.

[228] *See supra* note 15 and accompanying text discussing the Rule 3–05 filing period.

[229] *See* discussion of the omission of Rule 3–05 Financial Statements in Section 1II.1B.3. above. The provision in Rule 3–05 regarding omission of financial statements for acquisitions exceeding 40 percent significance is inapplicable in Rule 3–14.

[230] Rule 3–14 currently uses the phrase ''proposes to acquire'' when discussing ''to be acquired'' real estate operations and does not explicitly limit the scope to acquisitions probable of acquisition. The amendment codifies the current practice of interpreting this phrase to mean ''probable of acquisition.'' *See* FRM *supra* note 94 at Section 2310.1

• The acquisition of an interest in a real estate operation accounted for using the equity method [231] or, in lieu of the equity method, the fair value option, is considered the acquisition of a real estate operation;

• Rule 3–14 does not apply to a real estate operation that is totally held by the registrant prior to consummation of the transaction; [232]

• If registering an offering of securities to the security holders of the real estate operation to be acquired, the financial statements for the acquired real estate operation must cover the periods specified in Rules 3–01 and 3–02, except as provided otherwise for filings on Forms N–14, S–4 or F–4, and that the financial statements covering those fiscal years must be audited except as provided in Item 14 of Schedule 14A with respect to certain proxy statements or in registration statements filed on Forms N–14, S–4, or F–4; [233]

• Related real estate operations must be treated as a single acquisition for significance testing; [234] and

• Pro forma amounts are permitted for significance testing in certain circumstances consistent with the application in Rule 3–05.[235]

The amendments also clarify that Rule 3–14 Financial Statements should be prepared and audited in accordance with Regulation S–X and that they should be for the period that the real estate operation has been in existence, if that period is shorter than the period explicitly required for the financial statements.[236] In addition, the amendments conform the requirements related to acquisitions of foreign real estate operations in Rule 3–14 to the analogous provisions in Rule 3–05.[237]

Aside from the substance of the rules, the amendments also conform the organization and format of certain related rules and forms, as appropriate. We are amending Item 8 of Form 10–K which currently excepts registrants from complying with Rule 3–05 and Article 11, to include Rule 3–14,[238] instead of retaining the exception in Rule 3–14 itself. We are also conforming the general format and wording of Rule 3–14 to Rule 3–05, as appropriate, for consistency and to make the rule easier to follow.[239]

Finally, we are also revising Form 8–K to:

• Clarify that Item 2.01 requires the disclosure of the acquisition or disposition of assets that constitute a significant real estate operation as defined in Rule 3–14; [240]

• Address the filing requirements in Item 9.01(a) consistently for all business acquisitions, including real estate operations; and

• Revise Item 2.01 Instruction 4 to reference Rule 3–14 to make clear that, as with Rule 3–05, the aggregate impact of acquisitions of real estate operations is not required to be reported unless these acquisitions are related real estate operations and significant in the aggregate.

Also, as proposed, we are adopting amendments to conform Rule 3–14 to the Rule 3–05 amendments being adopted in this release where no unique industry considerations exist. Specifically, we are amending Rule 3–14 to conform to the amendments described in Section II.A.1.c (Investment Test only), Section II.A.3.c (related only to certain required footnote disclosures),[241] Section II.A.5.c, Section II.A.6.c, Section II.B.1.c (excluding the requirement related to acquisitions that exceed 40 percent significance, which does not apply to Rule 3–14), Section II.B.2.c and Section II.B.3.c.

2. Definition of Real Estate Operation

Neither Regulation S–X nor any other Securities Act or Exchange Act rule provides a definition of a ''real estate operation'' or an explanation of what is meant by the reference to ''properties'' in Rule 3–14. Because the terms are open to interpretation, Commission staff has provided guidance as to the meaning of these terms.[242] The Commission staff has interpreted, for purposes of Rule 3–14, a real estate operation to refer to properties that generate revenues solely through leasing,[243] but has not interpreted this definition to preclude a property that includes a limited amount of non-leasing revenues (like property management or other services related to the leasing) from being considered a real estate operation.[244] The Commission staff has additionally provided guidance that a real estate operation includes real properties that will be held directly by the registrant or through an equity interest in a pre-existing legal entity that holds the real property under lease and related debt.[245]

a. Proposed Amendments

The Commission proposed to amend Rule 3–14 to define a real estate operation as ''a business that generates substantially all of its revenues through the leasing of real property,'' which is consistent with current practice and staff interpretations [246] and to remove the unnecessary condition in Rule 11–01(a)(5) that clarifies that Article 11 applies to real estate operations.

b. Comments

We received limited comment specific to the proposed definition of real estate

[231] *See* FRM *supra* note 94 at Section 2305.4.

[232] *See* Rule 3–05(a)(4), as amended. *See also* Rule 1–02(y) for the definition of the term ''totally held subsidiary.''

[233] *See* Rule 3–05(b)(1), as amended.

[234] *See* Rules 3–05(a)(3) and 3–14(a)(3), as amended. Real estate operations are considered related if they are under common control or management, the acquisition of one real estate operation is conditional on the acquisition of each other real estate operation, or each acquisition is conditioned on a single common event.

[235] *See* Rules 3–05(b)(3) and 11–01(b)(3), as amended.

[236] *See* Rules 3–05(a)(1), 3–05(b)(2), 3–14(a)(1), and 3–14(b)(2), as amended.

[237] *See* Rules 3–05(c) and 3–14(d), as amended, and Rules 3–05(d) and 3–14(e).

[238] *See* Item 8(a) of Form 10–K.

[239] The changes in Rule 3–14 to conform wording include the addition of a paragraph similar to amended Rule 3–05(b)(1) about financial statements for certain proxy statements and registration statements on Forms S–4 and F–4, as well as the elimination of outdated industry-specific paragraphs (a)(2) and (3), which specify certain disclosures for circumstances that seldom occur today. We are also eliminating the Instruction in Item 9 of Form S–11, which refers back to the guidance in paragraphs (a)(2) and (3) of Rule 3–14.

[240] While Item 2.01 currently only requires that significant acquisitions and dispositions be reported if they are not in the ordinary course of business, in practice registrants provide Item 2.01 disclosure for acquisitions of significant real estate operations regardless of whether the acquisition or disposition was in the ordinary course of business. *See* Note to FRM *supra* note 94 at Section 2310.3.

[241] The footnote disclosure to provide an explanation of the impracticability of preparing financial statements that include the omitted expenses is not applicable to Rule 3–14 Financial Statements because Rule 3–14 does not contain an impracticability condition. *See* note 12. With respect to the footnote disclosure related to historical cash flows, we acknowledge, as observed by some commenters, that certain historical cash flows of a real estate operation may not be comparable to proposed future operations. However, we believe that there is also cash flow information that would be meaningful to investors if available, for example, disclosure regarding historical cash flows for capital improvements. We are, therefore, adopting this requirement as proposed.

[242] *See* FRM *supra* note 94 at Section 2305.1 ''Applicability of S–X 3–14,'' and Section 2305.2, ''Nature of Real Estate Operations.''

[243] *See* FRM *supra* note 94 at Section 2305.2.

[244] Examples of such properties include office, apartment, and industrial buildings, as well as shopping centers and malls. A real estate operation excludes properties that generate revenues from operations other than leasing, such as nursing homes, hotels, motels, golf courses, auto dealerships, and equipment rental operations because these operations are more susceptible to variations in revenues and costs over shorter periods due to market and managerial factors.

[245] *See* FRM *supra* note 94 at Section 2305.3 ''Investment in a Pre-Existing Legal Entity.''

[246] The proposed amendment used the term ''business (as set forth in § 210.11–01(d))'' in the definition of a real estate operation to address the fact that the acquisition of a real estate operation may be through an entity holding real property under lease or of a direct interest in the real property. *See* proposed Rule 3–14(a)(2).

operations. Two commenters explicitly supported the definition, and no commenters opposed it.[247] One of these commenters recommended adding ''or substantially all the assets of which are held for lease'' in order to include real property that is not currently leased, but is being acquired with the intention of leasing and has more than a nominal leasing history.[248] This commenter further recommended amending Rule 11–01(d) to clarify that there is a presumption that real property that is leased or held for lease to third parties constitutes a business. In addition, the same commenter recommended that we consider explicitly addressing real properties that have a limited leasing history or leasing history that is unrepresentative of expected future operations.[249] Another commenter recommended the Commission further clarify the meaning of ''substantially all.'' [250]

c. Final Amendments

We are amending Rule 3–14 to define a real estate operation as proposed as ''a business that generates substantially all of its revenues through the leasing of real property.'' We considered clarifying what is meant by ''substantially all'' in this context, as one commenter suggested. However, this term is not meant to be a bright line, and its application will depend on specific facts and circumstances. Accordingly, we are not making any changes in this regard.

We also considered whether additional language is necessary to address an acquisition of real property that is not leased and generating revenues upon acquisition, but was historically leased and is intended to be leased again in the near future. However, we do not believe that the definition, as proposed, requires any changes, because in these circumstances a registrant should consider whether the lack of revenues at acquisition may be unrepresentative based on the existence of a leasing history and the expected continuation of the leasing operation, and thus could still conclude that it is a business that generates substantially all of its revenues through the leasing of real property. We also considered whether we should add language to address acquisitions of real property with a limited leasing history or a leasing history that is unrepresentative of expected future operations. However, we believe those situations are best addressed through Rule 3–13.[251]

We believe the definition we are adopting appropriately frames the application of Rule 3–14, reduces uncertainty regarding the meaning of the term, and serves to clarify the rule without changing the substance of how it is currently applied. In light of the adopted definition that clarifies that a real estate operation is a ''business'' as that term is used in Article 11, we are removing the condition in Rule 11–01(a)(5) as it is no longer necessary.[252]

3. Significance Tests

As noted above, Rule 3–14 does not provide explicit guidance on how to determine whether a real estate operation is significant. Due to the nature of a real estate operation, staff interpretations have sought to focus registrants on the Investment Test in Rule 1–02(w), adapted to compare the registrant's and its other subsidiaries' ''investments in'' [253] the real estate operation, including any debt secured by the real properties that is assumed by the registrant, to the registrant's total assets at the last audited fiscal year end when determining ''significance'' under Rule 3–14.[254] When determining whether an acquisition is ''significant,'' the use of the Asset or Income Tests generally is not practical for a real estate operation because the historical amounts of assets and income of the acquired or to be acquired real estate operation are not available.[255]

a. Proposed Amendments

The Commission proposed to amend Rule 3–14 to specify that significance should be based on the Investment Test in Rule 1–02(w). Thus, consistent with the proposed amendments for Rule 3–05 acquisitions discussed above, the Commission proposed to require comparison with the registrant's aggregate worldwide market value. If aggregate worldwide market value is not available, then the Investment Test would be based on total assets. When the test is based on total assets for real estate acquisitions, the Commission also proposed to modify the investment amount to include any debt secured by the real properties that is assumed by the registrant.

b. Comments

We received limited comment addressing the significance tests as they relate to real estate operations.[256] One commenter recommended allowing registrants that do not have an aggregate worldwide market value (such as non-traded REITs) to use net asset value of their common equity as the denominator for the Investment Test.[257]

c. Final Amendments

We are amending Rule 3–14(b)(2) as proposed to require use of the Investment Test in Rule 1–02(w).[258] We believe this amendment will reduce uncertainty regarding the significance tests and clarify the rule without changing the substance of how it is currently applied. When based on total assets, the final amendments specify, as proposed, that the test should be adapted to compare the registrant's and its other subsidiaries' ''investments in'' [259] the real estate operation, including any debt secured by the real properties that is assumed by the registrant, to the registrant's total assets as of the end of the most recently completed fiscal year. We believe a modified Investment Test is necessary to appropriately determine significance for acquisitions of real estate operations because it takes into consideration the unique structure of these types of acquisitions, which typically involve assumed debt that is secured by the real properties that offsets the value of the real estate operation being acquired.

[247] *See* letter from Cravath and NAREIT.

[248] *See* letter from NAREIT.

[249] See letter from NAREIT. *See also* FRM *supra* note 94 at Section 2330.8 ''Rental History of Less Than Nine Months,'' Section 2330.9, ''Exception for Demolition'' and Section 2330.10 ''Exception for Properties with No or Nominal Leasing History'' for related staff guidance.

[250] *See* letter from GT.

[251] See Rule 3–13 *supra* note 58.

[252] We considered whether Rule 11–01(d) should include a presumption that real property that is leased or held for lease is a business, but we believe it is more appropriate for registrants to evaluate for each acquisition the facts and circumstances included in the rule to determine if it constitutes a business.

[253] *See supra* note 53.

[254] *See* FRM *supra* note 94 at Section 2315 ''Real Estate Operations—Measuring Significance.''

[255] The amounts are not available because most real estate managers do not maintain their books on a U.S. GAAP basis or obtain audits. Furthermore, because Rule 3–14 only requires abbreviated income statements to be filed, additional financial statements would have to be prepared solely for purposes of significance testing if the Asset and Income Tests applied to acquisitions of real estate operations.

[256] *See e.g.,* letter from EY.

[257] *See* letter from EY. This commenter further recommended that, if such a registrant is not permitted to use net asset value, the numerator should be limited to the consideration transferred and exclude any debt assumed by the buyer.

[258] We are not adopting amendments to permit non-traded REITs to use net asset value instead of aggregate worldwide market value due to the potential application complexities; however, we are adopting the modified investment test addressed in Section II.C.6., below, for blind pool offerings that will be applicable to non-traded REITs.

[259] *See supra* note 53.

4. Interim Financial Statements

Unlike Rule 3–05,[260] Rule 3–14 does not include an express requirement for registrants to provide interim financial statements. Article 11, however, requires pro forma financial information to be filed when the registrant has acquired one or more real estate operations which in the aggregate are significant.[261] Article 11 further provides that the pro forma condensed statement of comprehensive income must be filed for the most recent fiscal year and the period from the most recent fiscal year to the most recent interim date for which a balance sheet is required.[262] As a result of Article 11 and related staff interpretations, existing registrant practice is to provide interim financial statements for acquisitions of real estate operations.[263]

a. Proposed Amendments

The Commission proposed to amend Rule 3–14 to specifically require Rule 3–14 Financial Statements for the most recent year-to-date interim period prior to the acquisition.

b. Comments and Final Amendments

We received no comments specifically related to this proposal, so we are adopting the amendment to Rule 3–14(b)(2)(i) as proposed.[264]

5. Smaller Reporting Companies and Issuers Relying on Regulation A

Rule 8–06 provides smaller reporting company disclosure requirements for the financial statements of real estate operations acquired or to be acquired that are substantially similar to the requirements in Rule 3–14. Part F/S of Form 1–A directs an issuer relying on Regulation A to present financial statements of real estate operations acquired or to be acquired as specified by Rule 8–06.[265]

a. Proposed Amendments

The Commission proposed amendments to Article 8 to further simplify and conform the application of Rule 3–14 and our related proposals to smaller reporting companies.

b. Comments

None of the commenters that provided comments related to smaller reporting companies and smaller issuers commented on the proposed amendments to Rule 3–14.

c. Final Amendments

We are amending Rule 8–06 as proposed to direct registrants to Rule 3–14 for the requirements relating to financial statement disclosures of real estate operations acquired or to be acquired,[266] while still permitting smaller reporting companies to rely on the form and content for annual and interim financial statements provided in Rules 8–02 and 8–03. Rule 8–06 as amended will newly require smaller reporting companies to combine the discussion of material factors that they considered in assessing the acquisition with the disclosure required by Item 15 of Form S–11 when financial statements are presented in Form S–11.[267] We are also adding a reference to Rule 8–06 in Rule 3–06 to conform the requirements of Rule 8–06 and Rule 3–14 and adding Rule 8–01(f) to expressly permit smaller reporting companies to file financial statements covering a period of nine to 12 months to satisfy the requirement for filing financial statements for a period of one year for an acquired real estate operation.[268]

Additionally, because Part F/S of Form 1–A refers to Rule 8–06, the revisions to Rule 8–06 apply to issuers relying on Regulation A. As discussed in the Proposing Release, we believe these amendments will simplify these rules and reduce burdens for smaller reporting companies and issuers relying on Regulation A.[269]

6. Blind Pool Real Estate Offerings

Certain registrants, typically non-traded real estate investment trusts (''REITs''),[270] that conduct continuous offerings over an extended period of time follow the disclosure guidance provided under Industry Guide 5 *Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships* (''Industry Guide 5'').[271] These registrants generally do not initially own any real estate assets, and the specific intended use of the proceeds raised from investors is not initially identified because such registrants have not yet selected any assets for their portfolios. Registrants in these blind pool offerings also typically provide only limited liquidity through restricted share redemption programs. However, these registrants provide certain undertakings[272] to disclose information about significant acquisitions to investors in addition to Rule 3–14 Financial Statements.

Due to the nature of a blind pool investment as well as the supplemental undertakings provided, these registrants typically apply adapted significance tests when making the determination of whether they are required to provide Rule 3–14 Financial Statements.[273] Commission staff has interpreted significance during the distribution period to be computed by comparing the registrant's and its other subsidiaries' ''investments in''[274] the real estate operation to the sum of: (1) The registrant's total assets as of the date of the acquisition, and (2) The proceeds (net of commissions) in good faith expected to be raised in the registered offering over the next 12 months.[275]

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[260] *See* Rule 3–05(b)(2)(i) through (iv). The rule refers explicitly to the most recent fiscal year and any interim periods specified in Rules 3–01 and 3–02.

[261] *See* Rule 11–01.

[262] *See* Rule 11–02(c)(2)(i). To meet this pro forma requirement, registrants must prepare and present substantially the same information for the most recent interim period, if applicable, that would be included in Rule 3–14 Financial Statements in most circumstances.

[263] *See* Rule 11–02(c)(2)(i) and FRM *supra* note 94 at Section 2330.2 ''Periods to be Presented—Properties Acquired from Related Parties'' and Section 2330.3 ''Periods to be Presented—Properties Acquired from Third Parties.''

[264] *See* Section II.C.4 of the Proposing Release.

[265] *See* paragraph (b)(7)(v) of Part F/S. Part F/S of Form 1–A permits the periods presented to be the shorter of those applicable to issuers relying on Regulation A and the periods specified by Article 8.

[266] We are also amending the instruction in Item 9.01 of Form 8–K to include references to Rule 8–06 in order to conform the instruction to the text of Item 9.01, which already addresses the rules applicable to smaller reporting companies.

[267] *See* Instruction to Paragraph (f) in Rule 3–14. Since Item 15 of Form S–11 already applies to smaller reporting companies, the Instruction changes only the location of the discussion.

[268] *See* Rule 8–01(f) and the discussion related to Rule 3–06 in Section II.C.1 above.

[269] *See* Section II.C.5 of the Proposing Release.

[270] Non-traded REITs do not have securities listed for trading on a national securities exchange. Their purpose is to own and operate income-producing real estate or real estate-related assets.

[271] *See Publication of Revisions to the Division of Corporation Finance's Guide 5 and Amendment of Related Disclosure Provisions,* Release No. 33–6405 (June 3, 1982) [47 FR 25120 (June 10, 1982)]. While Industry Guide 5, by its terms, applies only to real estate limited partnerships, in 1991 the Commission stated that ''the requirements contained in the Guide should be considered, as appropriate, in the preparation of registration statements for real estate investment trusts and for all other limited partnership offerings.'' *See Limited Partnership Reorganizations and Public Offerings of Limited Partnership Interests,* Release No. 33–6900 (June 25, 1991) [56 FR 28979 (June 25, 1991)].

[272] *See* Item 20.D. of Industry Guide 5, Disclosure Guidance: Topic No. 6—*Staff Observations Regarding Disclosures of Non-Traded Real Estate Investment Trusts* and FRM *supra* note 94 at Section 2325.2. '''Blind Pool' Offerings—During the Distribution Period—Undertakings.'' The undertakings include use of sticker supplements related to certain significant properties that will be acquired and post-effective amendments.

[273] In certain circumstances, registrants in blind pool offerings acquire businesses that are within the scope of Rule 3–05 (for example, hotels) rather than Rule 3–14, but the registrants provide the Industry Guide 5 undertakings because they are conducting a blind pool offering. Currently, there is no special practice for measuring significance of Rule 3–05 acquisitions in these circumstances.

[274] *See supra* note 53.

[275] *See* FRM *supra* note 94 at Section 2325.3 '''Blind Pool' Offerings—During the Distribution

After the distribution period has ended, the registrant determines significance using the total assets as of the acquisition date until the registrant files its next Form 10–K. After that next Form 10–K is filed, the registrant, following the staff's guidance, can determine significance using total assets as of the end of the most recently completed fiscal year included in the Form 10–K.[276]

a. Proposed Amendments

The Commission proposed amendments to codify existing staff guidance by specifying that significance for blind pool offerings must be computed by comparing the registrant's and its other subsidiaries' ''investments in'' the real estate operation to the sum of: (1) The registrant's total assets as of the date of the acquisition, and (2) The proceeds (net of commissions) in good faith expected to be raised in the registered offering over the next 12 months.

b. Comments

Commenters generally supported the proposed amendments.[277] These commenters, however, recommended that, for registrants conducting blind pool offerings, the Commission extend the accommodations to acquisitions within the scope of Rule 3–05.[278] In support of this change, one commenter noted that staff guidance and Guide 5 do not distinguish between acquisitions of real estate and other operations with regards to the expected reporting of undertakings.[279]

c. Final Amendments

We are adopting the amendments as proposed, but with modifications after considering comments received. We are codifying staff interpretations in this area to provide that significance for blind pool offerings must be computed by comparing the registrant's and its other subsidiaries' ''investments in'' the real estate operation to the sum of: (1) The registrant's total assets as of the date of the acquisition, and (2) The proceeds (net of commissions) in good faith expected to be raised in the registered offering over the next 12 months as more fully described above. Without this accommodation, virtually all acquisitions in the early part of the distribution period would be deemed significant regardless of their size.

We are also adopting amendments, as suggested by commenters, to extend the adapted significance test to Rule 3–05 acquisitions by registrants in blind pool offerings because the accommodation is based on the unique characteristics of the offering and registrants, rather than the type of acquisition.

In light of the extension of the accommodation to Rule 3–05 acquisitions, we revised the location of these amendments for blind pool offerings to Rule 11–01(b), which addresses how to determine significance for both Rule 3–05 acquisitions and Rule 3–14 acquisitions.[280]

D. Pro Forma Financial Information

The pro forma financial information described in Article 11 of Regulation S–X must accompany Rule 3–05 Financial Statements and Rule 3–14 Financial Statements. Typically, pro forma financial information includes the most recent balance sheet and most recent annual and interim period income statements. Pro forma financial information for a business acquisition combines the historical financial statements of the registrant and the acquired business and is adjusted for certain items if specified criteria are met. As discussed above, pro forma financial information for an acquired business is required at the 20 percent and 10 percent significance thresholds under Rule 3–05 and Rule 3–14, respectively.[281] The rules also require pro forma financial information for a significant disposed business at a 10 percent significance threshold for all registrants.

1. Adjustment Criteria and Presentation Requirements

Rule 11–02 contains rules and instructions for the presentation of pro forma financial information. The rules provide some flexibility to tailor pro forma disclosures to particular events and circumstances. The presentation requirements for the pro forma condensed statement of comprehensive income were designed to elicit disclosures that distinguish between the one-time impact and the on-going impact of a transaction.[282] The rules call for pro forma financial information to show the impact of the transaction on income from continuing operations of the registrant.[283]

Article 11 provides that the only adjustments that are appropriate in the presentation of the pro forma condensed statement of comprehensive income are those that are:

- Directly attributable to the transaction;
- Expected to have a continuing impact on the registrant; and
- Factually supportable.[284]

The pro forma condensed balance sheet, on the other hand, reflects pro forma adjustments that are directly attributable to the transaction and factually supportable, regardless of whether the impact is expected to be continuing or nonrecurring because the objective of the pro forma balance sheet is to reflect the impact of the transaction on the financial position of the registrant as of the balance sheet date.

a. Proposed Amendments

The Commission proposed to revise Article 11 by replacing the existing pro forma adjustment criteria with simplified requirements to depict the accounting for the transaction (''Transaction Accounting Adjustments'') [285] and present the

Period—Significance.'' Calculation of the investment includes any debt secured by the real properties that is assumed by the purchaser. In addition, in estimating the offering proceeds, the registrant, following the staff's guidance, could consider the pace of fundraising as of the measurement date, the sponsor or dealer-manager's prior public fundraising experience, and offerings by similar companies.

[276] *See* FRM *supra* note 94 at Section 2325.5 '''Blind Pool'' Offerings—After the Distribution Period.''

[277] *See* letters from BDO, CAQ, DT, EY, GT, NAREIT, PWC, and RSM.

[278] *See id.*

[279] *See* letter from NAREIT.

[280] *See* Rule 11–01(b)(4). Rules 3–05 and 3–14 were also revised to refer to new Rule 11–01(b)(4).

[281] *See* 1996 Streamlining Release *supra* note 24.

[282] *See Instructions for the Presentation and Preparation of Pro Forma Financial Information and Requirements for Financial Statements of Businesses Acquired or To Be Acquired,* Release No. 33–6413 (June 24, 1982) [47 FR 29832 (July 9, 1982)] indicating that ''[t]he presentation requirements for the pro forma condensed statement of income are designed to elicit disclosures that clearly distinguish between the one-time impact and the on-going impact of the transaction and thereby assist investors in focusing on the transaction at hand.''

[283] Discontinued operations would not be reflected in the condensed historical financial statements used as the starting point for the pro forma presentation.

[284] *See* Rule 11–02(b)(6). Material non-recurring charges or credits which result directly from the transaction and which will impact the income statement during the next 12 months are not reflected in the pro forma condensed statement of comprehensive income.

[285] Under the proposed rule, Transaction Accounting Adjustments would depict: (1) In the pro forma condensed balance sheet the accounting for the transaction required by U.S. GAAP or IFRS–IASB, and (2) In the pro forma condensed income statements, the effects of those pro forma balance sheet adjustments assuming the adjustments were made as of the beginning of the fiscal year presented. If the condition in Rule 11–01(a) that is met does not have a balance sheet effect, then our proposal would require that Transaction Accounting Adjustments depict the accounting for the transaction required by U.S. GAAP or, if applicable, IFRS–IASB. Under the proposed rule, Transaction Accounting Adjustments would be limited to adjustments to account for the transaction using the measurement date and method prescribed by the applicable accounting standard. For probable transactions, the measurement date would be as of the most recent

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reasonably estimable synergies and other transaction effects that have occurred or are reasonably expected to occur (Management's Adjustments'').[286] In addition, the Commission proposed other changes to simplify and clarify Article 11 and to provide more consistent use of terminology. The Commission proposed these changes because the existing pro forma adjustment criteria are not clearly defined, can yield inconsistent presentations for similar fact patterns, and preclude the inclusion of adjustments for the potential effects of post-acquisition actions expected to be taken by management.

b. Comments

While commenters were generally supportive of replacing the existing pro forma adjustment criteria with the proposed Transaction Accounting Adjustments,[287] one commenter recommended retaining the existing methodology.[288] Several commenters recommended changes or sought clarification regarding the application of the rules to Transaction Accounting Adjustments.[289] However, most of the comments received relating to pro forma financial information were focused on Management's Adjustments. Commenters were mixed in their support [290] or opposition [291] to the proposed Management's Adjustments depicting synergies and other transaction effects.

Many commenters recommended against including the proposed Management's Adjustments in pro forma financial statement requirements.[292] Some of these commenters suggested that pro forma financial information is an inapt means for communicating the anticipated synergies from a transaction.[293] These commenters also expressed concerns relating to: The inherent uncertainty/subjectivity of synergy expectations; the burden of preparing the disclosure; the potential liability; the risk of synergy disclosure changing over time and confusing or misleading investors; and other unintended consequences.[294] In contrast, commenters supportive of the requirement indicated that the proposed Management's Adjustments would provide investors insight into the potential effects of the acquisition and post-acquisition plans expected to be taken by management [295] and provide greater flexibility for management to include forward-looking information and provide investors with insight into their decision to enter into the transaction.[296]

Many commenters, whether supportive of or opposed to the proposed requirements, recommended that the Commission provide additional guidance or clarification about their application, particularly with respect to the proposed Management's Adjustments.[297] Commenters recommended that the Commission provide examples of synergies and other transaction effects and the treatment of nonrecurring costs to achieve them.[298] Commenters also requested other implementation guidance, such as guidance on: The criteria for determining ''reasonably estimable'' and the permissible range; the timing parameters relating to realization and ''reasonably expected'' to occur; what would constitute a ''fair and balanced presentation''; the relationship between

practicable date prior to the effective date (for registration statements) or the mailing date (for proxy statements).

[286] Under the proposed rule, Management's Adjustments would be required for and limited to synergies and other effects of the transaction, such as closing facilities, discontinuing product lines, terminating employees, and executing new or modifying existing agreements, that are both reasonably estimable and have occurred or are reasonably expected to occur. However, if the registrant previously was a part of another entity and presentation of pro forma financial information was necessary to reflect the operations and financial position of the registrant as an autonomous entity, the proposed rules would provide that the adjustments necessary to show the registrant as an autonomous entity be included in Management's Adjustments. For example, where a company (the registrant) operates as a subsidiary of another entity and files a registration statement under the Securities Act in connection with an initial public offering, and presentation of pro forma financial information is necessary to reflect the operations and financial position of the registrant as an autonomous entity, the registration statement would include Article 11 pro forma financial information, which under our proposal would include such adjustments in Management's Adjustments. The proposed rule also included presentation requirements for Management's Adjustments, requiring that they be presented through a separate column in the pro forma financial information after the presentation of the combined historical statements and Transaction Accounting Adjustments. This presentation would permit investors to distinguish the accounting effects on the registrant of the underlying acquired business from operational effects of management's plans that are subject to management's discretion or other uncertainties. Similarly, the proposed rules would require that per share data be presented in two separate columns. One column would present the pro forma total depicting the combined historical statements with only the Transaction Accounting Adjustments, and the second column would present the combined historical statements with both the Transaction Accounting Adjustments and Management's Adjustments. Further, the proposed rule would include specific disclosures for each Management's Adjustments including: A description, including the material uncertainties, of the synergy or other transaction effects; disclosure of the underlying material assumptions, the method of calculation, and the estimated time frame for completion; qualitative information necessary to give a fair and balanced presentation of the pro forma financial information; and to the extent known, the reportable segments, products, services, and processes involved; the material resources required, if any; and the anticipated timing. For synergies and other transaction effects that are not reasonably estimable and will not be included in Management's Adjustments, the proposed rule would require that qualitative information necessary for a fair and balanced presentation of the pro forma financial information also be provided.

[287] *See* letters from Ball, Davis Polk, DT, FEI, New York City Bar Association, Committee on Mergers and Acquisitions (''NYCBA–M&A''), Pfizer, and SIFMA. One of these commenters noted that under the existing rules, pro forma financial statements can be difficult for registrants to prepare and are among the most prolific sources of questions for the staff. *See* letter from NYCBA–M&A.

[288] *See* letter from Cravath. Cravath indicated that it does not believe that there is significant confusion among preparers of financial information or investors with respect to the current Article 11 pro forma adjustment methodology, including using the current ''continuing impact'' criterion, or the benefits and limitations of such disclosure. However, Cravath also indicated that it had significant concerns regarding the proposal to require Management's Adjustments and opposed the inclusion of such a requirement in the final rules. Accordingly, Cravath recommended retaining the existing methodology.

[289] *See, e.g.,* letters from BDO, Davis Polk, DT, and FEI. For example, one of these commenters recommended the final rule permit the inclusion of pro forma adjustments for additional events that are directly related to the transaction, (*e.g.* adjusting for the effects of additional financing necessary to complete the acquisition). *See* letter from FEI. Another commenter recommended continuing to exclude nonrecurring items from the pro forma statement of comprehensive income and providing clarity about how to define non-recurring items. *See* letter from Davis Polk.

[290] *See, e.g.,* letters from Allstate, Ball, CFA, Davis Polk, IMA, MTBC, and PWC.

[291] *See, e.g.,* letters from Cravath, Eli Lilly, FEI, GT, Nasdaq, NYCBA–M&A, Pfizer, SIFMA, Shearman, and Williams. *See also* SBCFAC Recommendations, recommending that ''the proposed amendments to the pro forma financial information requirements with respect to whether the proposed addition of Management's Adjustments, which are intended to reflect reasonably estimable synergies and transaction effects, should be optional or not required at all.''

[292] *See, e.g.,* letters from Eli Lilly, Liberty, NYCBA–M&A, NYCBA—Sec., Pfizer, S&C, and SIFMA. *See also* SBCFAC Recommendations.

[293] *See, e.g.,* letters from S&C and NYCBA–M&A.

[294] *See, e.g.,* letters from Cravath, Debevoise, Eli Lilly, FEI, GT, KPMG, Liberty, Nasdaq, NYCBA–M&A, Pfizer, S&C, SIFMA, Shearman, and Williams. Some of these commenters further suggested the reasonably expected synergy disclosure requirement could, among other things, result in premature disclosure of sensitive information that could affect important relationships with stakeholders, impact boards of directors, auditors, and underwriters, and have a chilling effect on disclosure. *See, e.g.,* letters from FEI and Pfizer.

[295] *See, e.g.,* letters from Ball, CFA, IMA, and PWC. One of these commenters supported inclusion of the disclosure because, in the commenter's view, the information provided to investors in connection with marketing the deal should be consistent with, if not reconciled to, management projections provided to the board and shareholders, or the projections provided to financial advisors in connection with the fairness opinion. *See* letter from CFA.

[296] *See, e.g.,* letters from Ball and CAQ.

[297] *See, e.g.,* letters from DT, Liberty, Pfizer, and PWC.

[298] *See, e.g.,* letters from BDO, CAQ, Crowe, Davis Polk, DT, EY, GT, KPMG, PWC, and RSM.

Management's Adjustments on the pro forma statements of comprehensive income and those on the balance sheet; updating requirements for Management's Adjustments in subsequent filings; the presentation of multiple transactions; and treatment of overlap between Transaction Accounting Adjustments and Management's Adjustments.[299]

Some commenters that expressed concern relating to liability for the disclosure sought by the proposed amendments supported the application of the forward-looking information safe harbors under 17 CFR 230.175 (''Securities Act Rule 175'') and 17 CFR 240.3b–6 (''Exchange Act Rule 3b–6''),[300] while other commenters recommended further protections, such as a safe harbor for forward-looking information similar to that found in the Private Securities Litigation Reform Act safe harbor,[301] permitting Article 11 information to be ''furnished'' rather than ''filed,'' [302] or an exception or safe harbor for cases where synergies are not a material element of the transaction.[303]

Several commenters recommended the Commission consider whether such disclosure should be optional.[304] Other commenters recommended other ways to limit the proposed Management's Adjustments disclosure requirements while still providing useful information.[305] For example, two commenters recommended limiting the requirement to narrative disclosure of synergies information in transactions where the information has otherwise been publicly disclosed.[306] Another commenter recommended comprehensive disclosure in the footnotes of the related non-recurring costs and anticipated timing of the run-rate synergies.[307]

c. Final Amendments

We are adopting the amendments with modifications after considering comments received. We are amending Article 11, as proposed, by replacing the existing pro forma adjustment criteria with simplified requirements to depict the accounting for the transaction and to provide the option to depict synergies and dis-synergies of the acquisitions and dispositions for which pro forma effect is being given. We also are adopting, as proposed, other changes to simplify and clarify Article 11 and use terminology more consistently.[308] Additionally, we are, as proposed, deleting existing Rule 11–02(a), which describes the objectives of the preparation requirements, to avoid confusion and focus registrants on the requirements of the rule.

The revised pro forma adjustment criteria we are adopting are broken out into three categories:

(i) ''Transaction Accounting Adjustments;''

(ii) ''Autonomous Entity Adjustments;'' and

(iii) ''Management's Adjustments.'' [309]

The Transaction Accounting Adjustments reflect only the application of required accounting to the acquisition, disposition, or other transaction linking the effects of the acquired business to the registrant's audited historical financial statements. Autonomous Entity Adjustments are adjustments necessary to reflect the operations and financial position of the registrant as an autonomous entity when the registrant was previously part of another entity. Management's Adjustments provide both flexibility to registrants to include forward-looking information that depicts the synergies and dis-synergies identified by management in determining to consummate or integrate the transaction for which pro forma effect is being given and insight to investors into the potential effects of the acquisition and the post-acquisition plans expected to be taken by management. Under the final amendments, Transaction Accounting Adjustments and Autonomous Entity Adjustments are required adjustments. Management's Adjustments, as discussed further below, are optional under the final amendments.

Transaction Accounting Adjustments and Autonomous Entity Adjustments

We are adopting the Transaction Accounting Adjustments, as proposed, in amended Rule 11–02(a)(6)(i) to require registrants to depict: (1) In the pro forma condensed balance sheet the accounting for the transaction required by U.S. GAAP or IFRS–IASB, as applicable,[310] and (2) In the pro forma condensed income statements, the effects of those pro forma balance sheet adjustments assuming the adjustments were made as of the beginning of the fiscal year presented.[311] Consistent with the proposal, the amendment indicates that if the condition in Rule 11–01(a) that is met does not have a balance sheet effect, then the Transaction Accounting Adjustments to the pro forma statement

[299] *See, e.g.,* letters from BDO, CFA, Crowe, Debevoise, DT, EY, FEI, GT, IMA, KPMG, RSM, and S&C.

[300] *See* letters from Allstate, CFA, Cravath, Debevoise, PWC, and SIFMA. One of these commenters recommended that the final rules expressly provide a safe harbor for forward-looking information and that it include express language that the safe harbors apply to any pro forma financial information that includes both historical and forward-looking information. This commenter also expressed concern that the proposed requirement to provide qualitative information necessary for a fair and balanced presentation of the pro forma financial information when synergies and other transaction effects would not be included in Management's Adjustments because they are not reasonably estimable represented a new disclosure liability standard. *See* letter from Cravath.

[301] *See* letter from Davis Polk.

[302] *See* letter from S&C.

[303] *See* letter from NYCBA—M&A.

[304] *See, e.g.,* letters from BDO, Cravath, EY, and Williams. One of these commenters suggested that if Management's Adjustments were optional they could be removed from the pro forma financial information and underwriters could receive customary comfort as part of their due diligence process. *See* letter from BDO. Another commenter recommended the disclosure be optional or not required for smaller reporting companies. *See* SBCFAC Recommendations.

[305] *See, e.g.,* letters from Davis Polk, FEI, and S&C.

[306] *See* letters from Cravath and S&C.

[307] *See* letter from Davis Polk.

[308] Specifically, we are amending Article 11, as proposed, to refer to ''pro forma financial information,'' ''potential common stock'' as defined in U.S. GAAP, and ''pro forma basic'' per share data throughout, as well as amending existing Rule 11–02(b)(5) to require the pro forma condensed statement of comprehensive income to also disclose income (loss) from continuing operations attributable to the controlling interests because that amount is used to calculate earnings per share under U.S. GAAP. *See* amended Rule 11–02(a)(5). We are also, as proposed, amending existing Rule 11–01(a)(8) to remove the reference to other ''events'' as the concept of other events is encompassed by the reference to ''other transactions'' and amending existing Rule 11–02(b)(2) to refer to ''each transaction for which pro forma effect is being given'' in recognition that the information may be required to give effect to more than one transaction. *See* amended Rules 11–01(a)(8) and 11–02(a)(2).

[309] As proposed, the amendments: (i) Eliminate the substance of the first sentence of Instruction 2 as well as Instruction 4 and Instruction 5 of Rule 11–02(b) as this guidance is superseded by the requirements for Transaction Accounting Adjustments and Autonomous Entity Adjustments; (ii) Eliminate Instruction 3 regarding business dispositions as it is no longer necessary given the adoption of proposed Rules 11–02(a)(4), 11–02(a)(6), and 11–02(b)(3); (iii) Incorporate the substance of Instruction 1, using income from continuing operations, into amended Rule11–02(b)(1) and Instruction 2 guidance on financial institutions into amended Rule 11–02(b)(2); (iv) Add new Rule 11–02(b)(4) in place of Instruction 6 to clarify that each transaction for which pro forma effect is required to be given must be presented in separate columns; and (v) Add new Rule 11–02(b)(5) to replace Instruction 7 to Rule 11–02(b), which will codify pro forma tax effect guidance from Staff Accounting Bulletin No. 1.B., *Allocation Of Expenses And Related Disclosure In Financial Statements Of Subsidiaries, Divisions Or Lesser Business Components Of Another Entity, 1. Costs reflected in historical financial statements.*

[310] Transaction Accounting Adjustments are limited to adjustments to account for the transaction using the measurement date and method prescribed by the applicable accounting standard. For probable transactions, the measurement date is as of the most recent practicable date prior to the effective date (for registration statements) or the mailing date (for proxy statements).

[311] *See* Rule 11–02(a)(6)(i)(B).

of comprehensive income should depict the accounting for the transaction required by U.S. GAAP or IFRS–IASB, as applicable. Further, in a modification from the proposal made in response to comments, the amendments clarify that pro forma statement of comprehensive income ''adjustments must be made whether or not the pro forma balance sheet is presented pursuant to paragraph (c)(1) of this section.''

In order to effect the changes described below to our Management's Adjustments proposal, the requirement to show the registrant as an autonomous entity if the condition in Rule 11–01(a)(7) is met has been relabeled as ''Autonomous Entity Adjustments'' and relocated from the subparagraph concerning Management's Adjustments to Rule 11–02(a)(6)(ii) to clarify that such adjustments are required when the condition for their presentation is met and that they must be presented in a separate column from Transaction Accounting Adjustments.[312]

As proposed, the amendments will require that historical and pro forma per share data must be presented on the face of the pro forma condensed statement of comprehensive income and give effect to Transaction Accounting Adjustments. However, in a further modification from the proposal [313] to effect the changes described below to our Management's Adjustment proposal, the amendments require that such pro forma per share data also give effect to Autonomous Entity Adjustments.[314] We believe that including all adjustments required by our amendments to be presented on the face of the pro forma financial information, whether deemed recurring or nonrecurring by a registrant's management, will help achieve consistency in the application of our pro forma requirements and simplify compliance. This requirement, coupled with the requirement to disclose revenues, expenses, gains and losses and related tax effects that will not recur in the income of the registrant beyond 12 months after the transaction, will also enhance transparency.

Management's Adjustments

We agree with commenters that providing forward-looking information, subject to appropriate safe harbors, about synergies and related-transaction effects contemplated by the board and management in determining to execute the acquisition or disposition of a business would provide useful information for understanding the effects of the transaction. However, having considered the comments received, we are persuaded that the line-item specificity and the one year time horizon presented in our proposed pro forma requirements is not necessarily consistent with the manner in which synergy estimates are made and that not all transactions attach the same level of importance to synergies as a rationale for choosing to pursue the transaction. We are further persuaded that there may be different levels of confidence about different types of synergies and transaction effects and that disclosure requirements should be crafted with appropriate flexibility to permit management to depict full run-rate synergies and the nonrecurring costs to achieve them if, and in a manner, they deem appropriate. For example, we believe cost synergies should be permitted to be presented without revenue synergies provided that they incorporate related dis-synergies and the related disclosure describes the nature, uncertainties, and limitations of the amounts presented and the time-frames and uncertainties inherent in achieving them. We also believe such disclosure should be linked to pro forma financial information as a means to more fully demonstrate how historical amounts could change based on the transaction.

After considering comments received on the proposals, we are modifying the amendments to provide that Management's Adjustments depicting synergies and dis-synergies of the acquisitions and dispositions for which pro forma financial information is being given may, in the registrant's discretion, be presented if in its management's opinion, such adjustments would enhance an understanding of the pro forma effects of the transaction.[315] We encourage registrants to provide Management's Adjustments in these circumstances when certain additional conditions are met. Because under the final amendments the presentation of Management's Adjustments is optional, we are modifying the proposed rules such that, in order to present Management's Adjustments, certain conditions related to the basis for Management's Adjustments and the form of presentation must be met. These amendments are intended to ensure that if Management's Adjustments are presented, they are done so consistently and in a manner that would not be misleading to investors. Specifically, as modified, the *Basis for Management's Adjustments* in Rule 11–02(a)(7)(i) requires as conditions for presenting Management's Adjustments that:

- There is a reasonable basis for each such adjustment;
- The adjustments are limited to the effect of such synergies and dis-synergies on the historical financial statements that form the basis for the pro forma statement of comprehensive income as if the synergies and dis-synergies existed as of the beginning of the fiscal year presented. If such adjustments reduce expenses, the reduction shall not exceed the amount of the related expense historically incurred during the pro forma period presented; and
- The pro forma financial information reflects all Management's Adjustments that are, in the opinion of management, necessary to a fair statement of the pro forma financial information presented and a statement to that effect is disclosed. When synergies are presented, any related dis-synergies shall also be presented.

Further, as modified, the *Form of Presentation* in Rule 11–02(a)(7)(ii) requires as additional conditions for presenting Management's Adjustments that:

- If presented, Management's Adjustments must be presented in the explanatory notes to the pro forma financial information in the form of reconciliations of pro forma net income from continuing operations attributable to the controlling interest and the related pro forma earnings per share data to such amounts after giving effect to Management's Adjustments.
- If presented, Management's Adjustments included or incorporated by reference into a registration statement, proxy statement, offering statement or Form 8–K should be as of the most recent practicable date prior to the effective date, mail date, qualified date, or filing date as applicable, which may require that they be updated if previously provided in a Form 8–K that

[312] We believe this requirement is appropriate given the different purposes for which Transaction Accounting Adjustments and Autonomous Entity Adjustments are used. It will also facilitate compliance with the requirements for determining significance of acquisitions and dispositions using pro forma financial information, which as proposed will only include Transaction Accounting Adjustments. *See* Rule 11–01(b)(3)(i)(B).

[313] We do not believe it is necessary, as some commenters suggested, to modify our proposal to permit the inclusion of pro forma adjustments for additional events that are directly related to the transaction (*e.g.* adjusting for the effects of additional financing necessary to complete the acquisition) because Rule 11–01(a)(8) requires giving pro forma effect when consummation of other transactions has occurred or is probable for which disclosure of pro forma financial information would be material to investors.

[314] We were not persuaded by the suggestion to further modify our proposal to permit exclusion of nonrecurring items from the pro forma statement of comprehensive income or to define non-recurring items.

[315] *See* Rule 11–02(a)(7).

is appropriately incorporated by reference.

• If Management's Adjustments will change the number of shares or potential common shares, the change must be reflected within Management's Adjustments in accordance with U.S. GAAP or IFRS–IASB, as applicable, as if the common stock or potential common stock were outstanding as of the beginning of the period presented.

• The explanatory notes must also include disclosure of the basis for and material limitations of each Management's Adjustment, including any material assumptions or uncertainties of such adjustment, an explanation of the method of the calculation of the adjustment, if material, and the estimated time frame for achieving the synergies and dis-synergies of such adjustment.[316]

We believe these requirements are necessary to better enable an investor to understand Management's Adjustments being made in the pro forma financial information and that this presentation will clearly distinguish the accounting effects on the registrant of the underlying acquired business from operational effects of management's plans that are subject to management's discretion and other uncertainties.

Some commenters cited similarities between pro forma Management's Adjustments and projections. While we believe they are distinct, because Management's Adjustments may include measures that require similar judgments to projections, we have looked to the Commission's policy statement on projections in developing a framework for optional disclosure of Management's Adjustments.[317] Specifically, the amended rules include disclosure requirements related to the Basis for Management's Adjustments and Form of Management's Presentation.[318] Likewise, the final amendments require that there is a reasonable basis for each such adjustment and that the pro forma financial information reflects all Management's Adjustments that are, in the opinion of management, necessary to a fair statement of the pro forma financial information presented and a statement to that effect is disclosed.[319] The final amendments also require disclosure of both the basis for and material limitations of each Management's Adjustment, including any material assumptions or uncertainties of such adjustment, an explanation of the method of the calculation of the adjustment, if material, and the estimated time frame for achieving the synergies and dis-synergies of such adjustment.[320] The amendments also provide practical limits tailored to the pro forma financial information presentation.[321]

While we encourage registrants to include Management's Adjustments in pro forma financial information, we recognize that such adjustments may not be appropriate for all circumstances. In order to achieve consistency between pro forma financial information presentations that include Management's Adjustments and those that do not, and in recognition that the line item format of pro forma financial information may not be well-suited to Management's Adjustments, the amended rules provide that Management's Adjustments shall be presented in the explanatory notes to the pro forma financial information in the form of reconciliations of pro forma net income from continuing operations attributable to the controlling interest and the related pro forma earnings per share data to such amounts after giving effect to Management's Adjustments. Because Management's Adjustments might contain forward-looking information, we are amending the rule, as proposed, to include an instruction indicating that any forward-looking information supplied is expressly covered by the safe harbor provisions under 17 CFR 230.175 and 17 CFR 240.3b–6.[322] Given the reference to these safe harbors in the adopted rule and the other modifications we are making with respect to Management's Adjustments, we do not believe there is a need to create new safe harbors or to reference additional safe harbors.

Explanatory Notes

To further clarify the pro forma financial information disclosure, we are adopting, as proposed, amendments to require disclosure of revenues, expenses, gains and losses, and related tax effects that will not recur in the income of the registrant beyond 12 months after the transaction.[323] Additionally, for Transaction Accounting Adjustments, the final amendments will require, as proposed, disclosure of:

• Total consideration transferred or received, including its components and how they were measured. If total consideration includes contingent consideration, the amendments will require disclosure of the contingent consideration arrangement(s),[324] the basis for determining the amount of payment(s) or receipt(s), and an estimate of the range of outcomes (undiscounted) or, if a range cannot be estimated, that fact and the reasons why; and

• When the initial accounting is incomplete: A prominent statement to this effect, the items for which the accounting depicted is incomplete, a description of the information that the registrant requires, including, uncertainties affecting the pro forma financial information and the possible consequences of their resolution, an indication of when the accounting is expected to be finalized, and other available information regarding the magnitude of any potential adjustments.[325]

In order to effect the changes described above to our Management's Adjustments proposal, we are relocating the proposed explanatory note disclosures for Management's Adjustments that we believe also apply to Autonomous Entity Adjustments from the subparagraph concerning Management's Adjustments to Rule 11–02(a)(11)(iii). Specifically, the amended rules provide that the accompanying explanatory notes shall disclose for each Autonomous Entity Adjustment, a description of the adjustment (including the material uncertainties), the material assumptions, the calculation of the

[316] *See* Rule 11–02(a)(11)(iii).

[317] *See* Item 10(b) of Regulation S–K.

[318] *See* Rule 11–02(a)(7)(i) and (ii).

[319] *See* Rule 11–02(a)(7)(i)(A). This requirement is similar to the representation management must disclose in historical interim financial statements subject to Article 10, *Interim financial statements,* (*see* 17 CFR 210.10–01(b)(8) (''Rule 10–01(b)(8)'')) and taken together with the requirement to include dis-synergies if synergies are depicted (*see* Rule 11–02(a)(7)(i)(C)), we believe it will help achieve much the same purpose as our proposed requirement that pro forma presentations that include Management's Adjustments be fair and balanced. Because we are persuaded that the line-item specificity in our proposed pro forma requirements is not necessarily consistent with the manner in which synergy estimates are made, the amended rules do not include that proposed requirement or the one to disclose for each Management's Adjustment, to the extent known, the reportable segments, products, services, and processes involved; the material resources required, if any, and the anticipated timing.

[320] *See* Rule 11–02(a)(7)(ii)(C).

[321] For example, the amended rules limit the adjustments to the effect of such synergies and dis-synergies on the historical financial statements that form the basis for the pro forma statement of comprehensive income as if the synergies and dis-synergies existed as of the beginning of the fiscal year presented. The amended rules further require that if such adjustments reduce expenses, the reduction shall not exceed the amount of the related expense historically incurred during the pro forma period presented. *See* Rule 11–02(a)(7)(i)(B).

[322] *See* the Instruction to Rule 11–02(a)(6)(ii).

[323] *See* Rule 11–02(a)(10)(i), based on existing Rule 11–02(b)(5).

[324] In a modification from the proposal, the amended rule inserts ''contingent consideration'' before ''arrangements'' to clarify that the proposed rule's reference to ''arrangement(s)'' means ''contingent consideration arrangement(s).''

[325] *See* Rule 11–02(a)(11)(ii).

adjustment, and qualitative information about the Autonomous Entity Adjustments necessary to give a fair and balanced presentation of the pro forma financial information.[326] The amendments also tailor the proposed disclosure to reference Autonomous Entity Adjustments and to remove proposed disclosure that related to synergies and other transaction effects rather than to Autonomous Entity Adjustments. Further, the amendments retain for Autonomous Entity Adjustments the proposed requirement to disclose qualitative information about the Autonomous Entity Adjustments necessary to give a fair and balanced presentation of the pro forma financial information.[327]

We are additionally clarifying, as proposed, that: Pro forma financial information must be appropriately labeled and presented as required by Article 11; [328] requiring that each transaction for which pro forma effect is required to be given must be presented in a separate column; [329] and requiring that, if pro forma financial information includes another entity's statement of comprehensive income, such as that of an acquired business, it must be brought up to within one fiscal quarter, if practicable.[330]

2. Significance and Business Dispositions

Rule 11–01(a)(4) provides that pro forma financial information is required upon the disposition or probable disposition of a significant portion of a business either by sale, abandonment, or distribution to shareholders by means of a spin-off, split-up, or split-off, if that disposition is not fully reflected in the financial statements of the registrant. Rule 11–01(b) further provides that a disposition of a business is significant if the business to be disposed of meets the conditions of a significant subsidiary under Rule 1–02(w). Rule 1–02(w) uses a 10 percent significance threshold, rather than the 20 percent threshold used for business acquisitions under Rules 3–05 and 11–01(b). When a registrant determines that it has an acquisition or disposition of a significant amount of assets that do not constitute a business, Item 2.01 of Form 8–K uses a 10 percent threshold for both acquisitions and dispositions to require disclosure of certain details of the transaction.[331] The terms ''business'' and ''significant'' used in Form 8–K specifically reference Article 11 of Regulation S–X.

a. Proposed Amendments

The Commission proposed to:

- Raise the significance threshold for the disposition of a business from 10 percent to 20 percent to conform to the threshold at which an acquired business is significant under Rule 3–05;
- To the extent applicable, conform the tests used to determine significance of a disposed business to those used to determine significance of an acquired business; and
- Require smaller reporting companies to provide pro forma financial information for disposition of a significant business in Form 8–K and in certain registration statements and proxy statements when the disposition occurs during or after the most recently completed fiscal year.

b. Comments

Commenters generally supported raising the threshold for significant dispositions.[332] One commenter recommended aligning the criteria for measuring the significance of the disposition of a real estate operation with the criteria for measuring an acquisition.[333]

c. Final Amendments

We are adopting the amendments substantially as proposed. We believe these amendments will simplify compliance for registrants, and we see no compelling reason why the subset of businesses for which investors need information should differ depending on whether the business is being acquired or disposed.

We are amending Rule 11–01(b) to raise the significance threshold for the disposition of a business from 10 percent to 20 percent and to conform, to the extent applicable, the tests used to determine significance of a disposed business to those used to determine significance of an acquired business. We are also adopting as proposed the amendment to Form 8–K and Article 8 to require smaller reporting companies to provide pro forma financial information for disposition of a significant business in Form 8–K and in certain registration statements and proxy statements when the disposition occurs during or after the most recently completed fiscal year.[334]

The amendments apply to dispositions of real estate operations as defined in Rule 3–14(a)(2).[335] We are

[326] The amendments to provide required disclosure for Autonomous Entity Adjustments do not include the following proposed explanatory note disclosures for Management's Adjustments, which we believe may be less relevant to Autonomous Entity Adjustments: The estimated time frame for completion and, to the extent known, the reportable segments, products, services, and processes involved; the material resources required, if any, and the anticipated timing.

[327] Some commenters requested clarification about what disclosure would be necessary to satisfy this requirement, with at least one of these commenters stating its belief that the proposed requirement is a subjective standard. *See, e.g.,* letters from Crowe, DT, EY, and RSM. We observe that the Rule 11–01(a)(7) requirement for pro forma financial information that includes Autonomous Entity Adjustments—namely, that the registrant previously was a part of another entity and such presentation is necessary to reflect operations and financial position of the registrant as an autonomous entity—involves a facts and circumstances determination that does not lend itself to developing an all-inclusive list of disclosures. Instead, the amended rule requires application of judgment to identify ''additional'' qualitative disclosures, ''if any,'' necessary to achieve a fair and balanced presentation in light of a registrant's unique facts and circumstances. As with other disclosure obligations, this requirement should be assessed from the perspective of the reasonable investor.

[328] *See* Rule 11–02(a)(11) and Rule 11–02(c)(2). We are explicitly requiring this labeling and presentation in Article 11 to avoid confusing or inconsistent disclosure. The rules also generally preclude: (i) Presentation of pro forma financial information on the face of the historical financial statements, except where such presentation is specifically required by U.S. GAAP or IFRS–IASB, (ii) presentation of summaries of pro forma financial information that exclude material transactions, (iii) presentation of pro forma amounts that reflect Management's Adjustments elsewhere in a filing without also presenting with equal or greater prominence the amounts to which they are required to be reconciled and a cross-reference to that reconciliation, or (iv) presentations that give pro forma effect to the adoption of accounting standards.

[329] *See* Rule 11–02(b)(4).

[330] *See* Rule 11–02(c)(3). This change better accommodates registrants and acquired businesses that have 52–53 week fiscal years than the current requirement to bring the financial information to within 93 days of the registrant's most recent fiscal year end, if practicable.

[331] For acquisitions and dispositions of assets that do not constitute a business, Item 2.01 of Form 8–K specifies the tests to be used rather than referencing the tests in Rule 1–02(w). Specifically, Item 2.01 states that, ''an acquisition or disposition shall be deemed to involve a significant amount of assets: (i) If the registrant's and its other subsidiaries' equity in the net book value of such assets or the amount paid or received for the assets upon such acquisition or disposition exceeded 10 percent of the total assets of the registrant and its consolidated subsidiaries; or (ii) if it involved a business (*see* Rule 11–01(d)) that is significant (*see* Rule 11–01(b)).''

[332] *See* letters from Bass Berry, Cravath, Eli Lilly, FEI, Liberty, NAREIT, Shearman, and Williams.

[333] *See* letter from DT.

[334] The Form 8–K requirement for smaller reporting companies to provide pro forma financial information refers to Rule 8–05. Rule 8–05, however, only applies to acquisitions. While Article 8 has a requirement in Rule 8–03(b)(4) to provide pro forma financial information about dispositions of significant businesses, the provision only applies to the registrant's interim financial statements. In order to address the anomalous outcome where pro forma financial information is required when interim financial statements are presented but not when annual financial statements are presented, as proposed, we are removing Rule 8–03(b)(4) and revising Rule 8–05 to require disclosure of pro forma financial information when any of the conditions in Rule 11–01 is met.

[335] *See* Rule 11–01(b)(2).

not adopting for dispositions of real estate operations the last sentence of proposed Rule 1–02(w)(1)(i)(D), which modified the Investment Test to include debt secured by the real properties that is assumed by the buyer when the registrant's and its other subsidiaries' investments in and advances to the real estate operations are being compared to total assets of the registrant. Where real estate operations have been included in the consolidated financial statements of the registrant, the information necessary to apply the Investment, Asset and Income Tests is available. Thus, unlike for acquisitions of real estate operations, there are no unique industry considerations warranting limiting the significance determination to only the Investment Test or modifying that test.

3. Smaller Reporting Companies and Issuers Relying on Regulation A

Rule 8–05 sets forth pro forma financial information requirements for business acquisitions by smaller reporting companies. Additionally, Part F/S of Form 1–A directs an issuer relying on Regulation A to present the pro forma financial information specified by Rule 8–05.[336] Like Article 11, Rule 8–05(a) requires pro forma financial information only if financial statements of a business acquired or to be acquired are presented. Like Article 11, Rule 8–05(b) provides that pro forma financial information must consist of a pro forma balance sheet and a pro forma statement of comprehensive income presented in condensed, columnar form for the most recent year and interim period. Rule 8–05(b), however, does not provide further preparation guidance, such as the types of pro forma adjustments that can be made. Note 2 of the Preliminary Notes to Article 8 provides that, to the extent that Article 11–01 offers enhanced guidelines for the preparation, presentation, and disclosure of pro forma financial information, smaller reporting companies may wish to consider these items.

a. Proposed Amendments

The Commission proposed to revise Rule 8–05 to require that the preparation, presentation, and disclosure of pro forma financial information by smaller reporting companies substantially comply with Article 11.

b. Comments

No commenters offered specific comment on these proposed amendments. Two commenters generally supported the proposal to conform the rules applicable to smaller reporting companies to the generally applicable rules stating that it will codify current practice, reduce confusion, and simplify application of the rules.[337] In contrast, another commenter recommended that the Commission consider whether issuers relying on Regulation A warrant different treatment under the rules.[338] Another commenter recommended that smaller registrants be exempt from mandatory Management's Adjustments disclosure in pro forma financial information.[339]

c. Final Amendments

We are adopting the amendments to Rule 8–05 as proposed to require that the preparation, presentation, and disclosure of pro forma financial information by smaller reporting companies substantially comply with Article 11.[340] Additionally, because Part F/S of Form 1–A refers to Rule 8–05, the amendments to Rule 8–05 will apply to issuers relying on Regulation A.[341]

These revisions should ease compliance burdens and clarify the application of our rules for smaller reporting companies and issuers relying on Regulation A by focusing them on the more complete and better understood provisions of Article 11 and provide investors with more uniform information upon which to make their investment decisions.[342] As revised, in limited circumstances smaller reporting companies and issuers relying on Regulation A will now have to provide pro forma financial information for two years when the transaction for which pro forma effect is being given, such as a combination of entities under common control or discontinued operation, will be retrospectively reflected in the historical financial statements of smaller reporting companies and issuers relying on Regulation A for all periods presented as required by U.S. GAAP.[343]

We are also amending Rule 8–05 as proposed to require presentation of pro forma financial information when the conditions in Rule 11–01 exist.[344] Because Rule 8–05 currently requires pro forma financial information only for business acquisitions,[345] when Rule 8–05 applies, conforming its conditions to Rule 11–01 will require smaller reporting companies and issuers relying on Regulation A to provide pro forma financial information for significant acquisitions and dispositions[346] and when a roll-up transaction as defined in 17 CFR 229.901(c) occurs, the registrant previously was a part of another entity and such presentation is necessary to reflect operations and financial position of the registrant as an autonomous entity, or consummation of one or more transactions has occurred or is probable for which disclosure of pro forma financial information would be material to investors.[347]

E. Amendments to Financial Disclosure About Acquisitions Specific to Investment Companies

For financial reporting purposes, investment company registrants, including business development companies, must apply the general provisions in Articles 1, 2, 3, and 4 of Regulation S–X,[348] unless subject to the

[336] *See* paragraph (b)(7)(iv) of Part F/S. Part F/S of Form 1–A permits the periods presented to be the shorter of those applicable to issuers relying on Regulation A and the periods specified by Article 8.

[337] *See* letters from BDO and Cravath.

[338] *See* SBCFAC Recommendations.

[339] *See* letter from EY.

[340] *See* 8–05(b). However, because pro forma financial information begins with the historical financial statements of the registrant, revised Rule 8–05 requires application of Rule 8–03(a) requirements for condensed format rather than the requirement in Rule 11–02(b)(3).

[341] Certain related requirements applicable to smaller reporting companies do not apply to issuers relying on Regulation A. For example, issuers relying on Regulation A are not required to file reports on Form 8–K or proxy statements.

[342] *See* Section II.D.1.

[343] Rule 8–05 did not have a similar provision. However, the incremental burden on smaller reporting companies and issuers relying on Regulation A is not expected to be significant because the circumstances requiring retrospective revision are generally within their control and they must eventually revise their previously filed historical financial statements for all periods to reflect these circumstances.

[344] *See* Rules 8–05(a) and 11–01(a), as amended.

[345] *See supra* Section II.D.2.

[346] Based on an analysis of 2017 disclosures of acquisitions and dispositions by smaller reporting companies, Commission staff found that out of 191 disclosures of acquisitions and dispositions by smaller reporting companies in 2017, 178 already appeared to comply with Article 11 requirements. Based on an analysis of disclosures of acquisitions and dispositions in Forms 1–A originally filed in 2019, Commission staff found that out of 12 Forms 1–A that disclosed acquisitions subject to Rule 8–04 or Rule 8–06, 9 already appeared to comply with Article 11 requirements.

[347] Form 1–A requires the pro forma financial information described in Rule 8–05 only when financial statements are required for businesses acquired or to be acquired. We have amended Part F/S of Form 1–A to remove this limitation to be consistent with our amendments, as proposed, to Rule 8–05 to require presentation of pro forma financial information when the conditions in Rule 11–01 exist.

[348] In October 2016, as part of a broader investment company reporting modernization rulemaking, the Commission adopted certain amendments to Regulation S–X that expressly apply Article 6 to business development companies. *See Investment Company Reporting Modernization,*

Continued

special rules set forth in 17 CFR 210.6–01 through 210.6–10 (''Article 6'').[349] Investment company registrants differ from non-investment company registrants in several respects.[350] The Commission proposed amendments to tailor the financial reporting requirements for investment companies with respect to their acquisitions of investment companies and other types of funds (collectively, ''acquired funds''). Specifically, the Commission proposed:

- To add a definition of ''significant subsidiary'' in Regulation S–X that is specifically tailored for investment companies based on the current Rule 8b–2 definition with some modifications; [351]
- To add new Rule 6–11 of Regulation S–X, which would specifically cover financial reporting in the event of a fund acquisition; and
- To eliminate the pro forma financial information requirement for investment companies and replace it with proposed supplemental financial information that the Commission believed would be more relevant to fund investors.

Commenters generally supported the Commission's objective of tailoring financial reporting requirements for investment companies with respect to acquired funds.[352] As discussed below, we are adopting these requirements substantially as proposed, with certain modifications based on comments received.

1. Amendments to Significance Tests for Investment Companies

Investment companies are required to use the significant subsidiary tests in Rule 1–02(w) when applying Rule 3–05 and other rules within Regulation S–X.[353] However, the tests in Rule 1–02(w) were not written for the specific characteristics of investment companies.[354] As detailed in the Proposing Release, the definition of ''significant subsidiary'' in current Rule 1–02(w) has an Investment Test, an Asset Test, and an Income Test, while the definition of ''significant subsidiary'' in Rule 8b–2 has an investment test and an income test, but no asset test.[355] The Commission proposed to add new Rule 1–02(w)(2) to create a separate definition of ''significant subsidiary'' for investment companies in Regulation S–X, which—like Rule 8b–2—would use an investment test and an income test, but not an asset test.[356]

Two commenters supported adding a definition of ''significant subsidiary'' specifically tailored for investment companies.[357] One commenter noted that certain language in proposed Rule 1–02(w)(1) appeared inconsistent with proposed Rule 1–02(w)(2).[358]

a. Investment Test

Currently, the Investment Test for a significant subsidiary in Regulation S–X determines significance by evaluating whether the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary [359] exceed 10 percent of the registrant's total assets. Rule 8b–2 similarly determines significance using an investment test. For investment companies, the Commission proposed an investment test that would assess whether the value of the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceeds 10 percent of the value of the total investments of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year. The proposed investment test would be similar to the existing Investment Test, but modified so that the comparison would be to the value of the registrant's total investments rather than total assets.[360]

We are adopting, as proposed, the investment test for investment companies as part of the definition of ''significant subsidiary.'' We received one comment on the proposed investment test. This commenter supported the proposed investment test for investment companies, agreeing that investment in the tested subsidiary in the context of its relative exposure to total investments at fair value is the appropriate metric in evaluating its significance.[361] We continue to believe that a total investments measure is more appropriate for investment companies and more relevant than the existing tests, as it would focus the significance determination on the impact to the registrant's investment portfolio as opposed to other non-investment assets that may be held.[362]

b. Asset Test

The Asset Test in current Rule 1–02(w) compares the proportionate share of the total assets (after intercompany eliminations) of the tested subsidiary to the total assets of the registrant and its subsidiaries consolidated as of the end of the most recent fiscal year. There is no equivalent test under the Rule 8b–2 definition of ''significant subsidiary''.

As proposed, we are eliminating the Asset Test as a measure of significance for investment companies because we continue to believe that doing so would simplify compliance without changing the information available to investors as the Asset Test is generally not meaningful when applied to investment companies. The only commenter who addressed this aspect of the proposal expressed support for the elimination of

Release No. IC–32314 (Oct. 13, 2016) [81 FR 81870 (Nov. 18, 2016)].

[349] *See* Rule 6–03.

[350] *See* Section II.E. of the Proposing Release. Investment companies invest in securities principally for returns from capital appreciation and investment income. Investment companies are required to value their portfolio investments, with changes in value recognized in the statement of operations for each reporting period. *See* Rule 6–02(b) (''the term value shall have the same meaning given in Section 2(a)(41)(B) of the Investment Company Act''); *see also* FASB ASC 946–320–35, FASB ASC 946–323, FASB ASC 946–325–35, FASB ASC 946–810, and FASB ASC 815–10–35. Also, investment companies generally do not consolidate entities they control and do not account for portfolio investments using the equity method. *See* FASB ASC 946–810–45–2 (general consolidation guidance) and FASB ASC 946–810–45–3 (the exception to that guidance when considering an investment in an operating company that provides services to the investment company).

[351] The Commission additionally proposed to amend Rule 1–02(w) to provide that, with respect to the condition in proposed Rule 1–02(w)(2)(ii), the value of investments shall be determined in accordance with U.S. GAAP and, if applicable, Section 2(a)(41) of the Investment Company Act (15 U.S.C. 80a–2(a)(41)).

[352] *See* letters from BDO, CAQ, Deloitte, and Investment Company Institute (''ICI'').

[353] The changes to the ''significant subsidiary'' definition in Regulation S–X will affect disclosures for fund acquisitions and also have effects on investment company application of Rule 3–09 regarding separate financial statements for significant subsidiaries and Rule 4–08(g) regarding summarized financial information of subsidiaries not consolidated.

[354] *See* Proposing Release at n. 217 and accompanying text.

[355] See Section II.E.1. of Proposing Release.

[356] *Id.* The Commission also proposed conforming amendments to the definition of ''significant subsidiary'' in Securities Act Rule 405, Exchange Act Rule 12b–2, and Investment Company Act Rule 8b–2 to make them consistent with proposed Rule 1–02(w)(2).

[357] *See* letters from ICI and KPMG.

[358] *See* letter from EY. Specifically, proposed Rule 1–02(w)(1) stated that the conditions of paragraph (w)(2) would apply if the ''subsidiary'' is a registered investment company or a business development company, but paragraph (w)(2) stated that its provisions apply to a ''registrant'' that is a registered investment company or a business development company. We have revised Rule 1–02(w)(1) to state that the tests in Rule 1–02(w)(2) apply if the registrant is a registered investment company or a business development company.

[359] *See supra* note 29 (regarding the use of the term ''tested subsidiary'').

[360] *See* 17 CFR 210.6–04, item 4.

[361] *See* letter from Ares Capital Corporation (''Ares'').

[362] We also continue to believe that using total investments for this test would be a more transparent measure than total assets for registrants that use a statement of net assets instead of a balance sheet. *See* Section II.E.1.a. of Proposing Release.

the Asset Test, stating that it is not meaningful when applied to investment companies and has been confusing for business development companies to practically apply.[363]

c. Income Test

The Income Test in current Rule 1–02(w) compares the registrant's and its other subsidiaries' equity in the income from continuing operations before income taxes of the tested subsidiary exclusive of amounts attributable to any noncontrolling interests with the income of the registrant and its subsidiaries consolidated for the most recently completed fiscal year. The income test in Rule 8b–2, however, compares the total investment income of the tested subsidiary with the total investment income of the parent and its consolidated subsidiaries. Both tests find significance if the result is greater than 10 percent.

i. Proposed Amendments

The Commission proposed to amend the income test for investment companies to use the income test in Rule 8b–2, but modified to include any net realized gains and losses and net change in unrealized gains and losses. The proposed income test for investment companies would use components from the statement of operations required by 17 CFR 210.6–07 (''Rule 6–07''). In particular, the proposed income test for investment companies would include, in the numerator, the following amounts for the most recently completed pre-acquisition fiscal year of the tested subsidiary: (1) Investment income, such as dividends, interest, and other income; (2) The net realized gains and losses on investments; and (3) The net change in unrealized gains and losses. The absolute value of the sum of these amounts would be compared to the absolute value of the registrant and its subsidiaries' consolidated change in net assets resulting from operations. The Commission also proposed that a tested subsidiary would be deemed significant under the income test for investment companies if the test yields a condition of greater than either: (1) 80 percent by itself, or (2) 10 percent *and* the investment test for investment companies yields a result of greater than 5 percent (''alternate income test'').

To further mitigate the potential adverse effects of the proposed income test for investment companies with insignificant changes in net assets resulting from operations for the most recently completed fiscal year, the Commission proposed an instruction that would permit the registrant to compute the income test for investment companies using the average of the absolute value of the changes in net assets for the past five fiscal years.

ii. Comments

One commenter specifically supported the proposed income test for investment companies with an 80 percent threshold and the proposed alternate income test with 10 percent and five percent thresholds.[364] However, a different commenter requested that the Commission increase the five percent threshold for the investment component of the alternate income test to 10 percent, consistent with the investment test and Rule 8b–2(b),[365] and another commenter suggested that the Commission eliminate the proposed primary income test and adopt only the alternate income test.[366]

Several commenters recommended the Commission clarify the order of operations for the proposed income test, in particular whether the numerator should be the absolute value of the sum of the constituent elements or, instead, the sum of the absolute value of each of the constituent elements.[367] Commenters generally supported the former approach because it would avoid double counting of a gain (or loss) related to a sale previously recorded as an unrealized gain (or loss).[368] One commenter recommended that the income test be limited only to investment income as changes in gains and losses would be captured by the investment test.[369] Two commenters also observed that the methods for determining the numerator and the denominator of the income test were different and questioned the potential impact on the test.[370]

One commenter expressed support for the ability of the registrant to use the five-year average of the change in net assets from operations where the most recent fiscal year's change in net assets is insignificant.[371] Several commenters, however, preferred a bright-line threshold of 10 percent lower than the average change in net assets resulting from operations for the past five years rather than the ''insignificant'' standard.[372] Several commenters also recommended that five-year averaging be used for the 80 percent test as well as the alternate income test.[373]

iii. Final Amendments

We are adopting amendments to the income test substantially as proposed, but with some modifications after consideration of the comments received. Commenters supported the percentage thresholds in the income test. We are not increasing the investment component of the alternate income test to 10 percent of total investments, as one commenter suggested, because we believe that would render the alternate income test duplicative of the 10 percent threshold in the investment test. We also continue to believe that exceeding an 80 percent threshold in income alone may indicate significance for financial reporting purposes for a subsidiary even if the related assets represent less than 5 percent of total investments. We are, therefore, adopting this prong of the income test as proposed.

In response to commenters, we have revised the calculation of income to be the absolute value of ''the sum'' of combined investment income from dividends, interest, and other income, the net realized gains and losses on investments, and the net change in unrealized gains and losses on investments. We believe this modification will prevent confusion in applying absolute value with respect to income and avoid the potential double counting of gains or losses. We continue to believe that changes in realized and unrealized gains/losses can better reflect the impact of the tested subsidiary on an investment portfolio rather than investment income alone.[374] We also believe it is appropriate to compare the specified income elements received from the tested subsidiary [375] with the investment company registrant's change in net assets resulting from operations in order to evaluate the impact on the registrant's net income, particularly in the context of the subsidiary being a single portfolio investment. However, we agree that this approach is less relevant in the event of a fund acquisition since the acquired fund is likely to have fund-level expenses that should be netted against income. We have, therefore, modified the language

[363] *See* letter from Ares.

[364] *See* letter from ICI.

[365] *See* letter from Ares.

[366] *See* letter from KPMG.

[367] *See* letters from Ares, BDO, CAQ, Deloitte, KPMG, ICI, and RSM.

[368] *See* letters from BDO, CAQ, Deloitte, EY, and KPMG.

[369] *See* letter from Ares.

[370] *See* letters from Ares and IMA.

[371] *See* letter from ICI.

[372] *See* letters from BDO, CAQ, KPMG, and EY.

[373] *See* letters from BDO, CAQ, EY, ICI, PwC, Small Business Investor Alliance (''SBIA''), and RSM.

[374] *See* Section II.E.1.c. of Proposing Release.

[375] Rule 1–02(w)(2)(ii) covers the specified income elements ''from the tested subsidiary'' and is calculated at the registrant-level.

to state that, for purposes of Rule 6–11, the income determination is made by comparing the absolute value of the change in net assets resulting from operations of the tested subsidiary with that of the investment company registrant.

We are modifying the five-year income averaging provision, as suggested by commenters, to provide a bright-line threshold at 10 percent lower than the average change in net assets resulting from operations for the past five years rather than the ''insignificant'' standard in order to reduce potential inconsistencies in application.[376] As proposed, the five-year averaging provision applies to the income test, which would include both the 80 percent condition in the primary income test and the 10 percent condition in the alternate income test; however, in light of commenter confusion, we have clarified the rule text to expressly state that it applies to both conditions.[377]

2. Proposed Rule 6–11 of Regulation S–X

Currently, there are no specific rules or requirements in Article 6 for investment companies relating to the financial statements of acquired funds. Instead, investment companies apply the general requirements of Rule 3–05 and the pro forma financial information requirements in Article 11, although it is often unclear how to apply these reporting requirements in the context of acquired funds. Investment companies typically file Rule 3–05 Financial Statements in transactions in which an investment company with limited assets and operating history is created for the purpose of acquiring one or more private funds operating under the exclusions provided by Sections 3(c)(1) or 3(c)(7) of the Investment Company Act. These private funds often have prepared audited financial statements in accordance with U.S. GAAP, but generally have not prepared their financial statements in accordance, nor had an audit conducted in compliance, with Regulation S–X. A registrant that acquires a private fund typically must revise the historical financial statements of the acquired fund so that they comply with all applicable rules of Regulation S–X and possibly re-audit those statements.

a. Proposed Amendments

The Commission proposed Rule 6–11, which would specifically cover financial reporting in the event of a fund acquisition. Proposed Rule 6–11 would only apply to the acquisition of a fund, including any investment company as defined in Section 3(a) of the Investment Company Act, any private fund that would be an investment company but for the exclusions provided by Sections 3(c)(1) or 3(c)(7) of that Act, or any private account managed by an investment adviser. Because the definition of business in Rule 11–01(d) is not readily applicable in the context of a fund acquisition, the Commission proposed a facts and circumstances test as to whether a fund acquisition has occurred, including when one fund acquires all or substantially all of another fund's portfolio investments.

The Commission proposed to require only one year of audited financial statements for fund acquisitions, a change from the existing Rule 3–05 requirements that require between one and three years of audited financial statements, and to make the obligations more aligned with the financial statement obligations applicable to investment company registration statements.[378] Proposed Rule 6–11 would require the related schedules specified in Article 12, such as the schedule of investments, to be provided for an acquired or to be acquired fund. Acquisitions of a group of related funds would be considered as a single acquisition under proposed Rule 6–11(a)(3)[379] and a registrant would have the option of presenting the required financial statements either on an individual or combined basis for any periods they are under common control or management.

The Commission proposed to allow investment companies to provide financial statements for private funds that were prepared in accordance with U.S. GAAP. The Commission also proposed to require the investment company registrant to file schedules for the acquired fund that comply with Article 12 of Regulation S–X, which requires each investment to be listed separately.[380]

To determine whether financial statements of a fund acquired or to be acquired must be provided under proposed Rule 6–11, the conditions specified in the definition of ''significant subsidiary'' under proposed Rule 1–02(w)(2) would be applied, using the investment test and the alternate income test for investment companies and substituting 20 percent for 10 percent for each place it appears therein.[381] If either of the tests were satisfied at the 20 percent condition, the registrant would be required to file the financial statements for the acquired fund as set forth in proposed Rule 6–11. Otherwise, filing financial statements of the acquired fund would not be necessary. If the aggregate impact of individually insignificant funds acquired or to be acquired since the most recent audited balance sheet were to exceed the conditions of the investment test and the alternate income test for investment companies, substituting 50 percent for 10 percent, then the registrant would be required to provide the financial statements for each individually insignificant fund and the supplemental financial information.[382] In determining whether financial statements of funds acquired or to be acquired must be filed, the registrant would be permitted to use pro forma amounts that give effect to an acquisition consummated after the registrant's latest fiscal year-end for which the registrant has filed audited financial statements of such acquired fund as required by proposed Rule 6–11. Any requirement to file financial statements of an acquired fund would cease once an audited balance sheet required by Rules 3–01 or 3–18 is filed for a date after the date the acquisition was consummated.[383]

b. Comments

Commenters generally supported the Commission's objective of tailoring

[376] *See* Rule 1–02(w)(2)(ii).

[377] *Id.*

[378] Rule 3–18 allows registered investment management companies to file financial statements covering only the most recent fiscal year, except for an audited statement of changes in net assets which must cover the two most recent fiscal years.

[379] Funds would be considered related if they are under common control or management, the acquisition of one fund is conditional on the acquisition of each other fund, or each acquisition is conditioned on a single common event.

[380] Because proposed Rule 6–11 would require the schedule of investments as set forth in Article 12, a private fund would not be permitted to present a condensed schedule of investments.

[381] As proposed, the primary income test for investment companies with the 80 percent condition would not be used for purposes of proposed Rule 6–11.

[382] The Commission based the 50 percent condition on the provision in current Rule 3–05(b)(2)(i). Unlike the existing rule, however, proposed Rule 6–11 would require financial statements for each individually insignificant fund acquired or to be acquired, rather than the ''substantial majority'' requirement for businesses acquired under the current rule.

[383] At such time, the acquired investments would be reflected on the balance sheet or statement of net assets and accompanying schedules. In proposing this approach, the Commission expressed its belief that in these circumstances historical financial statements of acquired funds would be of less importance to investors and continued filing obligations would impose unnecessary costs since any realized and unrealized gains and losses on the acquired investments would be reflected in the daily net asset value calculation as well as fund performance measures on a going-forward basis. *See* Section II.E.2. of Proposing Release.

financial reporting requirements for investment companies with respect to acquired funds.[384] Commenters questioned the scope of the definition of fund acquisition, suggesting that proposed Rule 6–11 might technically apply whenever a fund acquires an equity interest in another fund [385] or when the portfolio securities acquired represent only a portion of another fund's holdings but will represent substantially all of the initial assets of a new registrant.[386] A number of commenters also requested guidance on when Rule 3–05 would apply to non-fund acquisitions by investment company registrants.[387]

One commenter supported proposed Rule 6–11's use of the ''significant subsidiary'' definition, modified to set the investment test at the 20 percent condition and to exclude the primary income test with the 80 percent condition.[388] This commenter recommended that the alternate income test be changed from five percent to 10 percent of total investments because the size of the acquired fund should be the principal determinant of significance. Two commenters questioned whether the significance tests would only apply to fund acquisitions covered in proposed Rule 6–11(b)(2) and not proposed Rule 6–11(b)(1).[389]

One commenter supported the proposed alignment of financial statement requirements with Rule 3–18, but expressed confusion about whether acquired fund financial statements would need to be included in subsequent filings until a post-acquisition audited balance sheet is filed.[390] Another commenter indicated that it was unclear as to the number of fiscal years for which financial statements must be presented for acquired funds, whether only for the past fiscal year or for the periods set forth in Rule 3–18.[391] A third commenter stated that proposed Rule 6–11 should eliminate reporting requirements for acquired companies that have previously filed audited financial statements with the Commission in accordance with Regulation S–X and allow unaudited financial statements for other acquired companies due to cost.[392]

Regarding the proposal to permit acquired private funds to provide financial statements prepared in accordance with U.S. GAAP and schedules that comply with Article 12, one commenter supported the proposed approach.[393] Two commenters requested that the Commission consider alternatives that would provide full transparency of the portfolio holdings of the acquired fund but not require audited Article 12 schedules.[394]

Several commenters suggested that the Commission make various amendments to Rules 3–09, 4–08(g), and 10–01(b)(1) of Regulation S–X, involving financial disclosures outside of the acquisition context.[395]

c. Final Amendments

We are adopting new Rule 6–11 to address the financial disclosure obligations for acquired funds, with certain modifications in response to comments received.[396] Investment company registrants will follow Rule 6–11, rather than Rule 3–05, in the event that a fund acquisition occurs or is probable to occur.[397] With respect to whether a fund acquisition has occurred, in response to commenters who sought further clarity, we have revised Rule 6–11(a)(2)(ii) to state that in evaluating the facts and circumstances as to whether an acquisition has occurred or is probable, a registrant should consider whether it will result in the acquisition of all or substantially all of the portfolio investments held by another fund.[398] We have also removed language that suggests acquired fund financial disclosure would be required if the registrant acquired a non-substantial portion of another fund's portfolio investments that would constitute all or substantially all of the initial assets of the registrant.[399] The intent of the facts and circumstances evaluation is to capture all situations where additional disclosure about the acquired fund is appropriate, regardless of the legal form, such as merger, consolidation, or asset sale, used to structure the transaction.

We are adopting the use of the ''significant subsidiary'' definition in Rule l–02(w)(2) as the basis for determining whether financial statements for the acquired fund must be filed under Rule 6–11, but modified, as proposed, to use the investment test at the 20 percent condition and to exclude the 80 percent condition of the primary income test. We are not altering the investment component of the alternate income test, as one commenter suggested, because we continue to believe that five percent of total investments represents a material threshold.[400] As adopted without change from the proposal, the significance tests in Rule 6–11 only apply to situations covered in paragraph (b)(2) and not paragraph (b)(1). Thus, an investment company registrant filing a registration statement on Form N–14 in connection with the acquisition of another fund will not apply the significance tests in Rule 6–11(b)(2).

As proposed, Rule 6–11 would have required an investment company registrant to include acquired fund financial statements as part of the registrant's financial statements until its next audited balance sheet after the acquisition was consummated. Given the availability of the acquired fund financial statements on the Commission's EDGAR system once filed and that the price of investment company shares or interests is established by the value of its current investment portfolio, we agree with commenters that acquired fund financial statements need not be included in future filings. Accordingly, we have modified the rule to require acquired fund financial statements to be filed only once.[401]

One commenter requested clarification of the number of fiscal

[384] *See* letters from BDO, CAQ, Deloitte, and ICI.

[385] *See* letters from CAQ, EY, and GT.

[386] *See* letters from EY and KPMG.

[387] *See* letters from CAQ, Deloitte, EY, GT, ICI, KPMG, and PwC.

[388] *See* letter from ICI.

[389] *See* letter from EY and ICI.

[390] *See* letter from ICI.

[391] *See* letter from EY.

[392] *See* letter from Ares.

[393] *See* letter from ICI.

[394] *See* letters from ICI and KPMG.

[395] *See* letters from Ares, BDO, KPMG, and SBIA.

[396] We also are adopting, as proposed, conforming amendments to Rules 3–18(d), 5–01(a), 6–01, 6–02(b) and (c), and 6–03 of Regulation S–X to reflect the addition of Rule 6–11.

[397] Investment company registrants are currently subject to the requirements of Rule 3–05, provided the conditions set forth in that rule are satisfied. Rule 3–05, as revised, will continue to apply to investment company registrants with respect to acquired and disposed businesses that do not involve a fund acquisition covered by Rule 6–11.

[398] Rule 6–11(a).

[399] *Id.*

[400] The modified conditions in Rule 6–11 only substitute 20 percent for 10 percent for the investment test and alternate income test described in Rule 1–02(w)(2). Thus, for purposes of Rule 6–11, a registrant would apply an investment test condition of 20 percent of the value of total investments and the alternate income test conditions of 20 percent of the absolute value of the change in net assets resulting from operations and five percent of the value of total investments.

[401] Rule 6–11(b)(4). Proposed Item 14(d)(5) of Schedule 14A [17 CFR 240.14a–101] would have required proxy statements filed by a fund, with respect to a merger, consolidation, acquisition, or similar matter, to include financial statements of the acquiring fund, including those required by Rules 3–05 and 6–11 and Article 11 of Regulation S–X ''with respect to transactions other than that as to which action is to be taken as described'' in the proxy statement. Since Rule 6–11 only requires acquired fund financial statements to be filed once, we are not adopting the proposed amendment to Item 14(d)(5) of Schedule 14A.

years for which financial statements must be presented in Rule 6–11 and whether the requirement should be consistent with Rule 3–18.[402] In response, we have revised Rule 6–11 to make clear that if the acquired fund is subject to Rule 3–18, then the financial statements for the periods described in Rule 3–18 shall be filed.[403] For all other acquired funds, such as private funds, only the financial statements for the most recent fiscal year and the most recent interim period need to be filed.[404] We are not following the suggestion, made by one commenter, to eliminate the filing of acquired fund financial statements if they were previously filed with the Commission in accordance with Regulation S–X by the acquired fund, because the disclosure is predominantly for the benefit of the acquiring fund's shareholders, not the acquired fund's shareholders.[405]

We are not persuaded by the commenter who requested that we permit filing of unaudited financial statements for acquired funds due to cost. We continue to believe that a significant number of private funds currently prepare audited financial statements under U.S. GAAP due to investor demand and for regulatory compliance purposes.[406] Moreover, although auditing an acquired private fund's financial statements involves costs, we believe that our proposed approach requiring audited U.S. GAAP financial statements with respect to acquisitions of private funds will reduce costs as compared to re-issuing audited financial statements in compliance with Regulation S–X, but still will provide investors appropriate information about the acquired fund. We also have modified Rule 6–11(c) from the proposal to make the filing of financial statements using U.S. GAAP permissive for private funds. Proposed Rule 6–11(c) provided that the financial statements of private funds ''shall'' comply with U.S. GAAP. Under the final rule, the financial statements of private funds may either comply with U.S. GAAP or Article 12.[407]

The Commission's proposal was intended to achieve a more appropriate balance by permitting registrants to file audited U.S. GAAP financial statements for acquired private funds, but supplementing those financial statements with audited schedules listing each investment as required by Article 12.[408] A condensed schedule of investments prepared under U.S. GAAP does not include the same prescriptive level of detail when compared to an Article 12 compliant (or full) schedule of investments. While each investment is listed separately in a full schedule of investments, a condensed schedule allows funds to aggregate investments by issuer or by investment type so long as each investment is individually less than five percent of the net assets of the fund.[409] While providing a full unaudited schedule of portfolio investments would provide transparency, we believe that the incremental costs of providing an audited schedule of investments that complies with Article 12 is minimal because the portfolio investment account balances already have been audited, and the incremental audit procedures therefore would be limited to the incremental disclosures required under Article 12. In addition, an audit will provide additional assurance for investors as to the accuracy of that schedule.

We also are removing the sentence from proposed Rule 6–11(a)(3) providing that the financial statements in connection with the acquisition of a group of related funds may be presented either on an individual or a combined basis for any periods the related funds are under common control or management. This change is based on our understanding that, unlike operating companies, funds generally do not file ''combined financial statements'' as defined in FASB ASC Topic 810–10–20.

Finally, with respect to commenters' suggestion to make substantive amendments to Rules 3–09, 4–08(g), and 10–01(b)(1) of Regulation S–X, we believe such amendments would be beyond the scope of this rulemaking.[410]

3. Pro Forma Financial Information and Supplemental Financial Information

Currently, Rule 11–01 requires an investment company to furnish pro forma financial information when a significant business acquisition has occurred or is probable, with significance being determined using the tests set forth in Rule 1–02(w) and substituting 20 percent for 10 percent in the conditions.[411]

a. Proposed Amendments

The Commission proposed to replace the pro forma financial disclosures requirement with proposed Rule 6–11(d), which would require that investment company registrants provide supplemental financial information about the newly combined entity that it believed would be more relevant to investors.[412] The proposed supplemental financial information would include: (1) A pro forma fee table, setting forth the post-transaction fee structure of the combined entity; (2) If the transaction will result in a material change in the acquired fund's investment portfolio due to investment restrictions, a schedule of investments of the acquired fund modified to show the effects of such change and accompanied by narrative disclosure describing the change; and (3) Narrative disclosure about material differences in accounting policies of the acquired fund when compared to the newly combined entity.

b. Comments

One commenter expressed support for the proposed replacement of the pro forma financial information requirement, indicating that the proposed supplemental financial information would better inform investors and reduce costs.[413] In addition, two commenters noted that the rule text in proposed Rule 6–11(d)(1)(iii) would require disclosure about material differences in ''financial and operating policies,'' while the preamble of the Proposing Release referred to material differences in ''accounting policies'' between the acquiring and acquired funds.[414]

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[402] Rule 3–18 applies to registered management investment companies. Business development companies are also permitted to use Rule 3–18 pursuant to the instructions set forth in Form N–2.

[403] Rule 6–11(b)(2)(ii) and (iii).

[404] *Id.*

[405] Some forms, such as Form N–14, permit backwards incorporation by reference of information not included in the prospectus. *See* General Instruction G to Form 14. Effective May 2, 2019, incorporation by reference on Form N–14 is allowed for all parties who may use the form, including business development companies. *See FAST Act Modernization and Simplification of Regulation S–K,* Release No. IC–10618 (Mar. 20, 2019) [84 FR 12674 (Apr. 2, 2019)].

[406] For example, private funds prepare audited financials, among other reasons, to satisfy their custody rule obligations under the Investment Advisers Act. *See* 17 CFR 275.206(4)–2.

[407] We also have made non-substantive changes to provide a more accurate heading for paragraph (c) and to reflect the intent of the Commission that the provision applies to a fund or private account that is ''acquired or to be acquired.'' As proposed, the language only referenced a fund or private account ''to be acquired.''

[408] *See* Section II.E.2. of Proposing Release.

[409] *See* FASB ASC 946.

[410] While we are not making substantive changes to Rule 3–09, as a result of the changes to Rule 1–02(w) we are revising Rule 3–09(a) to make clear that it applies to Rule 1–02(w)(1).

[411] Rule 11–02 permits investment companies to provide a narrative description of the pro forma effects of the transaction in lieu of pro forma financial statements, if there are a limited number of required pro forma adjustments and they are easily understood. *See* Rule 11–02(b)(1).

[412] *See* Section II.E.3. of Proposing Release.

[413] *See* letter from ICI.

[414] *See* letters from EY and ICI.

c. Final Amendments

We are adopting the amendments substantially as proposed, but with one modification in response to comments received. As proposed, we are adopting amendments to eliminate the requirement to provide pro forma financial information for investment company registrants in connection with fund acquisitions and to require the supplemental financial information in its place.[415] We believe that the pro forma financial information is not necessary in light of the costs to prepare such disclosures and given that the supplemental financial information will provide material information to investors by highlighting important changes resulting from a fund acquisition as context for the acquired fund's financial statements. We also are modifying Rule 6–11(d)(1)(iii) to state that it requires narrative disclosure about material differences in ''accounting policies'' of the acquired fund when compared to the acquiring fund, which was the Commission's intent as expressed in the preamble of the Proposing Release.

4. Amendments to Form N–14

Item 14 of Form N–14, the form used by investment companies to register securities issued in business acquisition transactions,[416] provides, subject to certain exceptions, that the corresponding Statement of Additional Information (''SAI'') ''shall contain the financial statements and schedules of the acquiring company and the company to be acquired required by Regulation S–X.''

a. Proposed Amendments

The Commission proposed to amend Form N–14 to make its disclosure requirements consistent with the disclosures required in proposed Rule 6–11. Specifically, the Commission proposed the following amendments:

- In the case of a fund acquisition, any financial statements and schedules required by Regulation S–X would only be required for the most recent fiscal year and the most recent interim period;[417]
- Permit private funds to provide financial statements and schedules that conform to U.S. GAAP and Article 12 of Regulation S–X;
- Require inclusion of the supplemental financial information described in proposed Rule 6–11(d), except for the pro forma fee table;[418]
- Remove provisions no longer relevant because of prior amendments;[419] and
- Remove the existing exclusion in Form N–14 for pro forma financial statements required by Rule 11–01 of Regulation S–X if the net asset value of the company being acquired does not exceed 10 percent of the registrant's net asset value, because pro forma financial statements would no longer be required for fund acquisitions and, for non-fund acquisitions, the significance measure for pro forma financial statements in Rule 11–01(b)(1) is and will remain 20 percent.

b. Comments

Two commenters noted that the rule text of the proposed amendments to Item 14.2 of Form N–14, which describes the financial statement requirements when the acquired fund is a private fund, differed from the rule text of proposed Rule 6–11(c).[420]

c. Final Amendments

We are amending Form N–14 substantially as proposed, but with some modifications in response to commenters. We continue to believe that it is appropriate for investors who acquire securities in a registered offering to have the same disclosure that investors receive through financial statement disclosure in shareholder reports. With respect to Item 14.2, we agree with commenters that there should be consistency between the Form N–14 and Rule 6–11 disclosure requirements for private funds using U.S. GAAP, and we have made conforming amendment to Form N–14 to reflect Rule 6–11 as adopted.[421]

F. Transition

After considering feedback from commenters,[422] registrants will not be required to apply the final amendments until the beginning of the registrant's fiscal year beginning after December 31, 2020 (the ''mandatory compliance date''). Acquisitions and dispositions that are probable or consummated after the mandatory compliance date must be evaluated for significance using the final amendments.[423]

Registrants filing initial registration statements are not required to apply the final amendments until an initial registration statement is first filed on or after the mandatory compliance date. For initial registration statements first filed on or after the mandatory compliance date, all probable or consummated acquisitions and dispositions, including those consummated prior to the mandatory compliance date, must be evaluated for significance using the final amendments.[424]

[415] See Section II.E.4. of Proposing Release.

[416] *See* 17 CFR 239.23 (setting forth the requirement for an investment company to file Form N–14 to register securities in business combination transactions) and 17 CFR 230.145 (specifying the types of transactions that trigger the Form N–14 filing requirement).

[417] Non-fund acquisitions would continue to be required to follow the other financial statement disclosure requirements set forth in Regulation S–X for the periods required by Rule 3–05, including any pro forma financial information required by Article 11.

[418] The Commission proposed to exclude the pro forma fee table from Item 14 of Form N–14 because it is already required in the prospectus under Item 3 of that Form.

[419] Specifically, the Commission proposed to remove the ability to place columns C and D of Schedule II under 17 CFR 210.12–14 (''Rule 12–14'') to Part C of the registration statement, with the remainder of the schedule being provided in the SAI. When originally adopted, Form N–14 was based on Form N–1A, which had a similar provision. *See Registration Form Used by Open-End Management Investment Companies: Guidelines,* Release No. IC–13436 (Aug. 12, 1983) [48 FR 37928 (Aug. 22, 1983)]. This provision was removed from Form N–1A in 1998. *See Registration Form Used by Open-End Management Investment Companies,* Release No. 33–7512 [63 FR 13916 (Mar. 23, 1998)].

[420] *See* letter from EY (stating that proposed Item 14.2 of Form N–14 included text that was not included in proposed rule 6–11(c)); *see also* letter from ICI (same).

[421] Item 4.2 of Form N–14.

[422] *See e.g.,* letters from BDO, DT, EY, and KPMG. BDO recommended permitting application of the amendments in filings made on or after publication of the amendments in the **Federal Register**. DT indicated it may be useful for preparers to understand whether the new rules should be applied to all acquisitions (1) Consummated after the effective date, (2) Reported on Form 8–K or 8–K/A filed after the effective date, or (3) Reported in a new or amended registration statement filed after the effective date and when registrants would apply the new pro forma requirements, particularly if some acquisitions were consummated before the effective date and others were consummated after. EY recommended that registrants that have filed a current report announcing the completion of a significant acquisition or disposition before the effective date of the final rule be allowed to comply with the existing rules for that transaction and registrants that have submitted a draft or confidential registration statement or filed a registration statement before the effective date of the final rule be allowed to complete their offering under the existing rules. KPMG recommended that the Commission provide transition guidance that clarifies the effective date, including the permissibility of early application of the amendments and application of the amendments to transactions consummated near the final rule's effective date.

[423] For registration statements filed on or after the mandatory compliance date, registrants that are subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act at the mandatory compliance date may test acquisitions and dispositions consummated before the mandatory compliance date using rules that were in effect when the acquisitions and dispositions were consummated.

[424] Issuers relying on Regulation A filing initial offering statements on Form 1–A are not required to apply the final amendments until an initial offering statement is first filed on or after the mandatory compliance date. For initial offering statements first filed on or after the mandatory compliance date, all probable or consummated

Continued

Voluntary early compliance with the final amendments is permitted [425] in advance of the registrant's mandatory compliance date provided that the final amendments are applied in their entirety from the date of early compliance.[426]

III. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated these rules a ''major rule,'' as defined by 5 U.S.C. 804(2).

IV. Economic Analysis

A. Introduction

We are adopting amendments to our rules and forms to improve their application, assist registrants in making more meaningful determinations of whether a subsidiary or an acquired or disposed business is significant, and improve the disclosure requirements for financial statements relating to acquisitions and dispositions of businesses, including real estate operations and investment companies. The amendments are intended to improve the utility and relevance of the financial information about acquired or disposed businesses provided to investors, facilitate timely access to capital, and reduce the complexity and costs to prepare required disclosures. The reduction in compliance costs could in theory facilitate increased acquisition or disposition activity by registrants. However, registrants engage in acquisitions and dispositions for a variety of business reasons, and, as a general matter, their evaluation of the advisability of acquisitions and dispositions often involve cost and benefit considerations much greater than compliance cost considerations. More specifically, with respect to significant transactions which could trigger disclosure relevant to the amendments, these other considerations are likely to be even more important to the decision to engage in acquisition and disposition activity than the more modest effects of the final amendments.

Providing timely, accurate, and transparent information, especially financial information, about acquired and disposed businesses is important to mitigate the information asymmetry that exists between corporate insiders (managers and majority shareholders) and outsiders (minority shareholders, creditors, etc.). This is especially true in the context of major corporate transactions such as mergers, acquisitions, and dispositions, as investors rely on the financial information of the acquired and disposed businesses to assess the potential effects of these activities on the registrant. A properly functioning market for corporate control serves as an important external governance mechanism involving transactions that potentially create shareholder value through synergy generation or transferring assets to more efficient management.[427] However, in the absence of appropriately tailored disclosures, investors may not be able to optimize allocation of their resources or fully assess the effects of this important external governance mechanism on the firms in which they invest.

Disclosure requirements also impose costs on registrants that may seek to engage in acquisitions or dispositions. In particular, such costs could diminish the benefits associated with an acquisition or disposition; however, we would not expect such costs to alter a decision to pursue a particular transaction. Further, a registrant's ability to provide such disclosure for periods prior to an acquisition may be dependent on the availability and assistance of both the acquired business and the acquired business's independent auditor. While this potential issue would be unlikely to affect a registrant's decision to engage in an acquisition, it may impact its ability to comply with reporting requirements for capital raising transactions and, accordingly, to access capital in the manner and within the time frames it most desires.

We believe the final amendments, by streamlining and clarifying acquired business financial disclosure requirements, should reduce compliance costs while maintaining investors' access to information that is material to an understanding of the potential effects of an acquired or to be acquired business (or disposed or to be disposed business) on the registrant.

We are mindful of the costs imposed by and the benefits obtained from our rules and amendments. Section 2(b) of the Securities Act,[428] Section 3(f) of the Exchange Act,[429] and Section 2(c) of the Investment Company Act [430] require the Commission, when engaging in rulemaking where it is required 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. Additionally, Section 23(a)(2) of the Exchange Act [431] requires us, when adopting rules under the Exchange Act, to consider, among other things, the impact that any new rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the Exchange Act.

Below we address the potential economic effects of the amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition, and capital formation. We attempt to quantify these economic effects whenever possible; however, due to data limitations, we are not able to quantify all of the economic effects.

B. Baseline and Affected Parties

The current disclosure requirements in Rule 1–02(w), Rule 3–05, Rule 3–14, Article 11, and the related smaller reporting company requirements in Article 8 of Regulation S–X, together with current disclosure practices, form the baseline from which we estimate the

acquisitions and dispositions, including those consummated prior to the mandatory compliance date, must be evaluated for significance using the final amendments.

[425] To the extent that registrants have questions about application of the rules in connection with early compliance, they should reach out to Commission staff for additional transition guidance.

[426] For an acquisition or disposition of a business for which the disclosure required by an Item 2.01 Form 8–K has been filed (or was required to be filed) prior to the mandatory compliance date (or the voluntary early compliance date, if applicable), but for which Rule 3–05 Financial Statements and Article 11 pro forma financial information are not required to be filed (*e.g.,* in an Item 9.01 Form 8–K) until after the mandatory compliance date (or until after the voluntary early compliance date, if applicable), the registrant must file the financial statements and pro forma financial information required by the rules in effect when the Item 2.01 Form 8–K was required to be filed.

[427] *See, e.g.,* Mark L. Mitchell & Kenneth Lehn, *Do Bad Bidders Become Good Targets?,* 98 J. Pol. Econ. 372 (1990) (''Mitchell & Lehn (1990)''); Anup Agrawal & Jeffrey F. Jaffe, *Do Takeover Targets Underperform? Evidence from Operating and Stock Returns,* 38 J. Fin. & Quantitative Analysis 721 (2003) (''Agrawal & Jaffe (2003)''). *See also, e.g.,* Xiaoyang Li, *Productivity, Restructuring, and the Gains from Takeovers,* 109 J. Fin. Econ. 250 (2013) (''Li (2013)''). Based on plant-level data, this study shows that acquirers increase targets' productivity through more efficient use of capital and labor, thus enhancing the value of the acquisitions.

[428] 15 U.S.C. 77b(b).

[429] 17 U.S.C. 78c(f).

[430] 15 U.S.C. 80a–2(c).

[431] 15 U.S.C. 78w(a)(2).

likely economic effects of the amendments.[432]

The amendments are likely to affect investors both directly and indirectly through other users of the disclosure (*e.g.,* security analysts, investment advisers, and portfolio managers), auditors, and registrants subject to Regulation S–X. Additionally, entities other than registrants may be affected, such as significant acquirees for which financial statements are required under Rule 3–05 and Rule 3–14.

The amendments may affect both domestic registrants and foreign private issuers.[433] We estimate that during calendar year 2019, approximately 6,792 registrants filed on domestic forms [434] and 849 foreign private issuers filed on F-forms, other than registered investment companies. Among the registrants that file on domestic forms, approximately 31 percent were large accelerated filers, 19 percent were accelerated filers,[435] and 50 percent were non-accelerated filers. In addition, we estimate that of these domestic issuers approximately 42.8 percent were smaller reporting companies and 17.2 percent of these domestic issuers were emerging growth companies.[436] About 26.1 percent of foreign private issuers that filed on Forms 20–F and 40–F were emerging growth companies. With respect to foreign private issuer accounting standards, approximately 39 percent of foreign private issuers reported under U.S. GAAP, 60 percent reported under IFRS–IASB, and approximately 1 percent reported under a comprehensive body of accounting principles other than U.S. GAAP or IFRS–IASB with a reconciliation to U.S. GAAP. Certain of the amendments may also affect issuers that rely on Regulation A and investment companies that must comply with the requirements of Regulation S–X. Based on staff analysis of EDGAR filings, we estimate that during calendar year 2019 there were 106 issuers with newly qualified Regulation A offering statements.

The ''significant subsidiary'' definition in Rule 1–02(w) is applied when determining if a subsidiary is deemed significant for the purposes of certain Regulation S–X and Regulation S–K requirements as well as certain Securities Act and Exchange Act rules and forms.[437] Because the significance of a subsidiary affects the disclosure required from registrants about the activities of those subsidiaries, the amendments we are adopting to Rule 1–02(w) will affect registrants' significance determinations and, as a result of those determinations, registrants' disclosure requirements.

Additionally, registrants are required to file separate audited annual and unaudited interim pre-acquisition financial statements of the acquired business if the acquisition triggers the Rule 1–02(w) significance tests as modified by Rule 3–05 and Rule 3–14. Because the United States has one of the most active markets for mergers and acquisitions,[438] the rules we are amending are relevant to a large number of transactions and businesses but the amendments themselves, beyond their potential cost savings, are not expected to have a significant effect on transactions or businesses more generally. Registrants would be potentially affected by the amendments if they engage in an acquisition or disposition transaction (or series of transactions) that is deemed significant under the Rule 1–02(w) significance tests as modified by Rule 3–05 and Rule 3–14 or the related smaller reporting company requirements in Article 8.

We are not able to observe the universe of acquisitions by all registrants, as acquisitions made by registrants that are not deemed significant or where the acquired businesses are not public firms might not be identified. For purposes of our Paperwork Reduction Act (''PRA'') analysis, Commission staff searched various form types filed from January 1, 2017 to October 1, 2018 for indications of acquisition or disposition disclosure and found approximately 1,261 filings on various forms that included Rule 3–05 Financial Statements or Rule 3–14 Financial Statements.[439] To better understand the overall market activity for mergers and acquisitions, we also examined mergers and acquisitions data from Thomson Reuters' Security Data Company (''SDC''). During the period from January 1, 2017 to December 31, 2019, there were 6,057 mergers and acquisitions entered into by publicly-listed U.S. firms. Among these transactions, 1,283 acquisitions involved non-U.S. targets and approximately 419 involved real estate operations.[440] Additionally, 171 of the 6,057 transactions were conducted by entities identified as smaller reporting companies. These estimates constitute an upper bound on the number of transactions that may have triggered disclosure requirements under Rule 3–05 or Rule 3–14, and the related requirements for smaller reporting companies,[441] as many of these transactions may have involved acquisitions that are small relative to the size of the registrant.[442]

All registered investment companies and business development companies that make fund acquisitions significant enough to trigger Rule 3–05 disclosure

[432] *See supra* Section II.

[433] The number of domestic registrants and foreign private issuers affected by the amendments is estimated as the number of unique companies, identified by Central Index Key (CIK), that filed Form 10–K, Form 20–F, and Form 40–F or an amendment thereto with the Commission during calendar year 2019. The estimates for the percentages of companies by accelerated filer status and the percentage of smaller reporting companies are based on the self-reported status provided by these registrants during calendar year 2019, with supplemental data from Ives Group Audit Analytics. The estimates for the percentages of foreign private issuers' basis of accounting used to prepare the financial statements are derived from the information in Forms 20–F and 40–F or an amendment thereto. These estimates do not include issuers that filed only initial registration statements during calendar year 2019, which will also be affected by the amendments.

[434] This number includes fewer than 20 foreign private issuers that file on domestic forms and approximately 100 business development companies. Of the foreign private issuers filing on domestic forms in calendar year 2019, approximately 85 percent reported under U.S. GAAP while 15 percent reported under IFRS–IASB.

[435] *See supra* note 23.

[436] Staff determined whether a registrant claimed emerging growth company status by parsing several types of filings (*e.g.,* Forms S–1, S–1/A, 10–K, 10–Q, 8–K, 20–F/40–F, and 6–K) filed by the registrant, with supplemental data drawn from Ives Group Audit Analytics.

[437] *See supra* Section II.A.

[438] *See* Anant K. Sundaram, *Mergers and Acquisitions and Corporate Governance,* 3 Mergers and Acquisitions 193 (2004); and 2019 J.P. Morgan Global M&A Outlook, available at *https://www.jpmorgan.com/jpmpdf/1320746694177.pdf.*

[439] Based on a review of Forms 10, S–1, S–3, F–1, F–3, and 8–K. *See* Section V.B.1 below for our review of forms filed by operating companies. We discuss our similar review of investment company forms in Section V.B.2 below.

[440] We estimate the number of real estate operation transactions that may be within the scope of Rule 3–14 based on transactions covered by SDC where the acquiree uses the Standard Industry Classification code (SIC) 6798 or SIC codes in the 6500s. These SIC codes include real estate companies and REITs generally. The transactions identified using these SIC codes would include, but are not necessarily limited to, real estate operations that are within the scope of Rule 3–14.

[441] Acquisitions that triggered Rule 3–05 or Rule 3–14 Financial Statements requirements are observed by searching EDGAR filings. Databases such as SDC have some coverage of mergers and acquisitions conducted by public listed firms in the U.S. However, when the acquired entities are privately owned, we do not have data in terms of their assets, income, and often the purchase prices paid by the acquiring firms. Thus we are not able to provide statistics on the relative size of these transactions.

[442] *See* Ronald W. Masulis, Cong Wang, & Fei Xie, *Corporate Governance and Acquirer Returns,* 62 J. Fin. 1851 (2007) (reporting that the mean (median) relative size of the mergers in their sample is around 16 percent (6 percent) for the period of 1990–2003). Relative size in this study is measured as the ratio of target market cap to the acquirer market cap, and the sample is limited to public firms. We expect the relative size of the acquisitions for non-public acquirees would be even smaller, but we do not have data on the size of private firms to provide comparable statistics about these transactions.

requirements would potentially be affected by the amendments. Among registered investment companies, as of the end of calendar year 2019, there were 10,239 open-end funds, 2,050 exchange-traded funds, and 681 closed-end funds. In addition, there were 102 business development companies. While we are not able to observe the universe of the fund acquisitions, we are able to observe those transactions that triggered the filing of acquired fund financial statements. In our PRA analysis, we searched various form types over a three-year period ended December 31, 2019 for indications of fund acquisition disclosure. Among the 503 filings on Form N–14 for fund transactions, 323 filings or 64 percent included acquired fund financial statements. There were only a few filings on Form N–1A and Form N–2 that included acquired fund financial statements.[443]

C. Potential Benefits and Costs of the Final Rule

1. Potential Benefits

We anticipate the amendments[444] will improve the application of the significance tests and assist registrants in making more meaningful significance determinations. We additionally anticipate the amendments will improve the financial information about acquired or disposed businesses, facilitate more timely access to capital, and reduce the complexity and costs to prepare the disclosure. Improved disclosure benefits users of financial information and can facilitate more efficient allocations of capital, while a reduced disclosure burden can shorten the time period to prepare disclosures necessary to access capital and typically generates cost savings for registrants, which can result in more capital being available for investment.

As they relate to significance determinations generally, the amendments are expected to reduce the burden of determining significance by improving the application of the definition. The amendments also should improve the salience of information for investors by focusing the applicable disclosures on significant subsidiaries.

As they relate to acquisitions and dispositions, the amendments are expected to increase the utility of related disclosures to investors by making these disclosures more relevant. The amendments should improve the salience of the information for investors by reducing the volume of information presented about acquired businesses and focusing the disclosures on more decision-relevant information. This, in turn, could lead to more informed investment decisions and improved capital allocation efficiency.

The amendments may also permit more timely access to capital. A registrant's ability to provide disclosure for periods prior to an acquisition is often dependent on access to and the cooperation of both the acquired or to be acquired business and its independent auditor. The age of the acquired or to be acquired business's required financial statements, as well as changes in the acquired business's personnel or its independent auditor that occurred during the historical periods for which financial statements may be required, can impair a registrant's ability to timely meet the financial reporting requirements for such acquisitions, which may impact its ability to access capital within the time frames it needs to operate its business and make investments. By focusing on more recent historical periods, relying on more relevant disclosure triggers and definitions, and increasing the relevance of pro forma financial information, the amendments should help to ameliorate these impediments, as we discuss in more detail below.

Further, to the extent that the amendments reduce the compliance burden, they may reduce the cost of merger, acquisition, and disposition activity generally. We note that well-functioning markets for corporate control are, on average, generally believed to be beneficial to investors to the extent that they serve as a disciplinary mechanism in which less efficiently managed assets are transferred to more efficient management.[445] It also has been generally observed that mergers and acquisitions may also generate synergies by combining two entities, and may result in firms with more efficient scale or scope.[446]

2. Potential Costs

We do not expect the amendments to generate significant costs for registrants. However, in certain situations the amendments could cause some transactions to be significant that would not be deemed so under the current rules. Inclusion of, for example, additional Rule 3–05 Financial Statements will result in increased costs to such registrants, though this may result in benefits to investors in the form of additional financial disclosures related to the transaction.

We do not anticipate significant costs to investors associated with the amendments. One commenter disagreed with our assessment of the potential costs to investors.[447] According to the commenter, our analysis ignored the potential costs of mergers, manifested in the destruction of value that mergers can cause for the shareholders of the acquiring companies. We acknowledge that there are a significant number of acquisitions that prove to be value-decreasing for the acquirer.[448] However, as discussed above, the amendments are unlikely to affect whether a registrant engages in an acquisition or disposition or whether, with the passage of time, any particular transaction proves to be value-enhancing. More specifically, focusing on any disclosures that could

[443] *See infra* Section V.B.2, Table 5.

[444] *See supra* Sections II.A through II.E.

[445] *See, e.g.,* Mark L. Mitchell & Kenneth Lehn, *Do Bad Bidders Become Good Targets?,* 98 J. Pol. Econ. 372 (1990) (''Mitchell & Lehn (1990)''); Anup Agrawal & Jeffrey F. Jaffe, *Do Takeover Targets Underperform? Evidence from Operating and Stock Returns,* 38 J. Fin. & Quantitative Analysis 721 (2003) (''Agrawal & Jaffe (2003)'').

[446] *See, e.g.,* Li (2013), *supra* note 427 (showing, based on plant-level data, that acquirers increase target's productivity through more efficient use of capital and labor, thus enhancing the value of the acquisitions).

[447] *See* letter from CII (generally asserting that disclosures should allow investors to evaluate transactions, including identifying value-decreasing acquisitions, and that recent studies on merger activity find generally negative results of merger activity). We acknowledge that there are varying views regarding the costs and benefits of acquisitions, dispositions, and mergers and we discuss in more detail below the topic of whether particular types of transactions have in general been more value-enhancing or value-decreasing. We also note: (1) Our conclusion that, for various reasons, the amendments are highly unlikely to affect whether a transaction proceeds or not, and (2) it is not the role of the Commission to substitute its judgment for that of issuers, shareholders, and other stakeholders regarding an acquisition or disposition transaction. Rather, the Commission's role is to craft rules designed to ensure that investors receive disclosure of information regarding the transaction that is material to an investment decision.

[448] We note that most of the studies that document value-decreasing acquisitions use data on acquisitions of targets that were Exchange Act registered companies. For those targets, the final amendments will not reduce the amount of relevant information available. We also acknowledge that the amendments might affect acquiring firms that acquire private targets more than those that acquire public targets, as financial information of public targets is readily available, regardless of whether Rule 3–05 Financial Statements are required. Prior studies, however, have shown that the acquisitions of private targets on average create shareholder value. *See, e.g.,* Kathleen Fuller, Jeffry Netter, & Mike Stegemoller, *What Do Returns to Acquiring Firms Tell Us? Evidence from Firms that Make Many Acquisitions,* 57 J. Fin. 1763 (2002) (''Fuller et al. (2002)'') (finding that acquisitions of private targets are associated with higher acquirer returns). We acknowledge that investors might face some search costs as target financial information will no longer be disclosed in connection with acquisitions. However, given the current data-gathering capabilities, and the fact that such disclosures will be available on EDGAR in electronic format, we do not expect these costs to be unduly burdensome for investors.

potentially be affected by the amendments, it is clear that various other factors are substantially more likely to affect acquisition and disposition decisions such as, for example, the registrant's assessment of the impact of the acquisition or disposition on its post-transaction performance. Specifically, other factors that are likely to be substantially more significant to post-transaction performance, and therefore influence decision making regarding the transaction and post-transaction performance, include but are not limited to financing costs, integration costs, ability to achieve expected synergies in the amounts and in the time frames anticipated, whether known and anticipated trends continue and materialize, whether management performs as expected, and whether the resulting actions of competitors, suppliers, distributors, customers and others are consistent with expectations at the time of the transaction. In this regard, we note that one of the recent studies cited by the commenter finds that the main predictors of post-acquisition underperformance are the method of payment (cash versus stock), the acquirer's pre-acquisition asset growth, and the acquirer's excess cash on the balance sheet.[449] Disclosure of these items will be unaffected by the final amendments. We note that, except in circumstances specifically authorized or required by statute, it is not the role of the Commission to substitute its judgment for that of issuers, shareholders, other relevant regulatory authorities and other stakeholders regarding, or otherwise exercise influence over, an acquisition or disposition transaction. Rather, the Commission's role generally, and in particular in this instance, is to craft rules designed to ensure that investors receive disclosure of information regarding the transaction that is material to an investment decision.

We also acknowledge that one objective of the amendments is to reduce unnecessary disclosure and as a result, in some cases, the amendments will reduce the amount of information provided. However, we do not believe that there will be a reduction in the disclosure of information that is material to investors. We anticipate that the amendments will generally result in disclosure that is more salient and that any potential loss of information will be mitigated by a registrant's obligation under Rule 4–01(a) of Regulation S–X to include such further material information as is necessary to make the required statements, in light of the circumstances under which they are made, not misleading. We also note that the disclosures of a registrant's own financial statements are not affected by the rule amendments.

Below we discuss the anticipated economic benefits and costs of specific aspects of the amendments in further detail.

D. Economic Effects of Specific Amendments

1. Significance Tests

The amendments to the significance tests should facilitate registrants' application of the tests. The amendments are expected to bring the Investment Test more in line with the economics of the registrant's interest in a subsidiary or of the transaction for an acquired business, and reduce anomalous results from the Income Test. This, in turn, should reduce compliance burdens associated with the application of the significance tests. In addition, these amendments should facilitate compliance with the application of these tests under Rule 3–05 or Rule 3–14.

The amendments to the Investment Test requiring use of the registrant's aggregate worldwide market value rather than the historical book value of its total assets to assess the significance of acquisitions and dispositions may better reflect the relative size of the business in economic terms. The investments in and advances to the acquired business generally reflect an acquirer's expectation of the fundamental value of the equity of the acquired business.[450] Similarly, using the aggregate worldwide market value of the registrant would be more in line with the market expectation of the registrant's discounted future free cash flow to equity holders, and thus may more accurately reflect the fundamental value of the registrant's equity. By better aligning these two components of the Investment Test for acquisitions and dispositions, the amendments potentially will avoid classifying transactions as significant when they are actually relatively insignificant in economic substance to the registrant. Further, aggregate worldwide market values may better reflect the relative size of the transaction, especially for high-growth acquiring registrants whose market value is significantly different from their book value.[451]

The use of aggregate worldwide market value instead of book value could raise questions relating to whether market price reflects a registrant's fundamental value and the appropriate measurement period to be used. If a firm's stock price is informationally efficient, it will reflect the fundamental value of the firm's equity. Any new information, including information about mergers or acquisitions, might lead investors to revise their expectations of the firm's risk and future cash flow, resulting in possible changes in stock price. Information about a transaction sometimes starts seeping into the stock market several months before an announcement, leading investors to speculate around potential mergers or acquisitions.[452] Thus, the market price of the registrant's shares might fluctuate depending on the information available. These and other factors could potentially affect stock price or the firm's market value. Thus, it is possible that the changes to the Investment Test that we are adopting might introduce errors or bias into the determination of the significance of an acquisition.

In response to concerns raised by commenters, the amendments to the Investment Test will require registrants to use the average of aggregate worldwide market value calculated daily for the last five trading days of the registrant's most recently completed month ending prior to the earlier of the registrant's announcement date or agreement date of the acquisition or disposition. Using the average aggregate worldwide market value should reduce the risk of anomalous results under the Investment Test as a result of market value fluctuations due to other news or events that are unrelated to the acquisitions or dispositions. Thus, we believe the use of the average market value of equity in the Investment Test should better identify the significance of the transaction while avoiding confounding events.

[449] *See* Richard Tortoriello et al., *Mergers & Acquisitions: The Good, the Bad, and the Ugly (and How to Tell Them Apart),* S&P Global, Aug. 2016, at 2–4, *https://www.spglobal.com/marketintelligence/en/documents/mergers-and-acquisitions-the-good-the-bad-and-the-ugly-august-2016.pdf.*

[450] The fundamental value of an entity's equity refers to the value of equity determined through fundamental analysis. For example, fundamental value of a firm's equity can be estimated by summing the discounted stream of expected future free cash flow to the firm's equity holders. *See* Tim Koller, Marc Goedhart, & David Wessels, *Valuation: Measuring and Managing the Value of Companies* (7th ed. 2020).

[451] *See, e.g.,* Andrei Shleifer & Robert W. Vishny, *Stock Market Driven Acquisitions,* 70 J. Fin. Econ. 295 (2003) (''Shleifer & Vishny (2003)'').

[452] *See, e.g.,* Paul J. Halpern, *Empirical Estimates of the Amount and Distribution of Gains to Companies in Mergers,* 46 J. Bus. 554 (1973); Gershon Mandelker, *Risk and Return: The Case of Merging Firms,* 1 J. Fin. Econ. 303 (1974) (''Mandelker (1974)'').

Under the amended Investment Test, some acquisitions may be considered insignificant that would otherwise have been significant under the existing rule. For example, this may occur when an acquiring company's equity is highly-valued, or an acquiring company has a high market-to-book ratio. Studies have shown that companies are more likely to make an acquisition if their stock is overvalued.[453] Therefore, because it uses the aggregate worldwide market value of equity as the denominator, the amended Investment Test may be less likely to require Rule 3–05 or Rule 3–14 Financial Statements for some acquisitions where the acquirer's stock is overvalued.

One commenter asserted that the proposed change to the Investment Test would result in less disclosure about acquisitions by companies whose market value is significantly larger than their book value.[454] The potential loss of information may be mitigated because significance is established if any one of the three significance tests is satisfied and Rule 3–05 Financial Statements can also be triggered by the Asset Test or the Income Test.

The amendments to the Income Test adding a revenue component should improve the application of the Income Test by mitigating the effect of infrequent expenses, gains, and losses on the calculation and also potentially preventing insignificant subsidiaries or acquired businesses from being deemed significant for registrants with net income or loss near zero. The amended rules will continue to use income from continuing operations before income taxes for the Income Test rather than after income taxes as proposed, which should also better reflect the significance of a tested subsidiary or acquired business by avoiding distortions that can occur as a result of the tax status of the entity or the volatility of income taxes. Also, as mentioned above, the amendments might affect acquiring firms that acquire private targets more than those that acquire public targets, as financial information of public targets is readily available, regardless of whether Rule 3–05 Financial Statements are required. Prior studies, however, have shown that the acquisitions of private targets on average create shareholder value, which further mitigates the commenter's concerns.[455] The amendments also clarify the application of the proposed revenue component by removing the reference to ''recurring annual revenue'' and indicating that the revenue component does not apply if either the registrant and its subsidiaries consolidated or the tested subsidiary did not have material revenue in each of the two most recently completed fiscal years. We believe this clarification will aid registrants in applying the test.

The inclusion of a revenue component in the Income Test may result in an acquired business that has a significant impact on net income, but not on revenues, not being deemed significant. When the registrant and its subsidiaries consolidated and the tested subsidiary have material revenue in each of the two most recently completed fiscal years, the amended Income Test would require both the new revenue component and the net income component to be met.[456] As a result, when the profitability of the registrant differs significantly from the profitability of the acquired business, the income component could generate a very different result from the revenue component.

Any potential risks of under-identification as a result of the amendments may be mitigated, because significance is established if any one of the three significance tests are satisfied. Therefore, any under-identification that may result from application of one test may not necessarily impact the outcome of whether disclosure would be required. For example, acquisitions conducted by highly-valued firms might not trigger Rule 3–05 Financial Statements based on the Investment Test because of their higher aggregate worldwide market value of equity. However, Rule 3–05 Financial Statements might still be required based on the Income Test or the Asset Test, thus mitigating the risks of under-identification of economically significant transactions. Additionally, any potential risks of under-identification could be mitigated by the fact that registrants must otherwise disclose material information about the acquisition that is necessary to make the required statements not misleading.

Overall, the amendments to the Investment Test and Income Test are expected to better capture the significance of a tested subsidiary or acquired business relative to the registrant, resulting in more salient disclosure and reducing compliance burdens. For example, to the extent that the amendments reduce the risk of deeming an insignificant acquisition to be significant, they may benefit registrants by reducing the number of instances in which registrants are required to file Rule 3–05 Financial Statements or Rule 3–14 Financial Statements, thus reducing compliance burdens. To the extent that the amendments to the significance tests capture more significant businesses and acquisitions and fewer insignificant ones, they may directly benefit investors by improving the overall salience of the information disclosed to them. Investors may also indirectly benefit from the amendments to the significance tests as the potential cost savings from reduced compliance burdens could be translated to more capital available to the registrants for future profitable investments and possibly the ability to access capital sooner than under existing requirements.

We believe that overall the amendments to the significance tests would improve the application of the tests and their ability to capture the economic substance of acquisitions and dispositions, which would benefit investors by helping ensure that they are provided with decision-relevant information about those acquisitions.

2. Audited Financial Statements for Significant Acquisitions

The amendment to eliminate the requirement to file the third year of Rule 3–05 Financial Statements would reduce registrants' disclosure burden. Currently, Rule 3–05 Financial Statements are required for up to three years prior to the acquisition depending on the significance of the transaction and the amount of net revenues reported by the acquired business in its most recent fiscal year. To the extent that information from three years prior might be less relevant to investors' analysis of an acquisition, we believe the benefits from the reduction in disclosure burden and audit costs justify investors' loss of the incremental value of the third year of financial information. For purposes of

[453] *See, e.g.,* Shleifer & Vishny (2003), *supra* note 451, which develops a model showing that over-valued firms are more likely to make an acquisition of undervalued firms using their over-valued stocks. *See also* Matthew Rhodes-Kropf, David T. Robinson, & S. Viswanathan, *Valuation Waves and Merger Activity: The Empirical Evidence,* 77 J. Fin. Econ. 561 (2005) (''Rhodes-Kropf et al. (2005)''); Ming Dong et al., *Does Investor Misvaluation Drive the Takeover Market?,* 61 J. Fin. 725 (2006) (''Dong et al. (2006)''); James S. Ang & Yingmei Cheng, *Direct Evidence on the Market-Driven Acquisition Theory,* 29 J. Fin. Res. 199 (2006) (''Ang & Cheng (2006)''). All three papers document stock market-driven acquisitions in which acquiring firms acquire targets using their over-valued stocks.

[454] *See* letter from CII (asserting that such companies are more likely to use stock as a payment method, which is also a predictor of post-acquisition underperformance).

[455] *See, e.g.,* Fuller et al. (2002), *supra* note 448 (finding that acquisitions of private targets are associated with higher acquirer returns).

[456] In this case, the registrant would use the lower of the revenue component and the net income component to determine the number of periods for which Rule 3–05 Financial Statements are required. *See* Rule 3–05(b)(2) of Regulation S–X.

the PRA, we expect the average reduction in registrants' compliance burden as a result of the amendments would be approximately 125 hours per Rule 3–05 Financial Statement filing.[457] In addition to these compliance cost savings, there could be other and more substantial benefits from the amendments. The amendments could facilitate merger and acquisition transactions and facilitate an acquiring company's access to capital. For example, if the preparation and audit of pre-acquisition financial statements are outside of the registrant's control, and the target company is unable to prepare and obtain an audit of any required financial statements for the third year, the registrant will be unable to comply with its disclosure requirements under Rule 3–05, which could delay the filing of a registration statement and impede its capital raising efforts.

The impact of the amendment on investors depends, in part, on the value of information about the third year. In an efficient market, information for the third year before an acquisition may not generally provide significant incremental value to investors to evaluate a transaction. However, in some cases the omission of the third year of Rule 3–05 Financial Statements could result in loss of information to investors, such as in those limited cases where the acquired business has an operating cycle that extends beyond two years and has not previously filed any financial reports. We expect this potential loss of information to be partially mitigated by a registrant's Rule 4–01(a) obligation to include such further material information as is necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

3. Financial Statements for Net Assets That Constitute a Business

The amendment to permit the use of abbreviated financial statements in circumstances where providing full audited financial statements would be impractical should reduce registrants' disclosure burdens, decrease compliance costs, and facilitate consummation of acquisitions. Registrants frequently acquire a component of an entity that is a business as defined in Rule 11–01(d), but does not constitute a separate entity, subsidiary, segment, or division, such as a product line or a line of business contained in more than one subsidiary of the selling entity. These businesses may not have separate financial statements or maintain separate and distinct accounts necessary to prepare Rule 3–05 Financial Statements because they often represent only a small portion of the selling entity. As a result, a registrant may be unable to provide the financial statements required under the current rule. In these circumstances, the amendments provide that registrants would be permitted to file abbreviated financial statements to comply with Rule 3–05 if the total assets and total revenues (both after intercompany eliminations) of the acquired or to be acquired business constitute 20 percent or less of such corresponding amounts of the seller and its subsidiaries consolidated. This bright line threshold is a modification from the proposal in response to commenter feedback. Applying a 20 percent bright line threshold will reduce inconsistency in interpreting ''small portion of the selling entity'' and should facilitate compliance by registrants. A bright line threshold in the disclosure requirement may lead to over- or under-identification. However, a 20 percent threshold also is generally consistent with the staff's granting of relief pursuant to Rule 3–13 in such situations. This amendment also will help ensure that abbreviated financial statements are not used when the component of the selling entity acquired is sufficiently large such that presentation of the seller's financial statements, along with pro forma financial information that removes the portion of the seller not acquired, would best inform investors about the business acquired. Additionally, we are clarifying the meaning of the term ''segment,'' the description of expenses, and the presentation of the abbreviated financial statements. These clarifications should improve registrant's ability to comply with the Rule 3–05 disclosure requirements. We believe allowing for abbreviated financial statements in these circumstances will reduce costs for registrants and facilitate the consummation of acquisitions. We also believe any potential costs to investors as a result of decreases in disclosure will be mitigated by the fact that registrants must otherwise disclose material information about the acquisition that is necessary to make the required statements not misleading.

4. Financial Statements of a Business That Includes Oil and Gas Producing Activities

When an acquired or to be acquired oil and gas producing business represents a component of an entity that does not constitute a separate entity, subsidiary, operating segment (as defined in U.S. GAAP or IFRS–IASB, as applicable), or division for which separate financial statements exist and for which historical depreciation, depletion and amortization expense is likely not meaningful to an understanding of the potential effects of the acquired or to be acquired business on the registrant, the amendments would permit registrants to provide abbreviated financial statements that consist of income statements modified to exclude expenses not comparable to future operations. We believe allowing for abbreviated financial statements in these circumstances will reduce costs for registrants. As noted above, we believe any potential costs to investors as a result of decreases in disclosure will be mitigated by the fact that registrants must otherwise disclose material information about the acquisition that is necessary to make the required statements not misleading.

5. Timing and Terminology of Financial Statement Requirements

The amendments include several revisions that clarify the timing and terminology related to the disclosure requirements, with some revisions based on commenter feedback. These clarifications should benefit registrants by avoiding any confusion that may arise from application of the current requirements, thereby enhancing the overall efficiency of their compliance efforts. Because these amendments do not modify the information required to be disclosed, we do not believe investors would be negatively affected by them. To the extent that these amendments make compliance more efficient for registrants, investors may indirectly benefit as cost savings could be passed through to them.

6. Foreign Businesses

The amendments permit foreign private issuers that prepare their financial statements using IFRS–IASB to provide Rule 3–05 and Rule 3–14 Financial Statements prepared using a comprehensive basis of accounting principles other than U.S. GAAP or IFRS–IASB to be reconciled to IFRS–IASB rather than U.S. GAAP for an acquired business that is a foreign business (as defined in 17 CFR 210.1–02(l)). Permitting the use of Rule 3–05 and Rule 3–14 Financial Statements reconciled to IFRS–IASB in these circumstances potentially benefits investors by providing them with information about the acquired business that is more comparable to the registrant. This may allow investors to analyze the impact of these acquisitions more expeditiously.

[457] *See infra* Section V.B.1, Table 1.

The amendments also allow Rule 3–05 and Rule 3–14 Financial Statements to be prepared in accordance with IFRS–IASB without reconciliation to U.S. GAAP for an acquired business that is not a foreign business (as defined in 17 CFR 210.1–02(l)), but would qualify as a foreign private issuer if it were a registrant. Preparing financial statements without reconciliation to U.S. GAAP in these circumstances reduces the compliance costs where an acquired business in a cross-border acquisition does not have U.S. GAAP financial statements. It may also reduce transaction costs associated with acquiring foreign entities that would be considered valuable potential acquisition targets. For example, a registrant might be discouraged under the current rules from completing a cross-border acquisition in situations where it would be costly for the foreign target to prepare its financial statements using U.S. GAAP.

The amendments further permit an acquired business that is not a foreign business, but would qualify as a foreign private issuer if it were a registrant to reconcile its financial statements prepared according to a comprehensive basis of accounting principles other than U.S. GAAP or IFRS–IASB to IFRS–IASB rather than U.S. GAAP when the registrant is a foreign private issuer that uses IFRS–IASB. Permitting use of Rule 3–05 and Rule 3–14 Financial Statements reconciled to IFRS–IASB in these circumstances potentially benefits investors by providing them with more comparable information, which could be more expeditiously analyzed. The amendments further clarify that this reconciliation should generally follow the form and content requirements in Item 17(c) of Form 20–F; however, accommodations in Item 17(c)(2) of Form 20–F that would be inconsistent with IFRS–IASB will not be available, and IFRS 1, *First-time Adoption of International Financial Reporting Standards,* may be applied. The improved clarity in the amendment should improve registrants' compliance process, potentially reducing compliance costs.

By providing flexibility to prepare an acquired or to be acquired business's financial statements using, or reconciling to, IFRS–IASB in these circumstances, the amendment may facilitate certain cross-border mergers that might otherwise not take place due to compliance costs associated with preparing financial statements using, or reconciling to, U.S. GAAP. Based on data from the SDC merger database for the three year period from January 2015 to January 2018, about 20 percent of acquisitions by U.S. companies involved non-U.S. targets. To the extent that the amendment leads to increased cross-border mergers and acquisitions, shareholders could potentially benefit from greater growth potential in new markets, more efficient distribution systems, or improved managerial processes, among other benefits.[458]

A possible consequence from the amendments could be inconsistencies in financial disclosure about acquired or to be acquired businesses where IFRS–IASB and U.S. GAAP differ significantly in reporting practices. For example, there are certain differences in the recognition, measurement, and impairment of long-lived assets between IFRS–IASB and U.S. GAAP.[459] Such inconsistencies could lead to confusion and a loss of comparability for investors of domestic registrants familiar with U.S. GAAP financial statements. Despite potential inconsistencies, we do not expect the amendments to impose substantial costs on investors because they should be familiar with IFRS–IASB financial statements from other contexts. Specifically, foreign private issuers have been permitted to file IFRS–IASB financial statements without reconciliation to U.S. GAAP for some time,[460] and IFRS–IASB is widely used for financial reporting purposes in other jurisdictions. In that respect, we do not believe using or reconciling to IFRS–IASB financial statements for businesses in foreign jurisdictions will necessarily lower the disclosure standard or cause undue confusion. In addition, pro forma financial information for the acquisition is required to reflect the acquired foreign business on the same basis of accounting as that of the registrant. For a U.S. registrant, that basis would be U.S. GAAP, which should mitigate any potential inconsistencies in the pre-acquisition historical financial statements.

7. Smaller Reporting Companies and Issuers Relying on Regulation A

The amendments revise Rule 8–04 to direct smaller reporting companies to Rule 3–05 for requirements relating to the financial statements of businesses acquired or to be acquired, although the form and content requirements for these financial statements would continue to be governed by Article 8. The amendments to Rule 8–04 also apply to issuers relying on Regulation A. Since the form and content of the required financial statements will continue to be prepared in accordance with Article 8, we do not believe the amendments will impose additional compliance costs on affected entities and do not expect the amendments to reduce information available to investors.

The amendments to require smaller reporting companies to provide pro forma financial information for significant acquisitions and dispositions made during annual periods and to use the enhanced guidelines in Article 11 when preparing pro forma financial information could increase the burden on smaller reporting companies. However, based on a staff analysis of 2017 disclosures of acquisitions and dispositions by smaller reporting companies, we believe most already comply with the conditions in Article 11.[461] As a result, we do not expect that the amendments will impose significant new costs on these entities. At the same time, the amendments may provide more relevant information to investors, although this benefit also will be limited to the extent that smaller reporting companies already comply with these requirements in practice.

The amendments do not provide additional accommodation for smaller reporting companies as suggested by some commenters.[462] As discussed in Section II.A.7.c above, additional accommodations might potentially complicate application of the rule. However, we expect the amendments will ease compliance burdens and simplify the application of our rules for all affected entities. To the extent that these compliance burdens entail certain fixed costs that do not scale with the size of the acquirer, smaller reporting companies and issuers relying on Regulation A may particularly benefit from the adopted changes.

8. Omission of Rule 3–05 and Rule 3–14 Financial Statements and Related Pro Forma Financial Information for Businesses That Have Been Included in the Registrant's Financial Statements

The amendments allow registrants to omit Rule 3–05 and Rule 3–14 Financial Statements from Securities Act registration statements and proxy statements for businesses that exceed 20 percent, but do not exceed 40 percent, significance after inclusion in post-acquisition results for nine months

[458] *See, e.g.,* Kenneth R. Ahern, Daniele Daminelli, & Cesare Fracassi, *Lost in Translation? The Effect of Cultural Values on Mergers Around the World,* 117 J. Fin. Econ. 165 (2015).

[459] As an example, IFRS–IASB permits the recognition of internally generated intangible assets in limited circumstances; U.S. GAAP does not.

[460] *See Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP,* Release No. 33–8879 (Dec. 21, 2007) [73 FR 986 (Jan. 4, 2008)].

[461] *See supra* note 346.

[462] *See supra* Section II.A.7.

(rather than the proposed complete fiscal year) and for businesses that exceed 40 percent significance once they are included in the registrant's post-acquisition results for a complete fiscal year. These amendments provide consistency between Rule 3–06 and Rule 3–05 for acquisitions that exceed 20 percent, but do not exceed 40 percent significance, and could also improve registrants' timely access to capital. For example, registrants currently have to test the significance of acquisitions that occurred during the earliest years for which the registrant is required to provide historical financial statements and, if significant, to provide pre-acquisition financial statements of the acquired business. These modifications are in response to commenter feedback. We anticipate reduced compliance burdens on registrants and do not anticipate significant costs on investors. We expect the amendments to be especially useful for registrants that complete an initial public offering, as those registrants are most likely not to have been required to file Rule 3–05 and Rule 3–14 Financial Statements before filing their initial registration statements. In these instances, a registrant might need to spend additional time or resources, or both, to prepare Rule 3–05 and Rule 3–14 Financial Statements for inclusion in a registration statement, which can delay a registrant's offering and hence delay its access to capital. In addition to anticipated benefits resulting from more timely access to capital, registrants may benefit from reduced compliance costs.

We believe that information from the historical pre-acquisition period is not as relevant once integration of the acquisition is completed. Additionally, in acquisitions where integration takes longer than a year, investors will still receive disclosure about material effects of the acquisition through the registrant's management's discussion and analysis.[463] We therefore do not expect the amendments to result in a meaningful loss of material information to investors. Instead, the reduction in compliance burdens and the timely access to capital may indirectly benefit investors.

9. Use of Pro Forma Financial Information To Measure Significance

The amendments permit the use of pro forma financial information to measure significance in initial registration statements. The amendments further clarify, based on commenter input, that if a registrant uses pro forma financial information to measure significance, it must continue to use pro forma financial information to measure significance until the next annual report on Form 10–K. This approach provides registrants with certain flexibility to more accurately measure the relative significance of an acquisition or disposition, which in turn may help reduce their disclosure burden and compliance costs and facilitate capital formation. Because pro forma financial information may capture the effects of significant acquisitions and dispositions consummated after the latest fiscal year-end that are not reflected in the registrant's annual historical financial statements (financial statements that would otherwise be used to measure significance), these amendments could enable registrants to more accurately determine the significance of these transactions.

The amendments could potentially reduce the amount of information presented to investors if significance determinations on the basis of pro forma financial information fail to identify acquisitions that are economically significant to a registrant. However, as noted above, Rule 4–01(a) requires registrants to include such further material information as is necessary to make the required statements, in light of the circumstances under which they are made, not misleading. We expect this requirement to mitigate concerns about any loss of relevant information to investors.

10. Disclosure Requirements for Individually Insignificant Acquisitions

Registrants are currently required to provide certain audited, historical pre-acquisition financial statements if the aggregate impact of ''individually insignificant businesses'' acquired since the date of the most recent audited balance sheet exceeds 50 percent.[464] In these circumstances, pro forma financial information is also required pursuant to Article 11 for the ''individually insignificant businesses'' for which audited, historical pre-acquisition financial statements are required.[465] To comply with these requirements, registrants may need to provide audited financial statements of acquired businesses that are not material to the registrant, and pro forma financial information that might not reflect the aggregate effect of the ''individually insignificant businesses.''

The amendments will affect disclosure requirements for individually insignificant businesses in several ways. First, the amendments require the registrants to provide audited historical financial statements only for those acquired businesses whose individual significance exceeds 20 percent. Reducing required disclosure of audited historical financial statements for insignificant acquisitions could improve registrants' access to capital since preparing such disclosure typically entails negotiating with the seller to timely provide this information, a process that can be costly and time-consuming. By simplifying and streamlining the historical financial statement disclosure requirement for individually insignificant acquisitions, the amendments may make it easier, quicker, and cheaper for registrants to access capital. The amendments also reduce registrants' disclosure burdens, leading to cost savings that may ultimately benefit shareholders.

Second, the amendments could improve the completeness of information provided to investors by requiring pro forma financial information that depicts the aggregate effect in all material respects of the acquired businesses, rather than only a mathematical majority of the individually insignificant businesses acquired. Investors might benefit by being able to more effectively assess the aggregate effect of these acquisitions on the registrant as a result of the amendments.

The amendments might impose additional compliance burdens on registrants to the extent they are required to present information about acquisitions, albeit in an aggregated form, that they have not disclosed in the past. Because we do not have information available to estimate the number of acquisitions that will be subject to this requirement in aggregate or for any given registrant, we cannot quantify these compliance costs. However, we do not expect registrants to incur substantial costs to prepare disclosure about such acquisitions because these are activities that typically underpin the decision to make an acquisition. The amendments also expand the aggregate impact determination to include both Rule 3–05 and Rule 3–14 acquisitions. This modification is consistent with the objective of aligning Rule 3–14 with Rule 3–05. We do not believe there will be significant economic effects from this expansion as the modification will apply only to registrants that acquire both Rule 3–05 businesses and Rule 3–14 real estate operations.

[463] *See* 17 CFR 229.303.

[464] *See supra* note 201.

[465] *See supra* note 211.

11. Rule 3–14—Financial Statements of Real Estate Operations Acquired or To Be Acquired

The amendments align Rule 3–14 with Rule 3–05 where no unique industry considerations warrant differentiated treatment of real estate operations. For example, the amendments align the threshold for individual significance for both rules at ''exceeds 20 percent'' and the threshold for aggregate significance for both rules at ''exceeds 50 percent.'' The amendments also align Rule 3–14 with Rule 3–05 in terms of the years of required financial statements for acquisitions from related parties, the timing of filings, application of Rule 3–06, which permits the filing of financial statements covering a period of nine to 12 months, and other less significant changes.

The amendments are expected to benefit registrants as greater consistency in application of the rules may reduce the costs of preparing disclosure, especially for registrants that make both real estate and non-real estate acquisitions. In addition to the alignment between Rule 3–14 and Rule 3–05, the amendments also define real estate operation as a business that generates substantially all of its revenues through the leasing of real property. This may reduce potential uncertainty and ambiguity in applying Rule 3–14 without negatively affecting investors.

The amendments also establish or clarify the application of Rule 3–14 regarding scope of the requirements, determination of significance, need for interim income statements, and special significance provisions for blind pool offerings that are consistent with current practice. Thus, while these amendments may reduce potential compliance uncertainty and ambiguity for registrants, we do not expect them to have a substantial effect on current disclosure practices.

In addition, because the special significance provisions for ''blind pool offerings'' are based on the unique characteristics of the offering and the registrant, rather than the type of acquisitions, the amendments also extend these special significance provisions to business acquisitions subject to Rule 3–05 by registrants conducting ''blind pool'' offerings. We do not believe this extension will have significant economic effects as the extended accommodation will only affect a very small population of registrants. For those it does impact, the amendment will increase consistency in the application of Rules 3–14 and 3–05, thereby reducing costs of preparation for registrants and immaterial disclosure to investors.

12. Pro Forma Financial Information

The amendments to replace the existing pro forma adjustment criteria in Article 11 of Regulation S–X with Transaction Accounting Adjustments and Autonomous Entity Adjustments simplify these requirements and reduce potential inconsistency in preparing pro forma financial information. The amendments to Article 11 could benefit investors in several ways. First, the Transaction Accounting Adjustments may lead to more consistent pro forma presentations than the current adjustment criteria, which may be subject to some interpretation. In addition, the Transaction Accounting Adjustments may permit registrants to better reflect acquisitions, dispositions, or other transactions, which could help investors better understand the effects of these transactions on the registrant's audited historical financial statements. Altogether, the amendments are expected to improve the relevance of the information disclosed to investors and help investors process information more effectively.

In a change from the proposal, under the final amendments, Management's Adjustments depicting synergies and dis-synergies of the acquisitions and dispositions for which pro forma effect is being given may, in the registrant's discretion, be presented if in its management's opinion, such adjustments would enhance an understanding of the pro forma effects of the transaction and specified conditions related to the *Basis for Management's Adjustments* and the *Form of Presentation* are met.[466] On the one hand, Management's Adjustments may provide investors better insight into the potential effects of the transaction as contemplated by the company. This potentially benefits investors by helping them to distinguish the accounting effects of the acquisitions or dispositions from management's judgment as to the expected operational effects based on management plans. On the other hand, there may be different levels of confidence about forward-looking information related to different types of synergies and dis-synergies contemplated by management. Making Management's Adjustments optional benefits registrants by permitting them to avoid uncertainties of estimation and increase flexibility in compliance, thus potentially reducing compliance costs.

The amendments to Article 11 could impose costs on registrants because they would be required to meet new presentation requirements for required or optional pro forma adjustments. For purposes of the PRA, we estimate the average incremental compliance burden for these new requirements would be around 25 hours per affected registrant.[467] However, synergy and dis-synergy estimation by registrants may introduce certain subjective judgments into the pro forma financial statements, potentially making them more difficult for investors to interpret. In addition, making Management's Adjustments optional could create risk that such adjustments would be disclosed selectively. The requirement that registrants disclose uncertainties, assumptions, and calculation methods and the requirement that when synergies are presented, any related dis-synergies must also be presented along with the Management's Adjustments, could mitigate the risk of biased pro forma adjustments. The amendments appear unlikely to cause significant loss in information for investors regarding the effects of the transaction; indeed investors may gain important insights to the extent a registrant chooses to disclose Management's Adjustments.

13. Significance and Business Dispositions

The amendments to conform the significance tests for a disposed business to that of an acquired business and to increase the threshold for determining the significance of a business disposition from 10 percent to 20 percent will reduce inconsistencies in reporting between acquisitions and dispositions and potentially reduce registrants' compliance burden.[468] For example, under the amendments, registrants will not have to file pro forma financial information for insignificant dispositions (*e.g.,* dispositions with significance levels exceeding 10 percent but not 20 percent), thus reducing compliance costs. In addition, there could be some positive spillover effect for registrants from applying the same thresholds to determine the significance of their transactions. For example, a registrant might engage in both acquisitions and

[466] *See supra* Section II.D.1.c.

[467] *See infra* Section V.B.1, Table 1.

[468] Under current requirements, pro forma financial information is required upon the disposition (and for certain registration statements and proxy statements, the probable disposition) of a significant portion of a business, if the business to be disposed of meets the conditions of a significant subsidiary under Rule 1–02(w). Rule 1–02(w) uses a 10 percent significance threshold, not the 20 percent threshold used for business acquisitions under Rules 3–05 and 11–01(b).

dispositions during the same reporting period. Identical thresholds might help achieve internal consistency in financial reporting in evaluating the impact of both types of transactions as well as the net effects. For investors, the amendment to conform the significance threshold for a disposed business to that of an acquired business could facilitate understanding and analysis of Rule 3–05 and Rule 11–01(b) disclosures by eliminating the inconsistency in reporting between acquisitions and dispositions.

14. Amendments to Financial Disclosure About Acquisitions Specific to Investment Companies

We believe the amendments related to investment companies would reduce compliance burdens by streamlining the disclosure requirements in a way that is tailored to investment companies. We do not anticipate significant costs to investors related to the amendments, because we do not believe the amendments will result in a reduction in material information available to investors.

Currently, there are no specific rules or requirements in Regulation S–X for investment companies relating to the financial statements of acquired funds. Instead, these entities apply the general requirements of Rule 3–05 and the pro forma financial information requirements in Article 11. However, investment company registrants differ from non-investment company registrants in several respects. For example, investment companies' income mainly stems from capital appreciation and investment income;[469] investment companies are required to report their net asset value on a daily basis using fair value for portfolio investments; and investment companies do not account for their investments using the equity method. As a result, investment companies have faced challenges applying the general requirements of Rule 3–05 and Article 11 in the context of fund acquisitions.

The amendments include a separate definition of ''significant subsidiary'' and separate significance tests specifically tailored for investment companies. The amendments focus the significance determination for investment companies on the impact to the registrant's investment portfolio held by the registrant. Further, the amended significance tests capture sources of income such as dividends, interest, and the net realized and unrealized gains and losses on investment that are most relevant to investment companies. We expect that together the amendments will benefit both investment companies and their investors by providing more appropriate standards for determining the significance of fund acquisitions. For example, the amended Income Test better aligns income from a particular investment or acquisition for purposes of analyzing the effect on the income of the investment company as a whole. We thus expect the amended Income Test to better reflect the impact of the tested subsidiary on an investment portfolio rather than a test based solely on investment income as used in current Rule 8b–2. This is because changes in the market value of an investment portfolio due to market volatility may be substantial even when the securities held in the portfolio do not produce investment income. The amendments also permit the use of a five-year average for income if income for the past year is at least 10 percent less than the average income for the past five years. The amendments also revise the calculation of income to be the absolute value of ''the sum'' of combined investment income from dividends, interest, and other income, the net realized gains and losses on investments, and the net change in unrealized gains and losses on investments. These modifications were made to prevent confusion in applying absolute value with respect to income and avoid the potential double counting of gains or losses. As a result, the amendments may more accurately identify acquisitions that are economically significant to investment company registrants. This will benefit registrants as they will not be required to prepare separate financial disclosure for economically insignificant acquisitions. The amendments also may benefit investors by avoiding the need to focus on economically insignificant acquisitions that are deemed significant under current rules. Furthermore, we do not anticipate that the amended significance tests would impose substantial costs on registrants to implement because we believe the required measures should be readily available to registrants.

The amended significance thresholds for the Income Test in Rule 1–02(w) when applied to investment companies has two prongs: Either (i) a threshold of 80 percent for income alone or (ii) a 10 percent threshold together with an Investment Test result higher than 5 percent. This amended threshold might reduce the compliance burden faced by investment companies as there is less need to produce additional financial information when a registrant's net income is relatively small. Smaller net income could produce anomalous results under the current Income Test as it may make it appear as if an acquisition or investment is a significant contribution to a registrant's net income when it represents only a very small portion of the registrant's portfolio of investments. By effectively conditioning the income test for investment companies on the investment test for investment companies, the amendments potentially better identify fund acquisitions that warrant additional disclosure. This amendment also could benefit investors to the extent that they place a higher weight on the value of investments, relative to the income produced by investments, when considering the economic impact of an acquisition.

The amendment to eliminate an asset-based test for investment companies simplifies compliance while likely not resulting in a significant loss in information. An asset-based test is generally not meaningful when applied to investment companies and, when the acquired entity is another investment company, is largely superfluous in light of the amended Investment Test for investment companies. Additionally, applying the asset test could be less meaningful when the tested subsidiary is not another investment company. Because the asset test in these circumstances would involve comparing assets measured under different methodologies, it may be a less reliable indicator of significance, causing registrants to incur costs to prepare disclosures for acquisitions that are not economically significant, and therefore of little benefit to investors.

New Rule 6–11 potentially reduces compliance burdens by setting forth financial statement requirements for acquired funds that are specifically tailored for investment companies as compared to Rule 3–05. Rule 6–11 deems the acquisition of all or substantially all portfolio investments held by another fund as a fund acquisition. This principles-based facts and circumstances evaluation of whether a fund acquisition has occurred could potentially reduce under-reporting of acquired fund disclosures by focusing on the economic substance of the transaction rather than its legal form. The amendments to require one year of audited financial statements for fund acquisitions and to eliminate pro forma financial statements could also reduce compliance burdens for

[469] Investment income includes dividends, interest on securities, and other income, but does not include net realized and unrealized gains and losses on investments. *See* Rule 6–07 of Regulation S–X.

registrants. We do not believe these amendments will lead to loss of relevant information to investors, as the price of investment company shares is calculated daily based on the fair value of its investment portfolio, and older historical financial statements are in general less relevant to fund investors. The amendments are also consistent with the accommodations typically provided by our disclosure review staff during consultations.[470] Permitting investment companies to provide financial statements for private funds that were prepared in accordance with U.S. GAAP will reduce compliance burdens for investment companies by potentially reducing the costs related to re-issuing audited financial statements in compliance with Regulation S–X. Any loss of information arising from these amendments will be mitigated by the requirement that investment companies file the schedules required under Article 12 of Regulation S–X and provide certain supplemental information regarding the acquired funds. We believe this information is more relevant and potentially enhances efficiency in processing the information by fund investors. These supplemental disclosures, however, will entail costs to registrants. For purposes of the PRA, we estimate the average incremental compliance burden for this additional disclosure is around 25 hours per affected registrant. We further estimate that all of these amendments taken together will reduce a registrant's compliance burden by approximately 100 hours.[471]

E. The Effects on Efficiency, Competition, and Capital Formation

We anticipate that the amendments will have favorable effects on efficiency, competition, and capital formation for both operating companies and investment companies. By reducing disclosure burdens for registrants regarding business acquisitions and dispositions, the amendments should facilitate such activities, although, as stated earlier, compliance costs may be a more modest factor when a registrant considers whether to engage in an acquisition or disposition. An active mergers and acquisitions market creates efficiencies by transferring inefficiently managed assets to more efficient management or by creating synergies through economies of scale or economies of scope.[472] On average, mergers and acquisitions benefit investors in the acquired business.[473]

The amendments to revise the disclosure relating to acquired and disposed businesses are expected to benefit registrants by potentially reducing compliance burdens and facilitating more timely access to capital. Considering all registrants, including both operating companies and investment companies, for PRA purposes, the estimated reduction in the total number of incremental burden hours required for compliance with all forms from the amendments is about 82,225 company hours.[474] The resulting total reduction in incremental professional costs for all forms under the amendments is approximately $21,470,000.[475] We thus believe the potential cost savings from the amendments are significant.

At the same time, we do not believe investors face a significant loss in information as a result of the amendments. Instead, we expect the amendments to provide investors with more relevant information, which may allow them to process the information more efficiently, enhancing their investment decisions and thus potentially facilitating capital formation. Additionally, reduced regulatory complexity may lead to increased efficiency in the market for mergers and acquisitions. Under the existing disclosure requirements related to acquired businesses, some mergers may be delayed or more costly due to the burdens of compliance with Rule 3–05 Financial Statement requirements (*e.g.,* a private business may not have more than two years of audited financial statements, but the transaction may trigger additional disclosure because the business crosses the highest significance threshold). By decreasing the acquisition costs for registrants, the amendments could promote competition in the market for mergers and acquisitions and potentially benefit shareholders of acquired businesses. Better disclosure quality and an improved information environment could also facilitate the market for mergers and acquisitions, which could help achieve efficient capital allocation and exert effective external control mechanisms on public firms, leading to an overall increase in efficiency.[476]

F. Alternatives Considered

1. Approaches to the Significance Tests

One alternative to the amended significance tests would be to adopt a principles-based framework, such as materiality, rather than the current bright-line tests for determining when financial statements of acquired or disposed businesses are required. The benefit of using a principles-based approach based on materiality to determine significance is that it would permit judgment and consideration of unique facts and circumstances. An additional benefit of such an approach is that materiality is a familiar concept to registrants who currently make materiality determinations in preparing their filings with the Commission. However, while a principles-based approach is frequently the appropriate standard for registrants to apply when preparing disclosures, determinations related to business acquisitions and dispositions pose unique challenges. Unlike periodic reporting, acquisitions and dispositions tend to be episodic, and moreover, there is less similarity between such transactions. As a result, it can be difficult for registrants to efficiently make a determination of materiality in an acquisition context, where timing considerations can be paramount.

Furthermore, unlike disclosure that relates solely to the registrant, which is prepared by the registrant on an ongoing basis, and where materiality is therefore evaluated regularly, in an acquisition context registrants must rely on information provided by third parties to make a determination of whether the acquisition is significant and whether the related disclosure is material. A bright-line test provides registrants with a level of certainty that allows them to efficiently make determinations about what level of disclosure is required in

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[470] *See supra* note 58.

[471] *See infra* Section V.B.2.

[472] For a discussion of the benefits of the market for corporate control, *see, e.g.,* Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence,* 11 Journal of Financial Economics. 5 (1983) (''Jensen & Ruback (1983)'') (noting that an active takeover market can create efficiencies by transferring inefficiently managed assets to more efficient management—or by creating synergies through economies of scale or scope). For a discussion of the agency costs of mergers and acquisitions, *see, e.g.,* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure,* 3 Journal of Financial Economics, 305 (1976) (explaining that managers have private incentives to conduct mergers and acquisitions to increase the size of the firm in order to extract more pay or perquisites at shareholder expense).

[473] Empirical studies have shown that around M&A announcements, the target firms earn a significant abnormal return. *See, e.g.,* Mandelker (1974), *supra* note 452; Jensen & Ruback (1983), *supra* note 472; Joy Ishii & Yuhai Xuan, *Acquirer-Target Social Ties and Merger Outcomes,* 112 J. Fin. Econ. 344 (2014).

[474] *See infra* Section V.C, Table 5 Column E.

[475] *See infra* Section V.C, Table 5 Column F.

[476] Studies have found that mergers may create shareholder value when the assets are transferred from inefficient management to more efficient management. *See* Mitchell & Lehn (1990), *supra* note 427; Agrawal & Jaffe (2003), *supra* note 427; Kenneth M. Lehn & Mengxin Zhao, *CEO Turnovers after Acquisitions: Are Bad Bidders Fired?,* 61 J. Fin. 1759 (2006).

an environment where delay is costly. Also, where a registrant misjudges materiality and fails to provide disclosure, investors would not receive information about the acquired business's financial impact on the registrant until the operating results of the acquired business have been reflected in the consolidated financial statements of the registrant for an extended period of time. As a result, the impact of the acquisition may be difficult for investors to disentangle from other events at the registrant, even where the acquisition may be economically significant. As a result, we expect a bright-line threshold in the case of these disclosures could be less costly for registrants and result in more consistent disclosure to investors where transactions are significant to a registrant.

The Investment Test compares the registrant's and its other subsidiaries' investments in and advances to the acquired business against the carrying value of the registrant's total assets. The amendment to the Investment Test uses the aggregate worldwide market value of the registrant's voting and non-voting common equity calculated as the average of such aggregate worldwide market value calculated daily for the last five trading days of the registrant's most recently completed fiscal quarter ending prior to the earlier of the registrant's announcement date or agreement date of the acquisition or disposition. As an alternative to the amended Investment Test, we could have required registrants to use enterprise value for the acquirer and the acquired business, rather than the value of common equity (for the acquirer) and investments in and advances to the acquired business. Enterprise value may more comprehensively reflect the value of the entity because it includes equity, debt, minority interests, and preferred shares. When a registrant makes an acquisition, depending on the ownership structure and capital structure of the registrant and the acquired business, the purchase price or investment in the acquired business would not necessarily reflect the total effect of the acquisition on the registrant, particularly if the acquired business is highly levered. Enterprise value would take into consideration the leverage of the acquired business and may, in such cases, better capture the economic effects of the transaction. Enterprise value, however, may not be appropriate for an acquirer or acquiree that has substantial liquid assets on its balance sheet. Additionally, enterprise value may not be a consistent indicator of relative size across registrants because capital structure (*i.e.,* leverage) may be very different among registrants in certain industries.

With respect to the amendment to the Investment Test, as noted earlier, because investors react to news and information, the anticipation of an acquisition could cause a change in equity value of both the potential acquirer and the potential acquired firm. More generally, the market values of registrants are expected to change with market conditions as well as firm-specific information. As a result, it is possible that our approach to the Investment Test, which requires measurement of investments in an acquisition against the acquirer's aggregate worldwide market value, averaged over the last five trading days of the registrant's most recently completed fiscal quarter ending prior to the earlier of the registrant's announcement date or agreement date of the acquisition or disposition, might not reflect all information about the value of the acquirer. As an alternative, we could have required the registrant to use its average market value over a longer period of time rather than a five trading day window when measuring the size of its investments. This approach would avoid situations in which positive or negative market-wide or firm-specific shocks lead to noisy measures of market value that result in inaccurate assessments of significance, which may over- or under-identify significant acquisitions. However, using average market value over a longer period could increase complexity and would raise questions about the appropriate choice of a required measurement period (*e.g.,* over a specified number of months or over the entire reporting period).

With respect to the Income Test, one alternative would be to replace the existing Income Test with a revenue test. A potential benefit of this approach is that a revenue test would be less likely to produce anomalous results because it does not include infrequent expenses, gains, or losses that can distort the determination of relative significance. However, a stand-alone revenue test may not be a meaningful indicator of significance for the reasons the Commission described when it eliminated revenue as a standalone significance test.[477]

A second alternative to the amended Income Test would involve switching from an income component to a revenue component when the acquirer's net income or loss is marginal or break-even. Such an alternative could rely on another financial ratio, such as return on assets, to identify instances where the acquirer's net income is sufficiently low to yield anomalous results from the income component. For example, under such an alternative, the revenue component would be used instead of the income component if the absolute value of the acquirer's return on assets were less than one percent. Relative to the amended Income Test, such an alternative may have a lower risk of under-identification of significant transactions if the revenue component causes transactions to not be significant under the Income Test when the acquirer's net income is not marginal or break-even and the Investment Test and Asset Test are not met. However, such an approach would require identifying a financial ratio to serve as the trigger for a switch from the income component to the revenue component and, absent calibration, such a ratio may yield inconsistent results across industries. For example, an appropriate threshold for return on assets may vary across industries depending on the extent of an acquirer's reliance on human capital versus physical capital. Moreover, for those that rely heavily on tangible assets, the information provided by a return on assets threshold may be subsumed by the existing Asset Test.

A third alternative to the amended Income Test would be to use an operating income or profit margin component instead of the income component. Operating income or profit margin could be a better indicator of significance than the income component in that it may eliminate the effects of non-operating items such as interest expense. However, not all registrants report these income measures, and these measures share the same issues as net income, which could lead to similarly anomalous results.

A final alternative to the adopting Income Test would be to lower the threshold required to meet the revenue component, for example to 15 percent or 10 percent. A potential benefit of this approach is that it may mitigate the risk of under-identification of significant transactions. However, it is difficult to calibrate the income component and revenue component thresholds in a way that decreases the risk of under-

[477] *See Separate Financial Statements Required by Regulation S–X,* Release No. 33–6359 (Nov. 6, 1981) [46 FR 56171 (Nov. 16, 1981)] (''The amendment reflects the Commission's view that the presentation of additional financial disclosures of an affiliated entity may not be meaningful in instances in which the affiliate has a high sales volume but a relatively low profit margin, and therefore has little financial impact on the operating results of the consolidated group.'').

identification without increasing the risk of over-identification.

2. Approaches to Financial Statement Requirements

An alternative to the required Rule 3–05 or Rule 3–14 Financial Statements would be to require U.S. GAAP or IFRS–IASB, as applicable, business combination disclosures at the time an acquisition is consummated or probable, which include, among other things, supplemental pro forma information about revenue and earnings for the two years prior to the acquisition. Under this approach, registrants would be required to disclose information that enables users of a registrant's financial statements to evaluate the nature and financial effect of a business combination that occurs either: (a) During the current reporting period; or (b) After the reporting date but before the financial statements are issued or are available to be issued.[478] These disclosures would eventually be required to be included in registrants' historical audited financial statements presented for the period in which the acquisition occurred, although the supplemental information may continue to be labeled as unaudited. However, compared with the final amendments, less information would be disclosed to investors under this alternative, and the information would not be audited. Further, guidance about the presentation and preparation of supplemental pro forma information is limited, which potentially may impact the consistency of pro forma presentations between registrants.

3. Approaches To Adopting Pro Forma Adjustments

An alternative to the optional Management's Adjustments for pro forma financial information is to require the disclosure of Management's Adjustments for synergies and dis-synergies that have occurred after the acquisition date but before filing the pro forma financial information and for forward-looking information previously filed with the Commission. This alternative might provide a more complete depiction of the expected effects of the transaction and avoid circumstances where Management's Adjustments are selectively presented because they are optional. However, as commenters observed, this alternative could give rise to compliance challenges for registrants as synergies and dis-synergies may not be tracked at the line-item level required in pro forma financial information. Also, requiring quantification of synergies and dis-synergies that have occurred would impose a requirement to create books and records related to synergies and dis-synergies even when they were not a significant factor in the decision to execute the transaction. Moreover, synergies may take more time (*e.g.,* more than a year) to be achieved and estimated; thus, such a requirement might not be practical for certain transactions in certain industries. We therefore decided not to adopt this alternative.

4. Alternatives to the Income Test for Investment Companies

One alternative to the amended income test for investment companies would be to use the absolute value of gains and losses within the Income Test components rather than netting them. Because netting losses against gains mitigates the effect of individual securities on overall results of the portfolio, the use of absolute value of gains and losses for individual securities could result in a more accurate assessment of the effects of the acquired fund securities on the income of the acquiring fund. However, under this alternative, the registrant would need to re-calculate the gain or loss for each individual security using absolute value for both the acquiring fund and the acquired fund, rather than using existing financial measures that have already been determined for the financial statements, thereby increasing the cost and complexity of the amended test for registrants without necessarily providing significant incremental benefits to investors.

Another alternative to the amended income test for investment companies would be to select a percentage lower than 80 percent for the significance test. One potential benefit of using a lower percentage is that it could reduce the possibility that an investment company registrant would not need to provide disclosure for a fund acquisition with a material impact on the acquiring fund's income. However, it could also increase the possibility that costly disclosure obligations would be triggered, even though the impact on the registrant's assets is not material (particularly if the income of the acquiring fund is relatively low). The combination of the amended Income Test and Investment Test in the final amendments is intended to mitigate this result.

[478] *See* FASB ASC 805–10–50–1.

V. Paperwork Reduction Act

A. Summary of the Collection of Information

Certain provisions of our rules and forms that would be affected by the amendments contain ''collection of information'' requirements within the meaning of the PRA.[479] The Commission published a notice requesting comment on the collection of information requirements in the Proposing Release, and submitted the proposed amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[480] While several commenters provided comments on the potential costs of the proposed amendments, no commenters specifically addressed our PRA analysis.[481]

The hours and costs associated with preparing and filing the forms and reports constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the affected collections of information are: [482]

[479] *See* 44 U.S.C. 3501 *et seq.*

[480] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[481] *See* Section II above.

[482] A number of forms could require Rule 3–05, Rule 3–14, and other disclosure impacted by the amendments such that the amendments could affect the PRA burden associated with those forms. Based on staff experience, however, Rule 3–05 or Rule 3–14 Financial Statements are not generally included in these forms. The potentially affected Forms include ''Form S–4'' (OMB Control No. 3235–0324), ''Form S–11'' (OMB Control No. 3235–0067), ''Form F–4'' (OMB Control No. 3235–0325), ''Form 20–F'' (OMB Control No. 3235–0288), ''Form 10–K'' (OMB Control No. 3235–0063), ''Regulation 14A'' and ''Schedule 14A'' (OMB Control No. 3235–0059), ''Regulation 14C'' and ''Schedule 14C'' (OMB Control No. 3235–0057), ''Form 10–Q'' (OMB Control No. 3235–0070), ''Form 1–K'' (OMB Control No. 3235–0720), and ''Form 1–SA'' (OMB Control No. 3235–0721). For example, staff experience has shown that for filings on Form S–4, registrants most often incorporate Rule 3–05 or Rule 3–14 Financial Statements by reference to a previously filed Form 8–K. While the amendments would also apply to registered investment companies, based on staff experience, Rule 3–05 or Rule 3–14 Financial Statements are not generally included in ''Form N–3'' (OMB Control No. 3235–0316), ''Form N–4'' (OMB Control No. 3235–0318), ''Form N–5'' (OMB Control No. 3235–0169), and ''Form N–6'' (OMB Control No. 3235–0503). Because we do not expect these forms to be generally affected by the amendments, we are not adjusting the burden estimates associated with these collections of information.

• ''Form S–1'' (OMB Control No. 3235–0065);
• ''Form S–3'' (OMB Control No. 3235–0073);
• ''Form F–1'' (OMB Control No. 3235–0258);
• ''Form F–3'' (OMB Control No. 3235–0256);
• ''Form 10'' (OMB Control No. 3235–0064);
• ''Form 8–K'' (OMB Control No. 3235–0060);
• ''Form N–1A'' (OMB Control No. 3235–0307);
• ''Form N–2'' (OMB Control No. 3235–0026);
• ''Form N–14'' (OMB Control No. 3235–0336); and
• ''Form 1–A'' (OMB Control No. 3235–0286).

The regulations, schedules, and forms listed above were adopted under the Securities Act, the Exchange Act, and/or the Investment Company Act and set forth the disclosure requirements for registration statements, periodic and current reports, and distribution reports filed by registrants to help investors make informed investment and voting decisions. A description of the amendments, including the need for the information and its use as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the amendments can be found in Section IV above.

B. Effect of the Amendments on Existing Collections of Information

1. Estimated Effects on Burdens for Registrants Other Than Investment Companies

The following table summarizes the estimated effects of the amendments on the paperwork burdens associated with the affected forms filed by registrants with operations or that otherwise are not investment companies.

TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS FOR REGISTRANTS (EXCLUDING INVESTMENT COMPANIES)

Amendment	Estimated effect and affected forms	Brief explanation of estimated effect
Rule 1–02(w), Rule 3–05, Rule 3–14, and related rules.	A reduction of 125 burden hours for each of the following forms: 10, 1–A, S–1, S–3, F–1, F–3, and 8–K.	• This reduction is the estimated effect on the affected forms by the amendments to Rules 3–05, 3–14, and the related rules (*e.g.,* Rule 1–02(w)), when considered in the aggregate and compared to the paperwork burden under existing requirements. • For PRA purposes, we estimate that existing Rule 3–05 or Rule 3–14 Financial Statements require an average of 500 burden hours as discussed in note 298 of the Proposing Release.
Article 11 (Rules 11–01, 11–02 and 11–03) and Rule 8–05 of Regulation S–X.	An increase of 25 burden hours for each of the following forms: 10, 1–A, S–1, S–3, F–1, F–3, and 8–K.	• This increase is the estimated effect on the affected forms by the amendments to the pro forma financial information requirements under Article 11 and Rule 8–05 of Regulation S–X, including the changes that permit registrants to provide certain forward-looking information, when considered in the aggregate and compared to the paperwork burden under existing requirements. • For PRA purposes, we estimate that existing pro forma financial information requires an average of 100 burden hours as discussed in note 299 of the Proposing Release.

a. Proposed Amendments to Rules 1–02(w), 3–05, and 3–14

Considering the various revisions outlined in Sections II.B. and C. above, we estimate that the amendments to Rule 1–02(w), Rule 3–05, and Rule 3–14 would generally reduce the paperwork burden for filings on an affected form that includes existing Rule 3–05 or Rule 3–14 Financial Statements.[483] However, not all filings on the affected forms include these disclosures because they are provided only in certain instances. Therefore, to estimate the overall paperwork burden reduction from the amendments, we estimated the number of filings that include Rule 3–05 and Rule 3–14 Financial Statements, used this data to extrapolate the effect of these changes on the paperwork burden, and applied these percentages to the current estimates for the number of responses in the Commission's current OMB PRA filing inventory.[484]

b. Proposed Amendments to Pro Forma Financial Information Requirements

Considering the various revisions outlined in Section II.D. above, we estimate that the amendments to Article 11 and Rule 8–05 will reduce a registrant's paperwork burden by simplifying disclosure requirements generally, but may increase burdens to the extent that the registrants are required to depict pro forma financial information for the aggregate impact in all material respects of the acquired businesses, rather than only a mathematical majority of the individually insignificant businesses acquired, and in the case of smaller reporting companies, requiring pro forma financial information in some additional circumstances[485] and requiring that the information be provided in a clearer and more robust manner. We are adopting amendments that permit, rather than require, registrants to include certain forward-looking information in the Management's Adjustments to the pro forma financial information. We have not revised our burden estimates from the Proposing Release as a result of this changes in order to more conservatively estimate the burden on issuers of providing this disclosure because these changes may additionally increase burdens to the extent registrants provide the disclosure. To estimate the overall paperwork burden reduction from the proposed amendments, we first estimated the number of filings that

[483] The Rule 1–02(w) definition of ''significant subsidiary'' is used in a number of rules and forms, including From 20–F, Form S–3, Form F–3, Schedule 14A, Form 8–K, Form 1–U, Form 10–Q, and Form 10–K. *See supra* note 23. We do not expect the changes to the definition to materially affect the burden estimate for these rules and forms beyond the effects for the changes related to Rule 3–05 and Rule 3–14 discussed in this PRA.

[484] To develop these estimates, Commission staff searched and analyzed filings for the calendar year 2017 and the first nine months of 2018. *See* discussion in Section V.B.1.a. of the Proposing Release.

[485] The additional circumstances that would require a smaller reporting company to present pro forma financial information under the amendments would include: Roll-up transactions as defined in 17 CFR 229.901(c); when such presentation is necessary to reflect the operations and financial position of the smaller reporting company as an autonomous entity; and other events transactions for which disclosure of pro forma financial information would be material to investors.

include Article 11 and Rule 8–05 pro forma financial information. Because pro forma financial information is most typically associated with acquisition and dispositions, we relied on the estimates of affected forms that we determined for the Rule 3–05 and Rule 3–14 burden estimates.

2. Estimated Effects of the Proposed Amendments on Paperwork Burdens for Investment Company Registrants

The following table summarizes the estimated effects of the amendments on the paperwork burdens associated with the affected forms filed by investment companies.

TABLE 2—ESTIMATED PAPERWORK BURDEN EFFECTS FOR INVESTMENT COMPANIES

Amendment	Estimated effect and affected forms	Brief explanation of estimated effect
Rule 6–11, Rule 1–02(w), Article 11 of Regulation S–X, and Form N–14.	A reduction of 100 burden hours for each filing that contains acquired fund financial information on the following forms: N–1A, N–2 and N–14.	• This reduction is derived from an estimated reduction of 125 burden hours resulting from the amendments discussed in Section II.E. above[486] compared to existing Rule 3–05 and pro forma financial information requirements.[487] • This reduction was then offset by an estimated increase of 25 burden hours for the schedules and supplemental information under Rule 6–11.[488]

Considering the various revisions outlined in Section II.E above, we estimate that Rule 6–11 and the related amendments generally will reduce the paperwork burden for filings on an affected form that currently includes Rule 3–05 Financial Statements. However, not all filings on the affected forms include these disclosures. Therefore, to estimate the overall paperwork burden reduction from the amendments, we estimated the number of filings that include acquired fund financial statements, used this data to extrapolate the effect of these changes on the paperwork burden, and applied these percentages to the current estimates for the number of responses in the Commission's current OMB PRA filing inventory.[489]

C. Aggregate Burden and Cost Estimates for the Amendments

Below we estimate the aggregate change in paperwork burden as a result of the amendments. These estimates represent the average burden for all registrants, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual registrants based on a number of factors, including the nature of their business. The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take a registrant to prepare and review disclosure required under the amendments. The portion of the burden carried by outside professionals is reflected as a cost,[490] while the portion of the burden carried by the registrant internally is reflected in hours.[491]

The tables below illustrate the change to the total annual compliance burden of affected forms, in hours and in costs, as a result of the amendments.

TABLE 3—CALCULATION OF THE REDUCTION IN BURDEN ESTIMATES OF CURRENT RESPONSES DUE TO THE AMENDMENTS TO RULE 3–05 AND RULE 3–14 AND PRO FORMA FINANCIAL INFORMATION REQUIREMENTS

Form	Number of estimated affected reponses	Burden hour reduction per current affected response	Reduction in burden hours for current affected responses	Reduction in company hours for current affected responses	Reduction in professional hours for current affected responses	Reduction in professional costs for current affected responses
	(A)	(B)	(C) = (A) × (B)	(D) = (C) × 0.75 or 0.25	(E) = (C) × 0.25 or 0.75	(F) = (E) × $400
10	20	(100)	(2,000)	(500)	(1,500)	($600,000)
1–A	18	(100)	(1,800)	(1,350)	(450)	(180,000)
S–1	78	(100)	(7,800)	(1,950)	(5,850)	(2,340,000)
S–3	192	(100)	(19,200)	(4,800)	(14,400)	(5,760,000)
F–1	2	(100)	(200)	(50)	(150)	(60,000)
F–3	3	(100)	(300)	(75)	(225)	(90,000)

[486] This estimated reduction of 125 burden hours is due to the changes affecting the required reporting periods and pro forma financial information and permitting the use of U.S. GAAP-compliant financial statements for acquired private funds. *See, e.g.,* Section II.E.2.

[487] To determine the paperwork burden for a registrant to make disclosures in accordance with Rule 6–11 and amendments to Form N–14, we estimated the number of burden hours required for an issuer to provide the existing financial statements. As previously noted, for PRA purposes, we estimate that existing Rule 3–05 Financial Statements require an average of 500 burden hours. *See* Proposing Release at note 298.

[488] *See supra* Section II.E.2 and II.E.3.

[489] *See* discussion in Section V.B.2. of the Proposing Release.

[490] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

[491] For purposes of the PRA, we estimate that 75 percent of the burden of preparation of Forms 8–K and 1–A is carried by the registrant internally and that 25 percent of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour. Additionally, we estimate that 25 percent of the burden of preparation for Forms 10, S–1, S–3, F–1, F–3, N–1A, N–2, and N–14 is carried by the registrant internally and that 75 percent of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour.

TABLE 3—CALCULATION OF THE REDUCTION IN BURDEN ESTIMATES OF CURRENT RESPONSES DUE TO THE AMENDMENTS TO RULE 3–05 AND RULE 3–14 AND PRO FORMA FINANCIAL INFORMATION REQUIREMENTS—Continued

Form	Number of estimated affected reponses (A)	Burden hour reduction per current affected response (B)	Reduction in burden hours for current affected responses (C) = (A) × (B)	Reduction in company hours for current affected responses (D) = (C) × 0.75 or 0.25	Reduction in professional hours for current affected responses (E) = (C) × 0.25 or 0.75	Reduction in professional costs for current affected responses (F) = (E) × $400
8–K	947	(100)	(94,700)	(71,025)	(23,675)	(9,470,000)
Total	1,260		(126,000)	(79,750)	(46,250)	(18,500,000)

TABLE 4—CALCULATION OF THE CHANGE IN BURDEN ESTIMATES OF CURRENT RESPONSES DUE TO RULE 6–11 AND AMENDMENTS TO FORM N–14

Form	Number of estimated affected reponses (A)	Burden hour change per current affected response (B)	Change in burden hours for current affected responses (C) = (A) × (B)	Change in company hours for current affected responses (D) = (C) × 0.75 or 0.25	Change in professional hours for current affected responses (E) = (C) × 0.25 or 0.75	Change in professional costs for current affected responses (F) = (E) × $400
N–1A	8	(100)	(800)	(200)	(600)	($240,000)
N–2	3	(100)	(300)	(75)	(225)	(90,000)
N–14	88	(100)	(8,800)	(2,200)	(6,600)	(2,640,000)
Total	99		(9,900)	(2,475)	(7,425)	(2,970,000)

TABLE 5—REQUESTED PAPERWORK BURDEN UNDER THE AMENDMENTS

Form	Current burden			Program change			Requested change in burden		
	Current annual responses (A)	Current burden hours (B)	Current professional cost burden (C)	Number of affected responses (D)	Reduction in company hours (E)	Reduction in professional costs (F)	Annual responses (G) = (A)	Burden hours (H) = (B) + (E)	Professional cost burden (I) = (C) + (F)
10	216	11,855	$14,091,488	20	(500)	($600,000)	216	11,355	$13,491,488
1–A	179	98,396	13,111,912	18	(1,350)	(180,000)	179	97,046	12,931,912
S–1	901	147,208	180,319,975	78	(1,950)	(2,340,000)	901	145,259	177,979,975
S–3	1,657	1,963,626	236,198,036	192	(4,800)	(5,760,000)	1,657	188,825	230,438,036
F–1	63	26,692	32,275,375	2	(50)	(60,000)	63	26,642	32,215,375
F–3	112	4,441	5,703,600	3	(75)	(90,000)	112	4,366	5,613,600
8–K	118,387	818,158	108,674,430	947	(71,025)	(9,470,000)	118,387	747,133	99,204,430
N–1A	6,002	1,642,490	131,139,208	8	(200)	(240,000)	6,002	1,642,290	130,899,208
N–2	166	74,145	4,718,196	3	(75)	(90,000)	166	74,070	4,628,196
N–14	253	125,820	5,842,000	88	(2,200)	(2,640,000)	192	123,620	3,202,000

VI. Final Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (''RFA'') [492] requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act,[493] to consider the impact of those rules on small entities. We have prepared this Final Regulatory Flexibility Act Analysis in accordance with Section 604 of the RFA.[494] It relates to the amendments to the definition of ''significant subsidiary'' and the financial disclosure requirements in Regulation S–X relating to significant business acquisitions and dispositions to improve those requirements for both investors and registrants. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and was included in the Proposing Release.

A. Reasons for, and Objectives of, the Final Amendments

The amendments include changes to the definition of ''significant subsidiary'' [495] and the requirements for the financial statements of acquisitions and dispositions of businesses, including real estate operations, in Rule 3–05 and Rule 3–14 and other related rules and forms.[496] We are also adopting new Rule 6–11 and amendments to Form N–14 to specifically govern

[492] 5 U.S.C. 601 *et seq.*

[493] 5 U.S.C. 553.

[494] 5 U.S.C. 604.

[495] We are amending the definition of ''significant subsidiary'' in Rule 1–02(w) of Regulation S–X, Exchange Act Rule 12b–2, Securities Act Rule 405, and Investment Company Act Rule 8b–2.

[496] We are also amending Rule 3–06 and Rule 3–09, Article 8, and Article 11 of Regulation S–X. In addition, we are making related amendments to Form S–11, Form 1–A, Form 8–K, Form 10–K, and Form N–2.

financial reporting for acquisitions involving investment companies. The purpose of the amendments is to improve the application of the rules, assist registrants in making more meaningful determinations of whether a subsidiary or an acquired or disposed business is significant, and to improve the disclosure requirements for financial statements relating to acquisitions and dispositions of businesses, including real estate operations and investment companies. The reasons for, and objectives of, the amendments are discussed in more detail in Sections II.A through II.E. above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on all aspects of the IRFA, including the number of small entities that would be affected by the proposed amendments, the existence or natures of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments. We did not receive any comments specifically addressing the IRFA. However, we received a number of comments on the proposed amendments generally,[497] and have considered these comments in developing the FRFA.

C. Small Entities Subject to the Proposed Rules

The final amendments will affect some registrants that are small entities. The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [498] For purposes of the RFA, under our rules, an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities that does not exceed $5 million.[499] We estimate that there are 1,056 issuers that file with the Commission, other than investment companies, that may be considered small entities and are potentially subject to the final amendments.[500] An investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of $50 million or less as of the end of its most recent fiscal year.[501] Commission staff estimates that, as of December 31, 2019, there were approximately 76 open-end and closed-end investment companies that would be considered small entities. Commission staff further estimates that, as of December 31, 2019, approximately 14 business development companies were small entities.[502]

D. Reporting, Recordkeeping, and Other Compliance Requirements

As noted above, the purpose of the final amendments is to improve the application of the rules and reduce the complexity and costs of preparing the related disclosure.[503] We are also amending specific regulatory requirements for investment companies to address the unique attributes of this group of registrants.[504]

Many of the changes simplify and streamline existing disclosure requirements in ways that are expected to reduce compliance burdens for all registrants, including small entities. Some, such as the rules permitting registrants to include Management's Adjustments in their pro forma financial information, could incrementally increase compliance costs to the extent that an entity chooses to provide this disclosure. In addition, compliance with the final amendments requires the use of professional skills, including accounting and legal skills. We discuss the economic impact, including the estimated costs and burdens, of the final amendments to all registrants, including small entities, in Sections IV and V above.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. Accordingly, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The final amendments generally simplify and streamline disclosure requirements in ways that are expected to reduce compliance burdens for all registrants, including small entities. Revising Rule 8–05 to require that the preparation, presentation, and disclosure of pro forma financial information by smaller reporting companies substantially comply with Article 11 may increase the burden of preparing that disclosure for some registrants. However, based on staff analysis of disclosures of acquisitions and dispositions by smaller reporting companies, we believe that most of these companies already comply with the conditions in existing Rule 11–01.[505] For investment companies, we believe that Rule 6–11 and related amendments will make it easier and less costly to provide appropriate disclosures to investors regarding fund acquisitions, which may benefit small entities that have smaller asset levels over which to apportion compliance costs. Accordingly, we do not believe it is necessary to exempt small entities from all or part of the final amendments or to establish different compliance or reporting requirements for such entities.

Finally, with respect to using performance rather than design standards, Regulation S–X and the final amendments generally contain elements similar to performance standards. For example, rather than imposing a specific uniform metric for determining significant business acquisitions and dispositions, the final amendments utilize a flexible standard, with alternative tests (*e.g.,* the investment, income, or asset test) that are intended to facilitate a registrant's determination of whether an acquisition or disposition is significant. We believe this flexible standard is appropriate because it allows registrants to omit financial information that is not necessary for an investment decision based on the facts and circumstances applicable to that registrant and offering.

[497] *See* Section II above.

[498] 5 U.S.C. 601(6).

[499] *See* 17 CFR 230.157 under the Securities Act and 17 CFR 240.0–10(a) under the Exchange Act.

[500] This estimate is based on staff analysis of issuers, excluding coregistrants, with EDGAR filings of Form 10–K, 20–F and 40–F, or amendments thereto, filed during the calendar year of January 1, 2018 to December 31st, 2018. Analysis is based on data from XBRL filings, Compustat, and Ives Group Audit Analytics.

[501] 17 CFR 270.0–10(a).

[502] These estimates are based on staff analysis of Morningstar data and data submitted by investment company registrants in forms filed on EDGAR as of December 31, 2019.

[503] *See supra* Sections II.A. through II.D. for a detailed discussion of the final amendments applicable to registrants with operations or that otherwise are not investment companies.

[504] *See supra* Section II.E.

[505] Commission staff found that out of 191 disclosures of acquisitions and dispositions by smaller reporting companies in 2017, 178 appeared to comply with Article 11 requirements. Commission staff also found that out of 12 Forms 1–A originally filed in 2019 that disclosed acquisitions subject to Rule 8–04 or Rule 8–06, 9 appeared to comply with Article 11 requirements.

VII. Statutory Authority

The amendments contained in this release are being adopted under the authority set forth in Sections 3, 6, 7, 8, 10, 19(a), and 28 of the Securities Act, Sections 3(b), 12, 13, 15(d), 23(a), and 36 of the Exchange Act, and Sections 6(c), 8, 24(a), 30, and 38 of the Investment Company Act.

List of Subjects

17 CFR Part 210

Accountants, Accounting, Banks, Banking, Employee benefit plans, Holding companies, Insurance companies, Investment companies, Oil and gas exploration, Reporting and recordkeeping requirements, Securities, Utilities.

17 CFR Part 230

Investment companies, Reporting and recordkeeping requirements, Securities.

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Brokers, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of the Amendments

For the reasons set out in the preamble, the Commission amends title 17, chapter II of the Code of Federal Regulations as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j–1, 78*l,* 78m, 78n, 78*o*(d), 78q, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–20, 80a–29, 80a–30, 80a–31, 80a–37(a), 80b–3, 80b–11, 7202 and 7262, and sec. 102(c), Pub. L. 112–106, 126 Stat. 310 (2012), unless otherwise noted.

■ 2. Amend § 210.1–02 by revising paragraph (w) to read as follows:

§ 210.1–02 Definitions of terms used in Regulation S–X (17 CFR part 210).

* * * * *

(w) *Significant subsidiary.* (1) The term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the conditions in paragraph (w)(1)(i), (ii), or (iii) of this section; however if the registrant is a registered investment company or a business development company, the tested subsidiary meets any of the conditions in paragraph (w)(2) of this section instead of any of the conditions in this paragraph (w)(1). A registrant that files its financial statements in accordance with or provides a reconciliation to U.S. Generally Accepted Accounting Principles (U.S. GAAP) must use amounts determined under U.S. GAAP. A foreign private issuer that files its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS–IASB) must use amounts determined under IFRS–IASB.

(i) *Investment test.* (A) For acquisitions, other than those described in paragraph (w)(1)(i)(B) of this section, and dispositions this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the aggregate worldwide market value of the registrant's voting and non-voting common equity, or if the registrant has no such aggregate worldwide market value the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

(*1*) For acquisitions, the ''investments in'' the tested subsidiary is the consideration transferred, adjusted to exclude the registrant's and its other subsidiaries' proportionate interest in the carrying value of assets transferred by the registrant and its subsidiaries consolidated to the tested subsidiary that will remain with the combined entity after the acquisition. It must include the fair value of contingent consideration if required to be recognized at fair value by the registrant at the acquisition date under U.S. GAAP or IFRS–IASB, as applicable; however if recognition at fair value is not required, it must include all contingent consideration, except contingent consideration for which the likelihood of payment is remote.

(*2*) For dispositions, the ''investments in'' the tested subsidiary is the fair value of the consideration, including contingent consideration, for the disposed subsidiary when comparing to the aggregate worldwide market value of the registrant's voting and non-voting common equity, or, when the registrant has no such aggregate worldwide market value, the carrying value of the disposed subsidiary when comparing to total assets of the registrant.

(*3*) When determining the aggregate worldwide market value of the registrant's voting and non-voting common equity, use the average of such aggregate worldwide market value calculated daily for the last five trading days of the registrant's most recently completed month ending prior to the earlier of the registrant's announcement date or agreement date of the acquisition or disposition.

(B) For a combination between entities or businesses under common control, this test is met when either the net book value of the tested subsidiary exceeds 10 percent of the registrant's and its subsidiaries' consolidated total assets or the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated.

(C) In all other cases, this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

(ii) *Asset test.* This test is met when the registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total assets (after intercompany eliminations) exceeds 10 percent of such total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

(iii) *Income test.* (A) This test is met when:

(*1*) The absolute value of the registrant's and its other subsidiaries' equity in the tested subsidiary's consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interests exceeds 10 percent of the absolute value of such income or loss of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; and

(*2*) The registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total revenue from continuing operations (after intercompany eliminations) exceeds 10 percent of such total revenue of the registrant and its subsidiaries consolidated for the most recently completed fiscal year. This paragraph (w)(1)(iii)(A)(*2*) does not apply if either the registrant and its subsidiaries consolidated or the tested subsidiary

did not have material revenue in each of the two most recently completed fiscal years.

(B) When determining the income component in paragraph (w)(1)(iii)(A)(*1*) of this section:

(*1*) If a net loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interest has been incurred by either the registrant and its subsidiaries consolidated or the tested subsidiary, but not both, exclude the equity in the income or loss from continuing operations before income taxes (after intercompany eliminations) of the tested subsidiary attributable to the controlling interest from such income or loss of the registrant and its subsidiaries consolidated for purposes of the computation;

(*2*) Compute the test using the average described in this paragraph (w)(1)(iii)(B)(*2*) if the revenue component in paragraph (w)(1)(iii)(A)(*2*) of this section does not apply and the absolute value of the registrant's and its subsidiaries' consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interests for the most recent fiscal year is at least 10 percent lower than the average of the absolute value of such amounts for each of its last five fiscal years; and

(*3*) Entities reporting losses must not be aggregated with entities reporting income where the test involves combined entities, as in the case of determining whether summarized financial data must be presented or whether the aggregate impact specified in §§ 210.3–05(b)(2)(iv) and 210.3–14(b)(2)(i)(C) is met, except when determining whether related businesses meet this test for purposes of §§ 210.3–05 and 210.8–04.

(2) For a registrant that is a registered investment company or a business development company, the term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the following conditions using amounts determined under U.S. GAAP and, if applicable, section 2(a)(41) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(41)):

(i) *Investment test.* The value of the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the value of the total investments of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(ii) *Income test.* The absolute value of the sum of combined investment income from dividends, interest, and other income, the net realized gains and losses on investments, and the net change in unrealized gains and losses on investments from the tested subsidiary (except, for purposes of § 210.6–11, the absolute value of the change in net assets resulting from operations of the tested subsidiary), for the most recently completed fiscal year exceeds:

(A) 80 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; or

(B) 10 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year and the investment test (paragraph (w)(2)(i) of this section) condition exceeds 5 percent. However, if the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated is at least 10 percent lower than the average of the absolute value of such amounts for each of its last five fiscal years, then the registrant may compute both conditions of the income test using the average of the absolute value of such amounts for the registrant and its subsidiaries consolidated for each of its last five fiscal years.

* * * * *

■ 3. Revise § 210.3–05 to read as follows:

§ 210.3–05 Financial statements of businesses acquired or to be acquired.

(a) *Financial statements required.* (1) Financial statements (except the related schedules specified in § 210.12) prepared and audited in accordance with Regulation S–X (including the independence standards in § 210.2–01 or, alternatively if the business is not a registrant, the applicable independence standards) must be filed for the periods specified in paragraph (b) of this section if any of the following conditions exist:

(i) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3–01, a business acquisition has occurred; or

(ii) After the date of the most recent balance sheet filed pursuant to § 210.3–01, consummation of a business acquisition has occurred or is probable.

(2) For purposes of determining whether the provisions of this section apply:

(i) The determination of whether a *business* has been acquired should be made in accordance with the guidance set forth in § 210.11–01(d); and

(ii) The acquisition of a business encompasses the acquisition of an interest in a business accounted for by the registrant under the equity method or, in lieu of the equity method, the fair value option.

(3) Acquisitions of a group of related businesses that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the registrant have been filed must be treated under this section as if they are a single business acquisition. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. For purposes of this section, businesses will be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one business is conditional on the acquisition of each other business; or

(iii) Each acquisition is conditioned on a single common event.

(4) This section does not apply to a real estate operation subject to § 210.3–14 or a business which is totally held by the registrant prior to consummation of the transaction.

(b) *Periods to be presented.* (1) If registering an offering of securities to the security holders of the business to be acquired, then the financial statements specified in §§ 210.3–01 and 210.3–02 must be filed for the business to be acquired, except as provided otherwise for filings on Form N–14, S–4, or F–4 (§ 239.23, § 239.25, or § 239.34 of this chapter). The financial statements covering fiscal years must be audited except as provided in Item 14 of Schedule 14A (§ 240.14a–101 of this chapter) with respect to certain proxy statements or in registration statements filed on Forms N–14, S–4, or F–4 (§ 239.23, § 239.25, or § 239.34 of this chapter).

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the business acquired or to be acquired must be filed for the periods specified in this paragraph (b)(2) or such shorter period as the business has been in existence. Determine the periods for which such financial statements are to be filed using the conditions specified in the definition of significant subsidiary in § 210.1–02(w), using the lower of the total revenue component or income or loss from continuing operations component for evaluating the income test condition, as follows:

(i) If none of the conditions exceeds 20 percent, financial statements are not required.

(ii) If any of the conditions exceeds 20 percent, but none exceed 40 percent, financial statements must be filed for at least the most recent fiscal year and the most recent interim period specified in §§ 210.3–01 and 210.3–02.

(iii) If any of the conditions exceeds 40 percent, financial statements must be filed for at least the two most recent fiscal years and any interim periods specified in §§ 210.3–01 and 210.3–02.

(iv) If the aggregate impact of businesses acquired or to be acquired since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are either not required by paragraph (b)(2)(i) of this section or are not yet required based on paragraph (b)(4)(i) of this section, exceeds 50 percent for any condition, the registrant must provide the disclosure specified in paragraphs (b)(2)(iv)(A) and (B) of this section, however in determining the aggregate impact of the investment test condition also include the aggregate impact calculated in accordance with § 210.3–14(b)(2)(ii) of any acquired or to be acquired real estate operations specified in § 210.3–14(b)(2)(i)(C). In determining whether the income test condition (*i.e.* both the revenue component and the income or loss from continuing operations component) exceeds 50 percent, the businesses specified in this paragraph (b)(2)(iv) reporting losses must be aggregated separately from those reporting income. If either group exceeds 50 percent, paragraphs (b)(2)(iv)(A) and (B) of this section will apply to all of the businesses specified in this paragraph (b)(2)(iv) and will not be limited to either the businesses with losses or those with income.

(A) Pro forma financial information pursuant to §§ 210.11–01 through 210.11–02 that depicts the aggregate impact of these acquired or to be acquired businesses and real estate operations, in all material respects; and

(B) Financial statements covering at least the most recent fiscal year and the most recent interim period specified in §§ 210.3–01 and 210.3–02 for any acquired or to be acquired business or real estate operation for which financial statements are not yet required based on paragraph (b)(4)(i) of this section or § 210.3–14(b)(3)(i).

(3) The determination must be made using § 210.11–01(b)(3) and (4).

(4) Financial statements required for the periods specified in paragraph (b)(2) of this section may be omitted to the extent specified as follows:

(i) Registration statements not subject to the provisions of § 230.419 of this chapter and proxy statements need not include separate financial statements of an acquired or to be acquired business if neither the business nor the aggregate impact specified in paragraph (b)(2)(iv) of this section exceeds any of the conditions of significance in the definition of significant subsidiary in § 210.1–02 at the 50 percent level computed in accordance with paragraph (b)(3) of this section, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The date of the final prospectus or prospectus supplement relating to an offering as filed with the Commission pursuant to § 230.424(b) of this chapter, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business acquisition, and the financial statements have not previously been filed by the registrant.

(ii) A registrant, other than a foreign private issuer required to file reports on Form 6–K (§ 249.306 of this chapter), that omits from its initial registration statement financial statements of a recently consummated business acquisition pursuant to paragraph (b)(4)(i) of this section must file those financial statements and any pro forma information specified by §§ 210.11–01 through 210.11–03 (Article 11) under cover of Form 8–K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition.

(iii) Separate financial statements of the acquired business specified in paragraph (b)(2)(ii) of this section need not be presented once the operating results of the acquired business have been reflected in the audited consolidated financial statements of the registrant for at least nine months. Separate financial statements of the acquired business specified in paragraph (b)(2)(iii) of this section need not be presented once the operating results of the acquired business have been reflected in the audited consolidated financial statements of the registrant for a complete fiscal year.

(iv) A separate audited balance sheet of the acquired business is not required when the registrant's most recent audited balance sheet required by § 210.3–01 is for a date after the date the acquisition was consummated.

(c) *Financial statements of a foreign business.* Financial statements of an acquired or to be acquired foreign business (as defined in § 210.1–02(l)) meeting the requirements of Item 17 of Form 20–F (§ 249.220f of this chapter) will satisfy this section. Such financial statements may be reconciled to U.S. Generally Accepted Accounting Principles (U.S. GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS–IASB) if the registrant is a foreign private issuer that prepares its financial statements in accordance with IFRS–IASB. This reconciliation must generally follow the form and content requirements in Item 17(c) of Form 20–F; however, accommodations in Item 17(c)(2) of Form 20–F that would be inconsistent with IFRS–IASB may not be applied, and IFRS 1, *First-time Adoption of International Financial Reporting Standards,* may be applied.

(d) *Financial statements of an acquired or to be acquired business that would be a foreign private issuer if it were a registrant.* Financial statements of an acquired or to be acquired business that is not a foreign business (as defined in § 210.1–02(l)), but would qualify as a foreign private issuer (as defined in §§ 230.405 and 240.3b–4 of this chapter) if it were a registrant may be prepared in accordance with IFRS–IASB without reconciliation to U.S. GAAP or, if the registrant is a foreign private issuer that prepares its financial statements in accordance with IFRS–IASB, may be prepared according to a comprehensive basis of accounting principles other than U.S. GAAP or IFRS–IASB and must be reconciled to IFRS–IASB or to U.S. GAAP. This reconciliation must generally follow the form and content requirements in Item 17(c) of Form 20–F; however, accommodations in Item 17(c)(2) of Form 20–F that would be inconsistent with IFRS–IASB may not be applied, and IFRS 1, *First-time Adoption of International Financial Reporting Standards,* may be applied.

(e) *Financial statements for net assets that constitute a business.* For an acquisition of net assets that constitutes a business (*e.g.,* an acquired or to be acquired product line), the financial statements prepared and audited in accordance with Regulation S–X may be abbreviated financial statements prepared in accordance with paragraph (e)(2) of this section if the business meets all of the qualifying conditions in paragraph (e)(1) of this section.

(1) *Qualifying conditions.* (i) The total assets and total revenues (both after intercompany eliminations) of the acquired or to be acquired business constitute 20 percent or less of such corresponding amounts of the seller and its subsidiaries consolidated as of and for the most recently completed fiscal year.

(ii) Separate financial statements for the business have not previously been prepared;

(iii) The acquired business was not a separate entity, subsidiary, operating segment (as defined in U.S. GAAP or

IFRS–IASB, as applicable) or division during the periods for which the acquired business financial statements would be required; and

(iv) The seller has not maintained the distinct and separate accounts necessary to present financial statements that, absent this paragraph (e), would satisfy the requirements of this section and it is impracticable to prepare such financial statements.

(2) *Presentation requirements.* (i) The balance sheet may be a statement of assets acquired and liabilities assumed;

(ii) The statement of comprehensive income must include expenses incurred by or on behalf of the acquired business during the pre-acquisition financial statement periods to be presented including, but not limited to, costs of sales or services, selling, distribution, marketing, general and administrative, depreciation and amortization, and research and development, but may otherwise omit corporate overhead expense, interest expense for debt that will not be assumed by the registrant or its subsidiaries consolidated, and income tax expense. The title of the statement of comprehensive income must be appropriately modified to indicate it omits certain expenses; and

(iii) The notes to the financial statements must include:

(A) A description of the type of omitted expenses and the reason(s) why they are excluded from the financial statements.

(B) An explanation of the impracticability of preparing financial statements that include the omitted expenses.

(C) A description of how the financial statements presented are not indicative of the financial condition or results of operations of the acquired business going forward because of the omitted expenses.

(D) Information about the business's operating, investing and financing cash flows, to the extent available.

(f) *Financial statements of a business that includes oil and gas producing activities.* (1) Disclosures about oil and gas producing activities must be provided for each full year of operations presented for an acquired or to be acquired business that includes significant oil- and gas-producing activities (as defined in the FASB ASC Master Glossary). The financial statements may present the disclosures in FASB ASC Topic 932 *Extractive Activities—Oil and Gas,* 932–235–50–3 through 50–11 and 932–235–50–29 through 50–36 as unaudited supplemental information. If prior year reserve studies were not made, they may be computed using only production and new discovery quantities and valuation, in which case there will be no ''revision of prior estimates'' amounts. Registrants may develop these disclosures based on a reserve study for the most recent year, computing the changes backward. The method of computation must be disclosed in a footnote.

(2) The financial statements prepared and audited in accordance with Regulation S–X may consist of only statements of revenues and expenses that exclude expenses not comparable to the proposed future operations such as depreciation, depletion and amortization, corporate overhead, income taxes, and interest for debt that will not be assumed by the registrant or its subsidiaries consolidated if:

(i) The acquisition generates substantially all of its revenues from *oil and gas producing activities* (as defined in § 210.4–10(a)(16)); and

(ii) The qualifying conditions specified in paragraph (e)(1) of this section are met.

(3) If the financial statements are presented in accordance with paragraph (f)(2) of this section, the disclosures specified in paragraph (e)(2)(iii) of this section must be provided.

■ 4. Revise § 210.3–06 to read as follows:

§ 210.3–06 Financial statements covering a period of nine to twelve months.

(a) Except with respect to registered investment companies, the filing of financial statements covering a period of 9 to 12 months will be deemed to satisfy a requirement for filing financial statements for a period of 1 year where:

(1) The issuer has changed its fiscal year;

(2) The issuer has made a significant business acquisition for which financial statements are required under § 210.3–05, § 210.3–14, § 210.8–04, or § 210.8–06 and the financial statements covering the interim period pertain to the business being acquired; or

(3) The Commission so permits pursuant to § 210.3–13 or § 210.8–01(e).

(b) Where there is a requirement for filing financial statements for a time period exceeding one year but not exceeding three consecutive years (with not more than 12 months included in any period reported upon), the filing of financial statements covering a period of 9 to 12 months will satisfy a filing requirement of financial statements for one year of that time period only if the conditions described in paragraph (a)(1), (2), or (3) of this section exist and financial statements are filed that cover the full fiscal year or years for all other years in the time period.

■ 5. Amend § 210.3–09 by revising paragraph (a) to read as follows:

§ 210.3–09 Separate financial statements of subsidiaries not consolidated and 50 percent or less owned persons.

(a) If any of the conditions set forth in § 210.1–02(w), substituting 20 percent for 10 percent in the tests used therein to determine a significant subsidiary, are met for a majority-owned subsidiary not consolidated by the registrant or by a subsidiary of the registrant, separate financial statements of such subsidiary must be filed. Similarly, if either the first or third condition set forth in § 210.1–02(w)(1), substituting 20 percent for 10 percent, is met by a 50 percent or less owned person accounted for by the equity method either by the registrant or a subsidiary of the registrant, separate financial statements of such 50 percent or less owned person must be filed.

* * * * *

■ 6. Revise § 210.3–14 to read as follows:

§ 210.3–14 Special instructions for financial statements of real estate operations acquired or to be acquired.

(a) *Financial statements required.* (1) Financial statements (except the related schedules specified in § 210.12) prepared and audited in accordance with Regulation S–X (including the independence standards in § 210.2–01 or, alternatively if the real estate operation is not a registrant, the applicable independence standards) for the periods specified in paragraph (b) of this section and the supplemental information specified in paragraph (f) of this section must be filed if any of the following conditions exist:

(i) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3–01, an acquisition of a real estate operation has occurred; or

(ii) After the date of the most recent balance sheet filed pursuant to § 210.3–01, consummation of an acquisition of a real estate operation has occurred or is probable.

(2) For purposes of determining whether the provisions of this section apply:

(i) The term *real estate operation* means a business (as set forth in § 210.11–01(d)) that generates substantially all of its revenues through the leasing of real property.

(ii) The acquisition of a real estate operation encompasses the acquisition of an interest in a real estate operation accounted for by the registrant under the equity method or, in lieu of the equity method, the fair value option.

(3) Acquisitions of a group of related real estate operations that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the registrant have been filed will be treated under this section as if they are a single acquisition. The required financial statements may be presented on a combined basis for any periods they are under common control or management. For purposes of this section, acquisitions will be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one real estate operation is conditional on the acquisition of each other real estate operation; or

(iii) Each acquisition is conditioned on a single common event.

(4) This section does not apply to a real estate operation that is totally held by the registrant prior to consummation of the transaction.

(b) *Periods to be presented.* (1) If registering an offering of securities to the security holders of the real estate operation to be acquired, then the financial statements specified in paragraph (c) of this section and the supplemental information specified in paragraph (f) of this section must be filed for the real estate operation to be acquired for the periods specified in §§ 210.3–01 and 210.3–02, except as provided otherwise for filings on Form S–4 or F–4 (§ 239.25 or § 239.34 of this chapter). The financial statements covering fiscal years must be audited except as provided in Item 14 of Schedule 14A (§ 240.14a–101 of this chapter) with respect to certain proxy statements or in registration statements filed on Form S–4 or F–4 (§ 239.25 or § 239.34 of this chapter).

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the real estate operation acquired or to be acquired must be filed for the periods specified in this paragraph (b)(2) or such shorter period as the real estate operation has been in existence. The periods for which such financial statements are to be filed must be determined using the investment test condition specified in the definition of significant subsidiary in § 210.1–02(w)(1)(i) modified as follows:

(i)(A) If the condition does not exceed 20 percent, financial statements are not required.

(B) If the condition exceeds 20 percent, financial statements of the real estate operation for at least the most recent fiscal year and the most recent interim period specified in §§ 210.3–01 and 210.3–02 must be filed.

(C) If the aggregate impact of acquired or to be acquired real estate operations since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are either not required by paragraph (b)(2)(i)(A) of this section or are not yet required based on paragraph (b)(3)(i) of this section, exceeds 50 percent, the registrant must provide the disclosures specified in paragraphs (b)(2)(i)(C)(*1*) and (b)(2)(i)(C)(*2*) of this section. If there are also businesses acquired or to be acquired as described in § 210.3–05(b)(2)(iv), the requirements in § 210.3–05(b)(2)(iv) will apply instead.

(*1*) Pro forma financial information pursuant to §§ 210.11–01 through 210.11–02 that depicts the aggregate impact of these acquired or to be acquired real estate operations in all material respects; and

(*2*) Financial statements covering at least the most recent fiscal year and the most recent interim period specified in §§ 210.3–01 and 210.3–02 for any acquired or to be acquired real estate operation for which financial statements are not yet required based on paragraph (b)(3)(i) of this section.

(ii) When the investment test is based on the total assets of the registrant and its subsidiaries consolidated, include any assumed debt secured by the real properties in the ''investments in'' the tested real estate operation.

(iii) The determination must be made using § 210.11–01(b)(3) and (4).

(3) Financial statements required for the periods specified in paragraph (b)(2) of this section may be omitted to the extent specified as follows:

(i) Registration statements not subject to the provisions of § 230.419 of this chapter and proxy statements need not include separate financial statements of the acquired or to be acquired real estate operation if neither the real estate operation nor the aggregate impact specified in paragraph (b)(2)(i)(C) of this section exceeds the condition of significance in the definition of significant subsidiary in § 210.1–02(w)(1)(i), as modified by paragraphs (b)(2)(ii) and (iii) of this section, at the 50 percent level computed in accordance with paragraph (b)(2) of this section, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The date of the final prospectus or prospectus supplement relating to an offering as filed with the Commission pursuant to § 230.424(b) of this chapter, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the acquisition of the real estate operation, and the financial statements have not previously been filed by the registrant.

(ii) A registrant, other than a foreign private issuer required to file reports on Form 6–K (§ 249.306 of this chapter), that omits from its initial registration statement financial statements of a recently consummated acquisition of a real estate operation pursuant to paragraph (b)(3)(i) of this section must file those financial statements and any pro forma information specified by §§ 210.11–01 through 210.11–03 (Article 11) under cover of Form 8–K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition.

(iii) Separate financial statements of the acquired real estate operation specified in paragraph (b)(2)(i)(B) of this section need not be presented once the operating results of the acquired real estate operation have been reflected in the audited consolidated financial statements of the registrant for at least nine months.

(c) *Presentation of the financial statements.* (1) The financial statements prepared and audited in accordance with Regulation S–X may be only statements of revenues and expenses excluding expenses not comparable to the proposed future operations such as mortgage interest, leasehold rental, depreciation, amortization, corporate overhead and income taxes.

(2) The notes to the financial statements must include the following disclosures:

(i) The type of omitted expenses and the reason(s) why they are excluded from the financial statements;

(ii) A description of how the financial statements presented are not indicative of the results of operations of the acquired real estate operation going forward because of the omitted expenses; and

(iii) Information about the real estate operation's operating, investing and financing cash flows, to the extent available.

(d) *Financial statements of a foreign real estate operation.* Financial statements of an acquired or to be acquired foreign business (as defined in § 210.1–02(l)) that is a real estate operation, specified in paragraph (c) of this section and meeting the requirements of Item 17 of Form 20–F (§ 249.220f of this chapter), will satisfy this section. Such financial statements may be reconciled to U.S. Generally Accepted Accounting Principles (U.S. GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS–IASB) if the registrant is a foreign private issuer that prepares its financial statements in accordance with

IFRS–IASB. This reconciliation must generally follow the form and content requirements in Item 17(c) of Form 20–F; however, accommodations in Item 17(c)(2) of Form 20–F that would be inconsistent with IFRS–IASB may not be applied, and IFRS 1, *First-time Adoption of International Financial Reporting Standards,* may be applied.

(e) *Financial statements of an acquired or to be acquired real estate operation that would be a foreign private issuer if it were a registrant.* Financial statements of an acquired or to be acquired real estate operation that is not a foreign business (as defined in § 210.1–02(l)), but would qualify as a foreign private issuer (as defined in §§ 230.405 and 240.3b–4 of this chapter) if it were a registrant, may be prepared in accordance with IFRS–IASB without reconciliation to U.S. GAAP or, if the registrant is a foreign private issuer that prepares its financial statements in accordance with IFRS–IASB, may be prepared according to a comprehensive basis of accounting principles other than U.S. GAAP or IFRS–IASB and must be reconciled to IFRS–IASB or to U.S. GAAP. This reconciliation must generally follow the form and content requirements in Item 17(c) of Form 20–F; however, accommodations in Item 17(c)(2) of Form 20–F that would be inconsistent with IFRS–IASB may not be applied, and IFRS 1, *First-time Adoption of International Financial Reporting Standards,* may be applied.

(f) *Supplemental information.* For each real estate operation for which financial statements are required to be filed by paragraphs (b)(2)(i)(B) and (b)(2)(i)(C)(*2*) of this section, material factors considered by the registrant in assessing the real estate operation must be described with specificity in the filing, including sources of revenue (including, but not limited to, competition in the rental market, comparative rents, and occupancy rates) and expense (including, but not limited to, utility rates, property tax rates, maintenance expenses, and capital improvements anticipated). The disclosure must also indicate that the registrant is not aware of any other material factors relating to the specific real estate operation that would cause the reported financial statements not to be indicative of future operating results.

Instruction 1 to paragraph (f): When the financial statements are presented in Form S–11 (§ 239.18 of this chapter), the discussion of material factors considered should supplement the disclosures required by Item 15 of Form S–11.

§ 210.3–18 [Amended]

■ 7. Amend § 210.3–18(d) by removing the text ''§§ 210.6–01 to 210.6–10'' and adding in its place ''§§ 210.6–01 through 210.6–11''.

§ 210.5–01 [Amended]

■ 8. Amend § 210.5–01(a) by removing the text ''§§ 210.6–01 to 210.6–10'' and adding in its place ''§§ 210.6–01 through 210.6–11''.

§ 210.6–01 [Amended]

■ 9. Amend § 210.6–01 by removing the text ''210.6–01 to 210.6–10'' everywhere it appears and adding in its place ''210.6–01 through 210.6–11''.

§ 210.6–02 [Amended]

■ 10. Amend § 210.6–02(b) and (c) by removing the text ''§§ 210.6–01 to 210.6–10'' and adding in its place ''§§ 210.6–01 through 210.6–11''.

§ 210.6–03 [Amended]

■ 11. Amend § 210.6–03 by removing the text ''§§ 210.6–01 to 210.6–10'' in the introductory text and paragraph (a) and adding in its place ''§§ 210.6–01 through 210.6–11''.

■ 12. Add § 210.6–11 to read as follows:

§ 210.6–11 Financial statements of funds acquired or to be acquired.

(a) *Financial statements required.* (1) Financial statements described in §§ 210.3–01 and 210.3–02, or § 210.3–18, as applicable, including the schedules specified in §§ 210.12–01 through 210.12–29 (Article 12), prepared and audited in accordance with Regulation S–X (including the independence standards in § 210.2–01 or, alternatively if the fund is not a registrant, the applicable independence standards) for the periods specified in paragraph (b) of this section and the supplemental information specified in paragraph (d) of this section must be filed if any of the following conditions exist:

(i) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3–01 or § 210.3–18, a fund acquisition has occurred; or

(ii) After the date of the most recent balance sheet filed pursuant to § 210.3–01 or § 210.3–18 or, if no relevant balance sheet has been filed in connection with a post-effective amendment for a new series submitted pursuant to § 230.485(a)(2) of this chapter (Rule 485(a)(2) under the Securities Act), the filing of such amendment, consummation of a fund acquisition has occurred or is probable.

(2) For purposes of this section:

(i) The term *fund* includes any investment company as defined in section 3(a) of the Investment Company Act of 1940, including a business development company, or any company that would be an investment company but for the exclusions provided by sections 3(c)(1) or 3(c)(7) of that Act, or any private account managed by an investment adviser.

(ii) The determination of whether a fund has been acquired or will be acquired should be evaluated in light of the facts and circumstances involved. Among the facts and circumstances which should be considered in evaluating whether a fund acquisition has occurred or will occur are whether it will result in the acquisition by the registrant of all or substantially all of the portfolio investments held by another fund.

(3) Acquisitions of a group of related funds that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the registrant have been filed will be treated under this section as if they are a single acquisition. For purposes of this section, funds will be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one fund is conditional on the acquisition of each other fund; or

(iii) Each acquisition is conditioned on a single common event.

(4) This section does not apply to a fund which is totally held by the registrant prior to consummation of the transaction.

(b) *Periods to be presented.* (1) If securities are being registered to be offered to the security holders of the fund to be acquired, the financial statements specified in §§ 210.3–01 and 210.3–02 or § 210.3–18 for the fund to be acquired and the supplemental information specified in paragraph (d) of this section must be filed, except as provided otherwise for filings on Form N–14 (§ 239.23 of this chapter). The financial statements covering the fiscal year must be audited except as provided in Item 14 of Schedule 14A (§ 240.14a–101 of this chapter) with respect to certain proxy statements or in registration statements filed on Form N–14 (§ 239.23 of this chapter).

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the fund acquired or to be acquired for the periods specified in this paragraph (b)(2) or such shorter period as the fund has been in existence and the supplemental information specified in paragraph (d) of this section must be filed. Whether such financial statements

and supplemental information are to be filed must be determined using the conditions specified in the definition of significant subsidiary in § 210.1–02(w)(2)(i) and (w)(2)(ii)(B) as follows:

(i) If none of the conditions set forth in § 210.1–02(w)(2)(i) and (w)(2)(ii)(B), substituting 20 percent for 10 percent each place it appears therein, are satisfied, the financial statements and supplemental financial information in paragraph (d) of this section are not required.

(ii) If any of the conditions set forth in § 210.1–02(w)(2)(i) and (w)(2)(ii)(B), substituting 20 percent for 10 percent each place it appears therein, are satisfied, the financial statements of the acquired fund must be filed. If the acquired fund is subject to § 210.3–18, then the financial statements for the periods described therein must be filed. For all other acquired funds, the financial statements for the most recent fiscal year and the most recent interim period must be filed. The registrant must also provide the supplemental financial information in paragraph (d) of this section.

(iii) If the aggregate impact of funds acquired or to be acquired since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are not required by paragraph (b)(2)(i) of this section, satisfies any of the conditions set forth in § 210.1–02(w)(2)(i) and (w)(2)(ii)(B), substituting 50 percent for 10 percent each place it appears therein, the registrant must provide financial statements for any fund acquired or to be acquired for which financial statements are not yet required by paragraph (b)(2)(i) of this section. If any of the acquired funds are subject to § 210.3–18, then the financial statements for the periods described therein must be filed. For any other acquired funds, the financial statements for the most recent fiscal year and the most recent interim period must be filed. The registrant must also provide the supplemental financial information in paragraph (d) of this section for such funds.

(3) The determination must be made by comparing the most recent annual financial statement of each such fund, or for acquisitions each group of related funds on a combined basis, to the registrant's most recent annual financial statements filed at or prior to the date of acquisition. However, the determination may be made by using pro forma amounts as calculated by the registrant for the periods specified in § 210.1–02(w)(2) that only give effect to an acquisition consummated after the latest fiscal year-end for which the registrant's financial statements are required to be filed when the registrant has filed audited financial statements of such acquired fund and provided the supplemental financial information for the periods required by this section.

(4) Separate financial statements of the acquired fund and the supplemental information specified in paragraph (d) of this section need only to be filed once and not included in any subsequent filing or shareholder report.

(c) *Acquisitions involving private funds or private accounts.* If the fund acquired or to be acquired would be an investment company under the Investment Company Act but for the exclusion provided from that definition by either sections 3(c)(1) or 3(c)(7) of that Act, then the required financial statements may comply with U.S. Generally Accepted Accounting Principles and only Article 12. In situations of any private account managed by an investment adviser provide the schedules specified in Article 12 for the assets acquired or to be acquired.

(d) *Supplemental financial information.* (1) Supplemental financial information must consist of:

(i) A table showing the current fees for the registrant and the acquired fund and pro forma fees, if different, for the registrant after giving effect to the acquisition using the format prescribed in the appropriate registration statement under the Investment Company Act;

(ii) If the transaction will result in a material change in the acquired fund's investment portfolio due to investment restrictions, a schedule of investments of the acquired fund modified to reflect such change and accompanied by narrative disclosure describing the change; and

(iii) Narrative disclosure about material differences in accounting policies of the acquired fund when compared to the registrant.

(2) With respect to any fund acquisition, registered investment companies and business development companies must provide the supplemental financial information required in this section in lieu of any pro forma financial information required by §§ 210.11–01 through 210.11–03.

■ 13. Revise § 210.8–01 to read as follows:

§ 210.8–01 General requirements for Article 8.

Sections 210.8–01 through 210.8–08 (Article 8) shall be applicable to financial statements filed for smaller reporting companies. These sections are not applicable to financial statements prepared for the purposes of Item 17 or Item 18 of Form 20–F.

(a) Financial statements of a smaller reporting company, as defined by § 229.10(f)(1) of this chapter, its predecessors or any businesses to which the smaller reporting company is a successor shall be prepared in accordance with generally accepted accounting principles in the United States.

(b) Smaller reporting companies electing to prepare their financial statements with the form and content required in Article 8 need not apply the other form and content requirements in Regulation S–X with the exception of the following:

(1) The report and qualifications of the independent accountant shall comply with the requirements of §§ 210.2–01 through 210.2–07 (Article 2); and

(2) The description of accounting policies shall comply with § 210.4–08(n); and

(3) Smaller reporting companies engaged in oil and gas producing activities shall follow the financial accounting and reporting standards specified in § 210.4–10 with respect to such activities.

(c) Financial statements for a subsidiary of a smaller reporting company that issues securities guaranteed by the smaller reporting company or guarantees securities issued by the smaller reporting company must be presented as required by § 210.3–10, except that the periods presented are those required by § 210.8–02.

(d) Financial statements for a smaller reporting company's affiliates whose securities constitute a substantial portion of the collateral for any class of securities registered or being registered must be presented as required by § 210.3–16, except that the periods presented are those required by § 210.8–02.

(e) The Commission, where consistent with the protection of investors, may permit the omission of one or more of the financial statements or the substitution of appropriate statements of comparable character. The Commission by informal written notice may require the filing of other financial statements where necessary or appropriate.

(f) Section 210.3–06 applies to the preparation of financial statements of smaller reporting companies.

§ 210.8–03 [Amended]

■ 14. Remove and reserve § 210.8–03(b)(4).

■ 15. Revise § 210.8–04 to read as follows:

§ 210.8–04 Financial statements of businesses acquired or to be acquired.

Apply § 210.3–05 substituting §§ 210.8–02 and 210.8–03, as applicable, wherever § 210.3–05 references §§ 210.3–01 and 210.3–02.

■ 16. Revise § 210.8–05 to read as follows:

§ 210.8–05 Pro forma financial information.

(a) Pro forma financial information must be disclosed when any of the conditions in § 210.11–01 exist.

(b) The preparation, presentation, and disclosure of pro forma financial information must comply with §§ 210.11–01 through 210.11–03 (Article 11), except that the pro forma financial information may be condensed pursuant to § 210.8–03(a).

■ 17. Revise § 210.8–06 to read as follows:

§ 210.8–06 Real estate operations acquired or to be acquired.

Apply § 210.3–14 substituting §§ 210.8–02 and 210.8–03, as applicable, wherever § 210.3–14 references §§ 210.3–01 and 210.3–02.

■ 18. Amend § 210.11–01 by:

■ a. Revising paragraphs (a) introductory text and (a)(1) and (2);

■ b. Removing and reserving (a)(5);

■ c. Revising paragraphs (a)(6) and (8), (b), and (c).

The revisions read as follows:

§ 210.11–01 Presentation requirements.

(a) Pro forma financial information must be filed when any of the following conditions exist:

(1) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3–01, a significant business acquisition has occurred (for purposes of this section, this encompasses the acquisition of an interest in a business accounted for by the equity method);

(2) After the date of the most recent balance sheet filed pursuant to § 210.3–01, consummation of a significant business acquisition or a combination of entities under common control has occurred or is probable;

* * * * *

(6) Pro forma financial information required by § 229.914 of this chapter is required to be provided in connection with a roll-up transaction as defined in § 229.901(c) of this chapter;

* * * * *

(8) Consummation of other transactions has occurred or is probable for which disclosure of pro forma financial information would be material to investors.

(b) A business acquisition or disposition will be considered significant if:

(1) The business acquisition meets:

(i) The definition of a significant subsidiary in § 210.1–02(w)(1), substituting 20 percent for 10 percent each place it appears therein; or

(ii) If the business is a real estate operation as defined in § 210.3–14(a)(2), the significant subsidiary condition in § 210.1–02(w)(1)(i) (*i.e.,* the investment test condition), substituting 20 percent for 10 percent, as modified by the guidance in § 210.3–14(b)(2)(ii).

(2) The business disposition, including a business that is a real estate operation as defined in § 210.3–14(a)(2), meets the definition of a significant subsidiary in § 210.1–02(w)(1), substituting 20 percent for 10 percent each place it appears therein.

(3) The determination must be made, except as noted in paragraph (b)(4) of this section for the continuous offerings described therein, by using:

(i) For amounts derived from financial statements, the registrant's most recent annual consolidated financial statements required to be filed at or prior to the date of acquisition or disposition and the business's pre-acquisition or pre-disposition financial statements for the same fiscal year as the registrant or, if the fiscal years differ, the business's most recent fiscal year that would be required if the business had the same filer status as the registrant, however the determination may be made using:

(A) The financial statements for the business described in § 210.3–05(e) or (f) if the business meets the conditions for presenting those financial statements.

(B) Pro forma amounts for the registrant for the periods specified in § 210.11–01(b)(3) that only depict significant business acquisitions and dispositions consummated after the latest fiscal year-end for which the registrant's financial statements are required to be filed and only include Transaction Accounting Adjustments (*see* § 210.11–02(a)(6)(i)), provided that:

(*1*) The registrant has filed audited financial statements for any such acquired business for the periods required by § 210.3–05 or § 210.3–14 and the pro forma financial information required by §§ 210.11–01 through 210.11–02 for any such acquired or disposed business. The tests may not be made by ''annualizing'' data; and

(*2*) If a registrant has used pro forma amounts to determine significance of an acquisition or disposition, it must continue to use pro forma amounts to determine significance of acquisitions and dispositions through the filing date of its next annual report on Form 10–K (§ 249.310 of this chapter) or Form 20–F (§ 249.220f of this chapter); or

(C) The registrant's annual consolidated financial statements, for the most recent fiscal year ended prior to the acquisition or disposition, that are included in the registrant's Form 10–K (§ 249.310 of this chapter) filed after the date of acquisition or disposition, but before the date financial statements and pro forma financial information for the acquisition or disposition would be required to be filed on Form 8–K (§ 249.308 of this chapter).

(ii) If the business is a related business (*see* § 210.3–05(a)(3)), combined pre-acquisition financial statements of the group of related businesses for the fiscal year specified in paragraph (b)(3)(i) of this section.

(4) When a registrant, including a real estate investment trust, conducts a continuous offering over an extended period of time and applies the Item 20.D. Undertakings of Industry Guide 5, the income test condition does not apply, and the determination must be made for the investment test condition, when it is based on the total assets of the registrant and its subsidiaries consolidated, and the asset test condition, if applicable, using the following for the registrant:

(i) During the distribution period, total assets as of the date of acquisition or disposition plus the proceeds (net of commissions) in good faith expected to be raised in the registered offering over the next 12 months, except that for acquisitions total assets must exclude the acquired business; and

(ii) After the distribution period ends and until the next Form 10–K is filed, total assets as of the date of acquisition or disposition, except that for acquisitions total assets must exclude the acquired business; and

(iii) After that next Form 10–K is filed, the guidance in paragraph (b)(3).

(c) The pro forma effects of a business acquisition need not be presented pursuant to this section if separate financial statements of the acquired business are not included in the filing, except where the aggregate impact of businesses acquired or to be acquired is significant as determined by § 210.3–05(b)(2)(iv) or § 210.3–14(b)(2)(i)(C).

* * * * *

■ 19. Revise § 210.11–02 to read as follows:

§ 210.11–02 Preparation requirements.

(a) *Form and content.* (1) Pro forma financial information must consist of a pro forma condensed balance sheet, pro

forma condensed statements of comprehensive income, and accompanying explanatory notes. In certain circumstances (*i.e.,* where a limited number of pro forma adjustments are required and those adjustments are easily understood), a narrative description of the pro forma effects of the transaction may be disclosed in lieu of the statements described in this paragraph (a)(1).

(2) The pro forma financial information must be accompanied by an introductory paragraph which briefly sets forth a description of:

(i) Each transaction for which pro forma effect is being given;

(ii) The entities involved;

(iii) The periods for which the pro forma financial information is presented; and

(iv) An explanation of what the pro forma presentation shows.

(3) The pro forma condensed financial information need only include major captions (*i.e.,* the numbered captions) prescribed by the applicable sections of Regulation S–X. Where any major balance sheet caption is less than 10 percent of total assets, the caption may be combined with others. When any major statement of comprehensive income caption is less than 15 percent of average net income attributable to the registrant for the most recent three fiscal years, the caption may be combined with others. In calculating average net income attributable to the registrant, loss years should be excluded unless losses were incurred in each of the most recent three years, in which case the average loss must be used for purposes of this test. Notwithstanding these tests, *de minimis* amounts need not be shown separately.

(4) Pro forma statements will ordinarily be in columnar form showing condensed historical statements, pro forma adjustments, and the pro forma results.

(5) The pro forma condensed statement of comprehensive income must disclose income (loss) from continuing operations and income or loss from continuing operations attributable to the controlling interest.

(6) The pro forma condensed balance sheet and pro forma condensed statements of comprehensive income must include, and be limited to, the following pro forma adjustments, except as noted in paragraph (a)(7) of this section:

(i) *Transaction Accounting Adjustments.* (A) Adjustments that depict in the pro forma condensed balance sheet the accounting for the transaction required by U.S. Generally Accepted Accounting Principles (U.S. GAAP) or, as applicable, International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS–IASB). Calculate pro forma adjustments using the measurement date and method prescribed by the applicable accounting standards. For a probable transaction, calculate pro forma adjustments using, and disclose, the most recent practicable date prior to the effective date (for registration statements), qualification date (for offering statements under 17 CFR 230.251 through 230.263 (Regulation A)), or the mail date (for proxy statements).

(B) Adjustments that depict in the pro forma condensed statements of comprehensive income the effects of the pro forma balance sheet adjustments in paragraph (a)(6)(i)(A) of this section assuming those adjustments were made as of the beginning of the fiscal year presented. Such adjustments must be made whether or not the pro forma balance sheet is presented pursuant to paragraph (c)(1) of this section. If the condition in § 210.11–01(a) that is met does not have a balance sheet effect, then depict the accounting for the transaction required by U.S. GAAP or IFRS–IASB, as applicable.

(ii) *Autonomous Entity Adjustments.* Adjustments that depict the registrant as an autonomous entity if the condition in § 210.11–01(a)(7) is met. Autonomous Entity Adjustments must be presented in a separate column from Transaction Accounting Adjustments.

(7) Management's Adjustments depicting synergies and dis-synergies of the acquisitions and dispositions for which pro forma effect is being given may, in the registrant's discretion, be presented if in its management's opinion, such adjustments would enhance an understanding of the pro forma effects of the transaction and the following conditions are met:

(i) *Basis for Management's Adjustments.* (A) There is a reasonable basis for each such adjustment.

(B) The adjustments are limited to the effect of such synergies and dis-synergies on the historical financial statements that form the basis for the pro forma statement of comprehensive income as if the synergies and dis-synergies existed as of the beginning of the fiscal year presented. If such adjustments reduce expenses, the reduction must not exceed the amount of the related expense historically incurred during the pro forma period presented.

(C) The pro forma financial information reflects all Management's Adjustments that are, in the opinion of management, necessary to a fair statement of the pro forma financial information presented and a statement to that effect is disclosed. When synergies are presented, any related dis-synergies must also be presented.

(ii) *Form of presentation.* (A) If presented, Management's Adjustments must be presented in the explanatory notes to the pro forma financial information in the form of reconciliations of pro forma net income from continuing operations attributable to the controlling interest and the related pro forma earnings per share data specified in paragraph (a)(9) of this section to such amounts after giving effect to Management's Adjustments.

(B) Management's Adjustments included or incorporated by reference into a registration statement, proxy statement, Regulation A offering statement, or Form 8–K should be as of the most recent practicable date prior to the effective date, mail date, qualification date, or filing date as applicable, which may require that they be updated if previously provided in a Form 8–K that is appropriately incorporated by reference.

(C) If Management's Adjustments will change the number of shares or potential common shares, reflect the change within Management's Adjustments in accordance with U.S. GAAP or IFRS–IASB, as applicable, as if the common stock or potential common stock were outstanding as of the beginning of the period presented.

(D) The explanatory notes must also include disclosure of the basis for and material limitations of each Management's Adjustment, including any material assumptions or uncertainties of such adjustment, an explanation of the method of the calculation of the adjustment, if material, and the estimated time frame for achieving the synergies and dis-synergies of such adjustment.

Instruction 1 to paragraph (a)(7): Any forward-looking information supplied is expressly covered by the safe harbor rules under §§ 230.175 and 240.3b–6 of this chapter.

(8) All pro forma adjustments should be referenced to notes that clearly explain the assumptions involved.

(9)(i) Historical and pro forma basic and diluted per share amounts based on continuing operations attributable to the controlling interests and the number of shares used to calculate such per share amounts must be presented on the face of the pro forma condensed statement of comprehensive income and only give effect to Transaction Accounting Adjustments and Autonomous Entity Adjustments.

(ii) The number of shares used in the calculation of the pro forma per share amounts must be based on the weighted average number of shares outstanding during the period adjusted to give effect to the number of shares issued or to be issued to consummate the transaction, or if applicable whose proceeds will be used to consummate the transaction as if the shares were outstanding as of the beginning of the period presented. Calculate the pro forma effect of potential common stock being issued in the transaction (*e.g.,* a convertible security), or the proceeds of which will be used to consummate the transaction, on pro forma earnings per share in accordance with U.S. GAAP or IFRS–IASB, as applicable, as if the potential common stock were outstanding as of the beginning of the period presented.

(10) If the transaction is structured in such a manner that significantly different results may occur, provide additional pro forma presentations which give effect to the range of possible results.

(11) The accompanying explanatory notes must disclose:

(i) Revenues, expenses, gains and losses and related tax effects which will not recur in the income of the registrant beyond 12 months after the transaction.

(ii) For Transaction Accounting Adjustments:

(A) A table showing the total consideration transferred or received including its components and how they were measured. If total consideration includes contingent consideration, describe the arrangement(s), the basis for determining the amount of payment(s) or receipt(s), and an estimate of the range of outcomes (undiscounted) or, if a range cannot be estimated, that fact and the reasons why; and

(B) The following information when the accounting is incomplete: A prominent statement to this effect; the items for which the accounting depicted is incomplete; a description of the information that the registrant requires, including, if material, the uncertainties affecting the pro forma financial information and the possible consequences of their resolution; an indication of when the accounting is expected to be finalized; and other available information that will enable a reader to understand the magnitude of any potential adjustments to the measurements depicted.

(iii) For each Autonomous Entity Adjustment, a description of the adjustment (including the material uncertainties), the material assumptions, the calculation of the adjustment, and additional qualitative information about the Autonomous Entity Adjustments, if any, necessary to give a fair and balanced presentation of the pro forma financial information.

(12) A registrant must not:

(i) Present pro forma financial information on the face of the registrant's historical financial statements or in the accompanying notes, except where such presentation is required by U.S. GAAP or IFRS–IASB, as applicable.

(ii) Present pro forma financial information, or summaries of such information, elsewhere in a filing that excludes material transactions for which pro forma effect is required to be given.

(iii) Present the pro forma amounts in paragraph (a)(7) of this section elsewhere in a filing without also presenting with equal or greater prominence the amounts specified in paragraph (a)(7) of this section to which they are required to be reconciled and a cross-reference to that reconciliation.

(iv) Give pro forma effect to the registrant's adoption of an accounting standard in pro forma financial information required by §§ 210.11–01 through 210.11–03.

(b) *Implementation guidance*—(1) *Historical statement of comprehensive income.* The historical statement of comprehensive income used in the pro forma financial information must only be presented through income from continuing operations (or the appropriate modification thereof).

(2) *Business acquisitions.* In some transactions, such as in financial institution acquisitions, measuring the acquired assets at their acquisition date fair value may result in significant discounts relative to the acquired business's historical cost of the acquired assets. When such discounts can result in a significant effect on earnings (losses) in periods immediately subsequent to the acquisition that will be progressively eliminated over a relatively short period, the effect of the discounts on reported results of operations for each of the next five years must be disclosed in a note.

(3) *Business dispositions.* Transaction Accounting Adjustments giving effect to the disposition of a business must not decrease historically incurred compensation expense for employees who were not, or will not be, transferred or terminated as of the disposition date.

(4) *Multiple transactions.* (i) When consummation of more than one transaction has occurred, or is probable, the pro forma financial information must present in separate columns each transaction for which pro forma presentation is required by § 210.11–01.

(ii) If the pro forma financial information is presented in a proxy or information statement for purposes of obtaining shareholder approval of one of the transactions, the effects of that transaction must be clearly set forth.

(5) *Tax effects.* (i) Tax effects, if any, of pro forma adjustments normally should be calculated at the statutory rate in effect during the periods for which pro forma condensed statements of comprehensive income are presented and should be reflected as a separate pro forma adjustment.

(ii) When the registrant's historical statements of comprehensive income do not reflect the tax provision on the separate return basis, pro forma statements of comprehensive income adjustments must reflect a tax provision calculated on the separate return basis.

(c) *Periods to be presented.* (1) A pro forma condensed balance sheet as of the end of the most recent period for which a consolidated balance sheet of the registrant is required by § 210.3–01 must be filed unless the transaction is already reflected in such balance sheet.

(2)(i) Pro forma condensed statements of comprehensive income must be filed for only the most recent fiscal year, except as noted in paragraph (c)(2)(ii) of this section, and for the period from the most recent fiscal year end to the most recent interim date for which a balance sheet is required. A pro forma condensed statement of comprehensive income may be filed for the corresponding interim period of the preceding fiscal year. A pro forma condensed statement of comprehensive income must not be filed when the historical statement of comprehensive income reflects the transaction for the entire period.

(ii) For transactions required to be accounted for under U.S. GAAP or, as applicable, IFRS–IASB by retrospectively revising the historical statements of comprehensive income (*e.g.,* combination of entities under common control and discontinued operations), pro forma statements of comprehensive income must be filed for all periods for which historical financial statements of the registrant are required. Retrospective revisions stemming from the registrant's adoption of a new accounting principle must not be reflected in pro forma statements of comprehensive income until they are depicted in the registrant's historical financial statements.

(3) Pro forma condensed statements of comprehensive income must be presented using the registrant's fiscal year end. If the most recent fiscal year end of any other entity involved in the transaction differs from the registrant's most recent fiscal year end by more than one fiscal quarter, the other entity's

statement of comprehensive income must be brought up to within one fiscal quarter of the registrant's most recent fiscal year end, if practicable. This updating could be accomplished by adding subsequent interim period results to the most recent fiscal year end information and deducting the comparable preceding year interim period results. Disclosure must be made of the periods combined and of the sales or revenues and income for any periods which were excluded from or included more than once in the condensed pro forma statement of comprehensive income (*e.g.,* an interim period that is included both as part of the fiscal year and the subsequent interim period).

Instruction 1 to paragraph (c)(3): In circumstances where different fiscal year ends exist, § 210.3–12 may require a registrant to include in the pro forma financial information an acquired or to be acquired foreign business historical period that would be more current than the periods included in the required historical financial statements of the foreign business.

(4) Whenever unusual events enter into the determination of the results shown for the most recently completed fiscal year, the effect of such unusual events should be disclosed and consideration should be given to presenting a pro forma condensed statement of comprehensive income for the most recent twelve-month period in addition to those required in paragraph (c)(2)(i) of this section if the most recent twelve-month period is more representative of normal operations.

§ 210.11–03 [Amended]

■ 20. Amend § 210.11–03 by:

■ a. In paragraph (a) introductory text, removing ''§ 210.11–02(b)(1)'' and adding in its place ''§ 210.11–02(a)(1)''; and

■ b. In paragraph (a)(2), removing ''§ 210.11–02(b)(3)'' and adding in its place ''§ 210.11–02(a)(3)''.

■ c. In paragraph (d), removing ''rule'' and ''generally accepted accounting principles'' and adding in their places ''section'' and ''U.S. GAAP or IFRS–IASB,'' respectively.

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 21. The authority citation for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78*o,* 78*o*–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. 112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

■ 22. Amend § 230.405 by revising the definition of ''Significant subsidiary'' to read as follows:

§ 230.405 Definitions of terms.

* * * * *

Significant subsidiary. The term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the conditions in paragraph (1), (2), or (3) of this definition; however, if the registrant is a registered investment company or a business development company, the tested subsidiary meets any of the conditions in paragraph (4) of this definition instead of any of the conditions in paragraph (1), (2), or (3) of this definition. A registrant that files its financial statements in accordance with or provides a reconciliation to U.S. Generally Accepted Accounting Principles (U.S. GAAP) must use amounts determined under U.S. GAAP. A foreign private issuer that files its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS–IASB) must use amounts determined under IFRS–IASB.

(1) *Investment test.* (i) For acquisitions, other than those described in paragraph (1)(ii) of this definition, and dispositions this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the aggregate worldwide market value of the registrant's voting and non-voting common equity, or if the registrant has no such aggregate worldwide market value, the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

(A) For acquisitions, the ''investments in'' the tested subsidiary is the consideration transferred, adjusted to exclude the registrant's and its subsidiaries' proportionate interest in the carrying value of assets transferred by the registrant and its subsidiaries consolidated to the tested subsidiary that will remain with the combined entity after the acquisition. It must include the fair value of contingent consideration if required to be recognized at fair value by the registrant at the acquisition date under U.S. GAAP or IFRS–IASB, as applicable; however if recognition at fair value is not required, it must include all contingent consideration, except contingent consideration for which the likelihood of payment is remote.

(B) For dispositions, the ''investments in'' the tested subsidiary is the fair value of the consideration, including contingent consideration, for the disposed subsidiary when comparing to the aggregate worldwide market value of the registrant's voting and non-voting common equity, or, when the registrant has no such aggregate worldwide market value, the carrying value of the disposed subsidiary when comparing to total assets of the registrant.

(C) When determining the aggregate worldwide market value of the registrant's voting and non-voting common equity, use the average of such aggregate worldwide market value calculated daily for the last five trading days of the registrant's most recently completed month ending prior to the earlier of the registrant's announcement date or agreement date of the acquisition or disposition.

(ii) For a combination between entities or businesses under common control, this test is met when either the net book value of the tested subsidiary exceeds 10 percent of the registrant's and its subsidiaries' consolidated total assets or the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated.

(iii) In all other cases, this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

(2) *Asset test.* This test is met when the registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total assets (after intercompany eliminations) exceeds 10 percent of such total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

(3) *Income test.* (i) This test is met when:

(A) The absolute value of the registrant's and its other subsidiaries' equity in the tested subsidiary's consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interests exceeds 10 percent of the absolute value of such income or loss of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; and

(B) The registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total revenue from continuing operations (after intercompany eliminations)

exceeds 10 percent of such total revenue of the registrant and its subsidiaries consolidated for the most recently completed fiscal year. This paragraph (3)(i)(B) does not apply if either the registrant and its subsidiaries consolidated or the tested subsidiary did not have material revenue in each of the two most recently completed fiscal years.

(ii) When determining the income component in paragraph (3)(i)(A) of this definition:

(A) If a net loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interest has been incurred by either the registrant and its subsidiaries consolidated or the tested subsidiary, but not both, exclude the equity in the income or loss from continuing operations before income taxes (after intercompany eliminations) of the tested subsidiary attributable to the controlling interest from such income or loss of the registrant and its subsidiaries consolidated for purposes of the computation;

(B) Compute the test using the average described in this paragraph (3)(ii)(B) if the revenue component in paragraph (3)(i)(B) in this definition does not apply and the absolute value of the registrant's and its subsidiaries' consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interests for the most recent fiscal year is at least 10 percent lower than the average of the absolute value of such amounts for each of its last five fiscal years; and

(C) Entities reporting losses must not be aggregated with entities reporting income where the test involves combined entities, as in the case of determining whether summarized financial data must be presented or whether the aggregate impact specified in §§ 210.3–05(b)(2)(iv) and 210.3–14(b)(2)(i)(C) of this chapter is met, except when determining whether related businesses meet this test for purposes of §§ 210.3–05 and 210.8–04 of this chapter.

(4) *Registered investment company or business development company.* For a registrant that is a registered investment company or a business development company, the term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the following conditions using amounts determined under U.S. GAAP and, if applicable, section 2(a)(41) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(41)):

(i) *Investment test.* The value of the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the value of the total investments of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(ii) *Income test.* The absolute value of the sum of combined investment income from dividends, interest, and other income, the net realized gains and losses on investments, and the net change in unrealized gains and losses on investments from the tested subsidiary (except, for purposes of § 210.6–11 of this chapter, the absolute value of the change in net assets resulting from operations of the tested subsidiary), for the most recently completed fiscal year exceeds:

(A) 80 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; or

(B) 10 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year and the investment test (paragraph (4)(i) of this definition) condition exceeds 5 percent. However, if the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated is at least 10 percent lower than the average of the absolute value of such amounts for each of its last five fiscal years, then the registrant may compute both conditions of the income test using the average of the absolute value of such amounts for the registrant and its subsidiaries consolidated for each of its last five fiscal years.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 23. The authority citation for part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m, 78n, 78o(d), 78o–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37; and sec. 107, Pub. L. 112–106, 126 Stat. 312, unless otherwise noted.

* * * * *

■ 24. Form S–11 (referenced in § 239.18) is amended by revising Item 9 to read as follows:

Note: The text of Form S–11 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S–11

* * * * *

Item 9. Selected Financial Data

File the information required by Item 301 of Regulation S–K (§ 229.301 of this chapter).

■ 25. Form N–14 (referenced in § 239.23) is amended by revising Item 14 to read as follows:

Note: The text of Form N–14 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM N–14

* * * * *

Item 14. Financial Statements

The Statement of Additional Information must contain the financial statements, including the schedules thereto, and supplemental financial information of the acquiring company and the company to be acquired required by Regulation S–X [17 CFR 210] for the periods specified in Article 3 and Rule 6–11 of Regulation S–X, except:

1. If the company to be acquired is an investment company or would be an investment company but for the exclusions provided by sections 3(c)(1) or 3(c)(7) of the 1940 Act [15 U.S.C. 80a–3(c)(1) and (c)(7)] (a ''private fund''), the financial statements need only be filed for the most recent fiscal year and the most recent interim period, unless it is an investment company subject to § 210.3–18 in which case the financial statements for the periods described therein must be filed;

2. if the company to be acquired is a private fund, then the required financial statements may comply with U.S. Generally Accepted Accounting Principles and only Article 12 of Regulation S–X;

3. the financial statements required by Regulation S–X for any subsidiary that is not a majority-owned subsidiary may be omitted from Part B and included in Part C; and

4. the table showing the current fees and pro forma fees, if different, required by Rule 6–11 of Regulation S–X (which is required by Item 3 of this Form).

* * * * *

■ 26. Amend Part F/S of Form 1–A (referenced in § 239.90) by revising paragraph (b)(7)(iv) to read as follows:

Note: The text of Form 1–A does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 1–A

REGULATION A OFFERING STATEMENT UNDER THE SECURITIES ACT OF 1933

GENERAL INSTRUCTIONS

* * * * *

Part F/S

* * * * *

(b) Financial Statements for Tier 1 Offerings * * *

(7) * * *

(iv) Pro Forma Financial Statements. File pro forma financial information as described in Rule 8–05 of Regulation S–X.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 27. The authority citation for part 240 continues to read, in part, 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, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 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. 1887 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 28. Amend § 240.12b–2 by revising the definition of ''Significant subsidiary'' to read as follows:

§ 240.12b–2 Definitions.

* * * * *

Significant subsidiary. The term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the conditions in paragraph (1), (2), or (3) of this definition; however, if the registrant is a registered investment company or a business development company, the tested subsidiary meets any of the conditions in paragraph (4) of this definition instead of any of the conditions in paragraph (1), (2), or (3) of this definition. A registrant that files its financial statements in accordance with or provides a reconciliation to U.S. Generally Accepted Accounting Principles (U.S. GAAP) must use amounts determined under U.S. GAAP. A foreign private issuer that files its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS–IASB) must use amounts determined under IFRS–IASB.

(1) *Investment test.* (i) For acquisitions, other than those described in paragraph (1)(ii) of this definition, and dispositions this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the aggregate worldwide market value of the registrant's voting and non-voting common equity, or if the registrant has no such aggregate worldwide market value, the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

(A) For acquisitions, the ''investments in'' the tested subsidiary is the consideration transferred, adjusted to exclude the registrant's and its subsidiaries' proportionate interest in the carrying value of assets transferred by the registrant and its subsidiaries consolidated to the tested subsidiary that will remain with the combined entity after the acquisition. It must include the fair value of contingent consideration if required to be recognized at fair value by the registrant at the acquisition date under U.S. GAAP or IFRS–IASB, as applicable; however if recognition at fair value is not required, it must include all contingent consideration, except contingent consideration for which the likelihood of payment is remote.

(B) For dispositions, the ''investments in'' the tested subsidiary is the fair value of the consideration, including contingent consideration, for the disposed subsidiary when comparing to the aggregate worldwide market value of the registrant's voting and non-voting common equity, or, when the registrant has no such aggregate worldwide market value, the carrying value of the disposed subsidiary when comparing to total assets of the registrant.

(C) When determining the aggregate worldwide market value of the registrant's voting and non-voting common equity, use the average of such aggregate worldwide market value calculated daily for the last five trading days of the registrant's most recently completed month ending prior to the earlier of the registrant's announcement date or agreement date of the acquisition or disposition.

(ii) For a combination between entities or businesses under common control, this test is met when either the net book value of the tested subsidiary exceeds 10 percent of the registrant's and its subsidiaries' consolidated total assets or the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated.

(iii) In all other cases, this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

(2) *Asset test.* This test is met when the registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total assets (after intercompany eliminations) exceeds 10 percent of such total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

(3) *Income test.* (i) This test is met when:

(A) The absolute value of the registrant's and its other subsidiaries' equity in the tested subsidiary's consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interests exceeds 10 percent of the absolute value of such income or loss of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; and

(B) The registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total revenue from continuing operations (after intercompany eliminations) exceeds 10 percent of such total revenue of the registrant and its subsidiaries consolidated for the most recently completed fiscal year. This paragraph (3)(i)(B) does not apply if either the registrant and its subsidiaries consolidated or the tested subsidiary did not have material revenue in each of the two most recently completed fiscal years.

(ii) When determining the income component in paragraph (3)(i)(A) of this definition:

(A) If a net loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interest has been incurred by either the registrant and its subsidiaries consolidated or the tested subsidiary, but not both, exclude the equity in the income or loss from continuing operations before income taxes (after intercompany eliminations) of the tested subsidiary attributable to the controlling interest from such income or loss of the registrant and its subsidiaries consolidated for purposes of the computation;

(B) Compute the test using the average described in this paragraph (3)(ii)(B) if the revenue component in paragraph (3)(i)(B) in this definition does not apply and the absolute value of the registrant's and its subsidiaries' consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interests for the most recent fiscal year is at least 10 percent lower than the average of the absolute

value of such amounts for each of its last five fiscal years; and

(C) Entities reporting losses must not be aggregated with entities reporting income where the test involves combined entities, as in the case of determining whether summarized financial data must be presented or whether the aggregate impact specified in §§ 210.3–05(b)(2)(iv) and 210.3–14(b)(2)(i)(C) of this chapter is met, except when determining whether related businesses meet this test for purposes of §§ 210.3–05 and 210.8–04 of this chapter.

(4) *Registered investment company or business development company.* For a registrant that is a registered investment company or a business development company, the term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the following conditions using amounts determined under U.S. GAAP and, if applicable, section 2(a)(41) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(41)):

(i) *Investment test.* The value of the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the value of the total investments of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(ii) *Income test.* The absolute value of the sum of combined investment income from dividends, interest, and other income, the net realized gains and losses on investments, and the net change in unrealized gains and losses on investments from the tested subsidiary (except, for purposes of § 210.6–11 of this chapter, the absolute value of the change in net assets resulting from operations of the tested subsidiary), for the most recently completed fiscal year exceeds:

(A) 80 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; or

(B) 10 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year and the investment test (paragraph (4)(i) of this definition) condition exceeds 5 percent. However, if the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated is at least 10 percent lower than the average of the absolute value of such amounts for each of its last five fiscal years, then the registrant may compute both conditions of the income test using the average of the absolute value of such amounts for the registrant and its subsidiaries consolidated for each of its last five fiscal years.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 29. The authority citation for part 249 continues to read, in part, 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.

* * * * *

■ 30. Form 8–K (referenced in § 249.308) is amended by revising the introductory text to Item 2.01, Instruction 4 to Item 2.01, and Item 9.01 to read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 8–K

* * * * *

Item 2.01. Completion of Acquisition or Disposition of Assets

If the registrant or any of its subsidiaries consolidated has completed the acquisition or disposition of a significant amount of assets, otherwise than in the ordinary course of business, or the acquisition or disposition of a significant amount of assets that constitute a real estate operation as defined in § 210.3–14(a)(2) disclose the following information:

* * * * *

Instructions. * * *

4. An acquisition or disposition will be deemed to involve a significant amount of assets:

(i) If the registrant's and its other subsidiaries' equity in the net book value of such assets or the amount paid or received for the assets upon such acquisition or disposition exceeded 10 percent of the total assets of the registrant and its consolidated subsidiaries;

(ii) if it involved a business (see 17 CFR 210.11–01(d)) that is significant (see 17 CFR 210.11–01(b)). The acquisition of a business encompasses the acquisition of an interest in a business accounted for by the registrant under the equity method or, in lieu of the equity method, the fair value option; or

(iii) in the case of a business development company, if the amount paid for such assets exceeded 10 percent of the value of the total investments of the registrant and its consolidated subsidiaries.

The aggregate impact of acquired businesses are not required to be reported pursuant to this Item 2.01 unless they are related businesses (see 17 CFR 210.3–05(a)(3)), related real estate operations (see 17 CFR 210.3–14(a)(3)), or related funds (see 17 CFR 210.6–11(a)(3)), and are significant in the aggregate.

5. Attention is directed to the requirements in Item 9.01 (Financial Statements and Exhibits) with respect to the filing of:

(i) Financial statements of businesses or funds acquired;

* * * * *

Item 9.01. Financial Statements and Exhibits

List below the financial statements, pro forma financial information and exhibits, if any, filed as a part of this report.

(a) *Financial statements of businesses or funds acquired.*

(1) For any business acquisition or fund acquisition required to be described in answer to Item 2.01 of this form, file financial statements and any applicable supplemental information, of the business acquired specified in Rules 3–05 or 3–14 of Regulation S–X (17 CFR 210.3–05 and 210.3–14), or Rules 8–04 or 8–06 of Regulation S–X (17 CFR 210.8–04 and 210.8–06) for smaller reporting companies, or of the fund acquired specified in Rule 6–11 of Regulation S–X (17 CFR 210.6–11).

(2) The financial statements must be prepared pursuant to Regulation S–X except that supporting schedules need not be filed unless required by Rule 6–11 of Regulation S–X (17 CFR 210.6–11). A manually signed accountant's report should be provided pursuant to Rule 2–02 of Regulation S–X (17 CFR 210.2–02).

(3) Financial statements required by this item may be filed with the initial report, or by amendment not later than 71 calendar days after the date that the initial report on Form 8–K must be filed. If the financial statements are not included in the initial report, the registrant should so indicate in the Form 8–K report and state when the required financial statements will be filed. The registrant may, at its option, include unaudited financial statements in the initial report on Form 8–K.

(b) *Pro forma financial information.*

(1) For any transaction required to be described in answer to Item 2.01 of this form, file any pro forma financial information that would be required pursuant to Article 11 of Regulation S–

X (17 CFR 210) or Rule 8–05 of Regulation S–X (17 CFR 210.8–05) for smaller reporting companies unless it involves the acquisition of a fund subject to Rule 6–11 of Regulation S–X (17 CFR 210.6–11).

(2) The provisions of paragraph (a)(3) of this Item 9.01 must also apply to pro forma financial information relative to the acquired business.

(c) *Shell company transactions.* The provisions of paragraph (a)(3) and (b)(2) of this Item do not apply to the financial statements or pro forma financial information required to be filed under this Item with regard to any transaction required to be described in answer to Item 2.01 of this Form by a registrant that was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b–2 under the Exchange Act (17 CFR 240.12b–2), immediately before that transaction. Accordingly, with regard to any transaction required to be described in answer to Item 2.01 of this Form by a registrant that was a shell company, other than a business combination related shell company, immediately before that transaction, the financial statements and pro forma financial information required by this Item must be filed in the initial report. Notwithstanding General Instruction B.3. to Form 8–K, if any financial statement or any financial information required to be filed in the initial report by this Item 9.01(c) is previously reported, as that term is defined in Rule 12b–2 under the Exchange Act (17 CFR 240.12b–2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in the initial report.

(d) *Exhibits.* * * *

Instruction.

During the period after a registrant has reported an acquisition pursuant to Item 2.01 of this form, until the date on which the financial statements specified by this Item 9.01 must be filed, the registrant will be deemed current for purposes of its reporting obligations under Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)). With respect to filings under the Securities Act, however, registration statements will not be declared effective and post-effective amendments to registration statements will not be declared effective unless financial statements meeting the requirements of Rule 3–05, Rule 3–14, Rule 6–11, Rule 8–04, and Rule 8–06 of Regulation S–X (17 CFR 210.3–05, 210.3–14, 210.6–11, 210.8–04, and 210.8–06), as applicable, are provided. In addition, offerings should not be made pursuant to effective registration statements, or pursuant to Rule 506 of Regulation D (17 CFR 230.506) where any purchasers are not accredited investors under Rule 501(a) of that Regulation, until the audited financial statements required by Rule 3–05, Rule 3–14, Rule 6–11, Rule 8–04, and Rule 8–06 of Regulation S–X (17 CFR 210.3–05, 210.3–14, 210.6–11, 210.8–04, and 210.8–06), as applicable, are filed; provided, however, that the following offerings or sales of securities may proceed notwithstanding that financial statements of the acquired business have not been filed:

(a) Offerings or sales of securities upon the conversion of outstanding convertible securities or upon the exercise of outstanding warrants or rights;

(b) dividend or interest reinvestment plans;

(c) employee benefit plans;

(d) transactions involving secondary offerings; or

(e) sales of securities pursuant to Rule 144 (17 CFR 230.144).

* * * * *

■ 31. Form 10–K (referenced in § 249.310) is amended by revising Item 8.(a) of PART II to read as follows:

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 10–K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

GENERAL INSTRUCTIONS

* * * * *

PART II. * * *

Item 8. Financial Statements and Supplementary Data

(a) File financial statements meeting the requirements of Regulation S–X (§ 210 of this chapter), except § 210.3–05, § 210.3–14, § 210.6–11, § 210.8–04, § 210.8–05, § 210.8–06 and Article 11 thereof, and the supplementary financial information required by Item 302 of Regulation S–K (§ 229.302 of this chapter). Financial statements of the registrant and its subsidiaries consolidated (as required by Rule 14a–3(b)) must be filed under this item. Other financial statements and schedules required under Regulation S–X may be filed as ''Financial Statement Schedules'' pursuant to Item 15, Exhibits, Financial Statement Schedules, and Reports on Form 8–K, of this form.

* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 32. The general authority citation for part 270 continues to read as follows:

Authority: 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, 80a–39, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 33. Amend § 270.8b–2 by revising paragraph (k) to read as follows:

§ 270.8b–2 Definitions.

* * * * *

(k) *Significant subsidiary.* The term ''significant subsidiary'' means a subsidiary, including its subsidiaries, which meets any of the following conditions, using amounts determined under U.S. Generally Accepted Accounting Principles and, if applicable, section 2(a)(41) of the Act:

(1) *Investment test.* The value of the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the value of the total investments of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(2) *Income test.* The absolute value of the sum of combined investment income from dividends, interest, and other income, the net realized gains and losses on investments, and the net change in unrealized gains and losses on investments from the tested subsidiary, for the most recently completed fiscal year exceeds:

(i) 80 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; or

(ii) 10 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year and the investment test (paragraph (k)(1) of this section) condition exceeds 5 percent. However, if the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated is at least 10 percent lower than the average of the absolute value of such amounts for each of its last five fiscal years, then the registrant may compute both conditions of the income test using the average of the absolute value of such amounts for the registrant and its subsidiaries consolidated for each of its last five fiscal years.

* * * * *

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 34. The general authority citation for part 274 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, 80a–29, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 35. Amend Form N–2 (referenced in §§ 239.14 and 274.11a–1) as follows:

■ a. Revise Item 8.6, paragraph (a) to Instruction 1 by removing the phrase ''Sections 210.6–01 through 210.6–10 of Regulation S–X [17 CFR 210.6–01 through 210.6–10]'' and adding in its place ''Article 6 of Regulation S–X [17 CFR 210.6–01 *et seq.*]''.

■ b. Revise Item 24, paragraph (a) to Instruction 1 by removing the phrase ''Sections 210.6–01 through 210.6–10 of Regulation S–X [17 CFR 210.6–01 through 210.6–10]'' and adding in its place ''Article 6 of Regulation S–X [17 CFR 210.6–01 *et seq.*]''.

Note: The text of Form N–2 does not, and this amendment will not, appear in the Code of Federal Regulations.

By the Commission.

Dated: May 20, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–11479 Filed 8–28–20; 8:45 am]

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Parts 32, 36, and 71

2020–2021 Station-Specific Hunting and Sport Fishing Regulations; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 32, 36, and 71

[Docket No. FWS–HQ–NWRS–2020–0013; FXRS12610900000–201–FF09R20000]

RIN 1018–BE50

2020–2021 Station-Specific Hunting and Sport Fishing Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are opening, for the first time, eight National Wildlife Refuges (NWRs) that were previously closed to hunting and sport fishing. In addition, we are opening or expanding hunting and sport fishing at 89 other NWRs and adding pertinent station-specific regulations for other NWRs that pertain to migratory game bird hunting, upland game hunting, big game hunting, and sport fishing for the 2020–2021 season. We are also opening hunting or sport fishing on nine units of the National Fish Hatchery System (NFHs). We are also adding pertinent station-specific regulations that pertain to migratory game bird hunting, upland game hunting, big game hunting, and sport fishing at these nine NFHs for the 2020–2021 season. Further, we are opening 41 limited-interest easement NWRs in North Dakota for upland and big game hunting and sport fishing in accordance with State regulations. Access to these NWRs is controlled by the current landowners, and, therefore, they are not open to the public unless authorized by the landowner. We are also making regulatory changes to existing station-specific regulations in order to reduce the regulatory burden on the public, increase access for hunters and anglers on Service lands and waters, and comply with a Presidential mandate for plain language standards. Lastly, we are prohibiting domestic sheep, goat, and camelid pack animals on the Arctic National Wildlife Refuge.

DATES: This rule is effective August 31, 2020.

FOR FURTHER INFORMATION CONTACT: Katherine Harrigan, (703) 358–2440.

SUPPLEMENTARY INFORMATION:

Background

The National Wildlife Refuge System Administration Act of 1966 closes NWRs in all States except Alaska to all uses until opened. The Secretary of the Interior (Secretary) may open refuge areas to any use, including hunting and/or sport fishing, upon a determination that the use is compatible with the purposes of the refuge and National Wildlife Refuge System mission. The action also must be in accordance with provisions of all laws applicable to the areas, developed in coordination with the appropriate State fish and wildlife agency(ies), consistent with the principles of sound fish and wildlife management and administration, and otherwise in the public interest. These requirements ensure that we maintain the biological integrity, diversity, and environmental health of the Refuge System for the benefit of present and future generations of Americans.

We annually review hunting and sport fishing programs to determine whether to include additional stations or whether individual station regulations governing existing programs need modifications. Changing environmental conditions, State and Federal regulations, and other factors affecting fish and wildlife populations and habitat may warrant modifications to station-specific regulations to ensure the continued compatibility of hunting and sport fishing programs and to ensure that these programs will not materially interfere with or detract from the fulfillment of station purposes or the Service's mission.

Provisions governing hunting and sport fishing on refuges are in title 50 of the Code of Federal Regulations in part 32 (50 CFR part 32), and on hatcheries in part 71 (50 CFR part 71). We regulate hunting and sport fishing to:

- Ensure compatibility with refuge and hatchery purpose(s);
- Properly manage fish and wildlife resource(s);
- Protect other values;
- Ensure visitor safety; and
- Provide opportunities for fish- and wildlife-dependent recreation.

On many stations where we decide to allow hunting and sport fishing, our general policy of adopting regulations that are identical to State hunting and sport fishing regulations is adequate in meeting these objectives. On other stations, we must supplement State regulations with more-restrictive Federal regulations to ensure that we meet our management responsibilities, as outlined under Statutory Authority, below. We issue station-specific hunting and sport fishing regulations when we open wildlife refuges and fish hatcheries to migratory game bird hunting, upland game hunting, big game hunting, or sport fishing. These regulations may list the wildlife species that you may hunt or fish; seasons, bag or creel (container for carrying fish) limits; methods of hunting or sport fishing; descriptions of areas open to hunting or sport fishing; and other provisions as appropriate.

In the case of this rule, we are issuing one regulation for an Alaska refuge. In 2015, the Arctic National Wildlife Refuge finalized their comprehensive conservation plan (CCP), which included a prohibition on domestic sheep, goat, and camelid use on the refuge based on the risk of disease transmission to Dall's sheep. Any closures or restrictions of recreational uses on Alaska refuges must go through extensive public outreach and comment, including publication in the **Federal Register**.

Statutory Authority

The National Wildlife Refuge System Administration Act of 1966 (Administration Act; 16 U.S.C. 668dd–668ee, as amended by the National Wildlife Refuge System Improvement Act of 1997 [Improvement Act]) governs the administration and public use of refuges. The Refuge Recreation Act of 1962 (16 U.S.C. 460k–460k–4) (Recreation Act) governs the administration and public use of refuges and hatcheries. The Alaska National Interest Lands Conservation Act (ANILCA, 16 U.S.C. 3101, *et seq.*) governs the administration of public lands, including refuges, in Alaska.

Amendments enacted by the Improvement Act were built upon the Administration Act in a manner that provides an ''organic act'' for the Refuge System, similar to organic acts that exist for other public Federal lands. The Improvement Act serves to ensure that we effectively manage the Refuge System as a national network of lands, waters, and interests for the protection and conservation of our Nation's wildlife resources. The Administration Act states first and foremost that we focus our Refuge System mission on conservation of fish, wildlife, and plant resources and their habitats. The Improvement Act requires the Secretary, before allowing a new use of a refuge or before expanding, renewing, or extending an existing use of a refuge, to determine that the use is compatible with the purpose for which the refuge was established and the mission of the Refuge System. The Improvement Act established as the policy of the United States that wildlife-dependent recreation, when compatible, is a legitimate and appropriate public use of the Refuge System, through which the American public can develop an appreciation for fish and wildlife. The Improvement Act established six wildlife-dependent recreational uses as the priority general public uses of the

Refuge System. These uses are hunting, fishing, wildlife observation and photography, and environmental education and interpretation.

The Recreation Act authorizes the Secretary to administer areas within the Refuge System and Hatchery System for public recreation as an appropriate incidental or secondary use only to the extent that doing so is practicable and not inconsistent with the primary purpose(s) for which Congress and the Service established the areas. The Recreation Act requires that any recreational use of refuge or hatchery lands be compatible with the primary purpose(s) for which we established the refuge and not inconsistent with other previously authorized operations.

The Administration Act and Recreation Act also authorize the Secretary to issue regulations to carry out the purposes of the Acts and regulate uses.

We develop specific management plans for each refuge prior to opening it to hunting or sport fishing. In many cases, we develop station-specific regulations to ensure the compatibility of the programs with the purpose(s) for which we established the refuge or hatchery and the Refuge and Hatchery System mission. We ensure initial compliance with the Administration Act and the Recreation Act for hunting and sport fishing on newly acquired land through an interim determination of compatibility made at or near the time of acquisition. These regulations ensure that we make the determinations required by these acts prior to adding refuges to the lists of areas open to hunting and sport fishing in 50 CFR parts 32 and 71. We ensure continued compliance by the development of CCPs, step-down management plans, and by annual review of hunting and sport fishing programs and regulations.

For refuges in Alaska, we regulate the uses of refuge lands in compliance with ANILCA. Section 1110(a) of ANILCA defines our authority to regulate the use of nonmotorized surface transportation in Alaska. Under that section of ANILCA, we may close an area on a temporary or permanent basis to these nonmotorized transportation uses when we find that such use would be detrimental to the resource values of the area. This section of ANILCA also provides that if an NWR in Alaska needs to close or restrict a public use or mode of access in order to protect resources of the refuge, we must do extensive public outreach and provide opportunities for public comment as described by section 1110(a) of ANILCA and the associated implementing regulations (*i.e.,* 43 CFR 36.11 and 50 CFR 36.42).

Summary of Comments and Responses

On April 9, 2020, we published in the **Federal Register** (85 FR 20030) a proposed rule to open hunting or sport fishing at 9 NFHs, open 41 limited-interest easement NWRs in North Dakota, open 8 NWRs that are currently closed to hunting and sport fishing, expand hunting and sport fishing at 89 other NWRs, and add pertinent station-specific regulations for other NWRs that pertain to migratory game bird hunting, upland game hunting, big game hunting, and sport fishing for the 2020–2021 season. We accepted public comments on the proposed rule for 60 days, ending June 8, 2020. By that date, we received 3,177 comments on the proposed rule. Among these comments were 21 that were either intended for a different Department of the Interior rulemaking or otherwise irrelevant to this rule. We discuss the remaining 3,156 comments we received below by topic. As we received 53 comments specific to the Arctic NWR regulation prohibiting domestic sheep, goats, and camelids on the refuge, those comments will be discussed by topic after all other comments. Beyond our responses below, additional station-specific information on how we responded to comments on particular hunting or fishing opportunities at a given refuge or hatchery can be found in that station's final hunting and/or fishing package, each of which can be located online here: *https://www.fws.gov/refuges/hunting/rules-regulations-and-improved-access/.*

Comment (1): A few comments were wholly or in part a request that we extend the 60-day public comment period for the proposed rule; a couple of these comments specifically mention the current viral pandemic as a reason for the requested extension.

Our Response: We declined to extend the comment period for our April 9, 2020, proposed rule (85 FR 20030). The standard public comment period for the annual rule proposing amendments to the regulations governing hunting and sport fishing on NWRs and NFHs is 30 days. The Service provided a 60-day comment period, which allowed for the submission of more than 3,000 public comments, for the 2020–2021 proposed rule. We recognize the impact of COVID–19, but believe that 60 days was an adequate amount of time for all interested parties to provide their comments to us. Moreover, extending the comment period could have disrupted coordination with State agencies or prevented the publication of a final rule in time for the start dates of relevant hunting and sport-fishing seasons, which would have effectively delayed the applicability of this rule.

Comment (2): We received a substantial number of comments expressing general support for the proposed changes in the rule. Of the 3,177 comments on the rule, 920 were in general support of the proposed changes. These comments of general support either expressed appreciation for the increased hunting and fishing access in the rule overall, expressed appreciation for increased access at particular refuges, or both. In addition to this general support, some commenters requested additional hunting and fishing opportunities at specific stations or generally in several States.

Our Response: Hunting and fishing on U.S. Fish and Wildlife Service lands is a tradition that dates back to the early 1900s. In passing the Improvement Act, Congress reaffirmed that the Refuge System was created to conserve fish, wildlife, plants, and their habitats, and would facilitate opportunities for Americans to participate in compatible wildlife-dependent recreation, including hunting and fishing on Refuge System lands. We prioritize wildlife-dependent recreation, including hunting and fishing, when doing so is compatible with the purpose of the refuge and the mission of the NWRS. Hunting or fishing on hatcheries, unlike Refuge System lands, is authorized, ''when such activity is not detrimental to the propagation and distribution of fish or other aquatic wildlife'' (50 CFR 71.1).

We will continue to open and expand hunting and sport fishing opportunities across refuges and hatcheries; however, as detailed further in our response to *Comment (3),* below, opening or expanding hunting or fishing opportunities on Service lands is not a quick or simple process. The annual regulatory cycle begins in June or July of each year for the following hunting and sport fishing season (the planning cycle for this 2020–2021 final rule began in June 2019). This annual timeline allows us time to collaborate closely with our State, tribal, and territorial partners, as well as other partners including nongovernmental organizations, on potential opportunities. It also provides us with time to complete environmental analyses and other requirements for opening or expanding new opportunities. Therefore, it would be impracticable for the Service to complete multiple regulatory cycles in one calendar year due to the logistics of coordinating with various partners. Once we determine that a hunting or

sport fishing opportunity can be carried out in a manner compatible with individual station purposes and objectives, we work expeditiously to open it.

We did not make any changes to the rule as a result of these comments.

Comment (3): Many commenters expressed general opposition to any hunting or fishing in the Refuge System. Of the 3,177 comments on the rule, 1,939 were in general opposition to the proposed changes. In many cases, commenters stated that hunting was antithetical to the purposes of a ''refuge,'' which, in their opinion, should serve as an inviolate sanctuary for all wildlife. Some of these commenters generically opposed expanded or new hunting or fishing opportunities at specific stations.

Our Response: The Service prioritizes facilitating wildlife-dependent recreational opportunities, including hunting and fishing, on Service land in compliance with applicable Service law and policy. For refuges, the Administration Act, as amended, stipulates that hunting (along with fishing, wildlife observation and photography, and environmental education and interpretation), if found to be compatible, is a legitimate and priority general public use of a refuge and should be facilitated (16 U.S.C. 668dd(a)(3)(D)). Thus, we only allow hunting of resident wildlife on NWRs if such activity has been determined compatible with the established purpose(s) of the refuge and the mission of the Refuge System as required by the Administration Act. For hatcheries, we allow hunting and fishing when such activity is determined not to be detrimental to the propagation and distribution of fish or other aquatic wildlife (50 CFR 71.1). For all 147 stations opening and/or expanding hunting and/or fishing in this rule, we determined that the proposed actions were compatible or would not have detrimental impacts.

Each station manager makes a decision regarding hunting and fishing opportunities only after rigorous examination of the available information, consultation and coordination with States and tribes, and compliance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), as well as other applicable laws and regulations. The many steps taken before a station opens or expands a hunting or fishing opportunity on the refuge ensure that the Service does not allow any opportunity that would compromise the purpose of the station or the mission of the agency.

Hunting of resident wildlife on NWRs generally occurs consistent with State regulations, including seasons and bag limits. Refuge-specific hunting regulations can be more restrictive (but not more liberal) than State regulations and often are more restrictive in order to help meet specific refuge objectives. These objectives include resident wildlife population and habitat objectives, minimizing disturbance impacts to wildlife, maintaining high-quality opportunities for hunting and other wildlife-dependent recreation, eliminating or minimizing conflicts with other public uses and/or refuge management activities, and protecting public safety.

The word ''refuge'' includes the idea of providing a haven of safety for wildlife, and as such, hunting might seem an inconsistent use of the Refuge System. However, again, the Administration Act stipulates that hunting, if found compatible, is a legitimate and priority general public use of a refuge. Furthermore, we manage refuges to support healthy wildlife populations that in many cases produce harvestable surpluses that are a renewable resource. As practiced on refuges, hunting and fishing do not pose a threat to wildlife populations. It is important to note that taking certain individuals through hunting does not necessarily reduce a population overall, as hunting can simply replace other types of mortality. In some cases, however, we use hunting as a management tool with the explicit goal of reducing a population; this is often the case with exotic and/or invasive species that threaten ecosystem stability. Therefore, facilitating hunting opportunities is an important aspect of the Service's roles and responsibilities as outlined in the legislation establishing the Refuge System, and the Service will continue to facilitate these opportunities where compatible with the purpose of the specific refuge and the mission of the Refuge System.

We did not make any changes to the rule as a result of these comments.

Comment (4): We received a comment from the Shoshone-Bannock Tribes expressing concern about public safety, compatibility with nonconsumptive uses, and the cultural value of certain areas to the tribes at Minidoka NWR. The tribes also requested that we list the 1868 Fort Bridger Treaty between the Shoshone-Bannock Tribes and the Federal Government in the background section of our refuge and NEPA planning documents for Minidoka NWR as a source of applicable law.

Our Response: We address the public safety and compatibility with nonconsumptive uses concerns of all commenters as a common topic of interest below, in our responses to Comments *(19)* and *(20),* respectively. As for the tribes' concern about impacts on culturally valuable areas, we understand the concern and note that protection of cultural resources, including religious, sacred, and ceremonial sites, archaeological sites, and traditional use areas, is a priority for Minidoka NWR. Moreover, protection of these resources is mandated under Federal law and policy, including, for example, NEPA, the National Historic Preservation Act (54 U.S.C. 300101 *et seq.*), and the Archaeological Resources Protection Act (16 U.S.C. 470aa *et seq.*). Staff monitors cultural resources and will note any unusual activity or disturbance. Our cultural resource staff will visit the resources and note any changes in condition, taking appropriate action. The cultural resources staff will also be notified of discovery of previously unknown resources and will ensure compliance with all applicable regulations and procedures.

As a result of the tribes' request with respect to the 1868 Fort Bridger Treaty, while we note that the treaty and our obligations under it are discussed in the relevant environmental analysis documents and the elk hunt plan for the Minidoka NWR, we will amend these documents to acknowledge the treaty in the background section and in additional key locations throughout the documents.

Comment (5): We received a comment from the Tohono O'odham Nation concerning coyote hunting, ''trophy hunting,'' impacts on wilderness areas, impacts on the endangered Sonoran pronghorn antelope, and impacts on cultural resource areas at Cabeza Prieta NWR.

Our Response: We respond generally to all commenters who raised predator hunting (including coyote), ''trophy hunting,'' and impact on wilderness concerns at any particular refuge or across the Refuge System, in our responses to Comments *(15), (16),* and *(17),* respectively. As to the effect on Sonoran pronghorn (*Antilocapra americana sonoriensis*) from hunting activities at Cabeza Prieta NWR, we fully assessed all hunts in this rule as part of our environmental analysis processes for the refuge and did not proceed with any hunts that could be expected to have an adverse affect on the pronghorn or any other endangered or threatened species. Furthermore, we have provided mitigation measures to

ensure that the impacts to pronghorn, in particular, are minimized. There is a 0.25-mile (0.4-kilometer) no-shoot/hunting buffer zone around the Sonoran pronghorn captive breeding pen. These no-shoot/hunting zones will protect the endangered Sonoran pronghorn and personnel at the breeding facility. The zone will also minimize the negative effects of hunting-related human activity on captive Sonoran pronghorn. Also, mule deer hunters will be provided with educational materials to prevent accidental take of Sonoran pronghorn.

In recognition of the cultural concerns expressed by the Tohono O'odham Nation, in this final rule, we have reduced the proposed hunting areas by 30,000 acres and rescinded proposed hunting of three specific species of cultural importance to the nation on Cabeza Prieta NWR. We will consult with the Tohono O'odham on how these acres and species may be considered for opening to hunting in the future, without adverse effects to cultural resources on the refuge.

Comment (6): The Hopi Tribe submitted a comment requesting an extension of the public comment period for our April 9, 2020, proposed rule (85 FR 20030), citing the COVID–19 pandemic as a reason for an extension.

Our Response: At Comment *(1)* above, we responded generally to the requests of those who submitted comments requesting an extension of the proposed rule's comment period, including those who specifically based their requests on the circumstances of the current viral pandemic. Our response reflects what we stated in letters to organizations that requested an extension of the comment period by letter separately from the public comment process.

Comment (7): We received comments from 20 State agencies, one regional association of fish and wildlife agencies, and one national association of fish and wildlife agencies either through the public comment on our April 9, 2020, proposed rule (85 FR 20030), the NEPA public comment process at one or more stations, or both. Among these comments, we received generally supportive comments with expressions of interest in continued collaboration from the Texas Parks and Wildlife Department; North Carolina Wildlife Resources Commission; Oklahoma Department of Wildlife Conservation; West Virginia Division of Natural Resources; Washington Department of Fish and Wildlife; Oregon Department of Fish and Wildlife; Nebraska Game and Parks Commission; Pennsylvania Fish and Boat Commission; Missouri Department of Conservation; Wyoming Game and Fish Department; Nevada Department of Conservation and Natural Resources; Kansas Department of Wildlife, Parks & Tourism; and Illinois Department of Natural Resources. We received comments from the Alaska Department of Fish & Game and from the Association of Fish & Wildlife Agencies (AFWA) that were also generally supportive of the rule but objected to the rule's approach to the State of Alaska, in particular the inclusion of a prohibition on certain pack animals at Arctic NWR. The Northeast Association of Fish & Wildlife Agencies expressed concerns about consistency and alignment with State regulations with respect to our regulations on the use of hunting dogs, in addition to expressing support for other parts of the rule. The remaining State agencies expressed support for much of the rule as well, but raised one or more concerns or requests for consideration on the proposed rule: The Georgia Department of Natural Resources requested further alignment of our regulations with State regulations. The South Dakota Department of Game, Fish and Parks submitted two comments;one expressing general support and the other requesting additional consideration for proposed hunts at LaCreek NWR. The Massachusetts Division of Fisheries & Wildlife raised concerns about limitations on certain hunts at stations within the State. The Idaho Department of Fish and Game expressed concerns about the Minidoka and Camas NWRs, indicating they are ''ready to assist'' with the CCP process for Minidoka NWR. The Arizona Department of Fish and Game advocated for further alignment with Arizona's hunting regulations, including on falconry as a method of take. The Florida Fish and Wildlife Conservation Commission expressed concerns about the impacts of off-road vehicle use on Everglades Headwaters NWR.

Our Response: The Service appreciates the support of, and is committed to working with, our State partners to identify additional opportunities for expansion of hunting and sport fishing on Service lands and waters. Our response to the concerns of the State of Alaska and AFWA are fully addressed in this comment summary and response under *Alaska,* below. Our response to the concerns of the Northeast Association of Fish and Wildlife Agencies is detailed at Comment *(24).*

In response to the request by the Georgia Department of Natural Resources, we made a change to the rule that fully aligns hours for alligator hunting with State regulations. In response to the concerns of the South Dakota Department of Game, Fish and Parks, we revised the rule to allow the use of electric trolling motors on Pool #10 and broader hunter access. In response to the concerns of the Massachusetts Division of Fisheries & Wildlife, we are committed to working with the State in future rulemakings as we consider hunting opportunities on stations within the State while also balancing this with due consideration of other recreational uses and biological and environmental factors. In response to the concerns of the Idaho Department of Fish and Game, we will consider their recommendations and plan to consult with them in shaping our proposed rule for 2021–2022. We also welcome their cooperation and assistance in completing a CCP for Minidoka NWR. In response to the concerns of the Arizona Department of Fish and Game, we specifically use the term ''archery,'' as requested, in our regulations for Cibola NWR, and we respond to their, and another commenter's, concerns about falconry at Comment *(23).* We will continue to regularly consult and communicate with the State as requested in the comment. In response to the concerns of the Florida Fish and Wildlife Conservation Commission, we will consider refuge use of off-road vehicles by hunters and anglers and how to balance impacts against other uses at Everglades Headwaters NWR.

Comment (8): Several commenters stated that we are improperly deferring to State wildlife management authority with the proposed hunting and fishing regulation changes.

Our Response: The Service works closely with our State partners in managing hunting and fishing programs on Service lands. We generally allow hunting or fishing of wildlife on refuges and hatcheries consistent with State regulations, including seasons and bag limits. Refuge-specific hunting and fishing regulations can be more restrictive (but not more liberal) than State regulations and often are more restrictive in order to help meet specific refuge objectives. Our authority to do so stems from the Administration Act, as amended, which states that when the Secretary determines that a proposed wildlife-dependent recreational use is a compatible use within a refuge, that activity should be facilitated, subject to such restrictions or regulations as may be necessary, reasonable, and appropriate (16 U.S.C. 668dd(a)(3)(D)). The Administration Act further provides that regulations permitting hunting or fishing of fish and resident

wildlife within the Refuge System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans (16 U.S.C. 668dd(m)). For hatcheries, hunting or fishing programs must be mutually agreed upon and managed with the States (50 CFR 70.1).

We did not make any changes to the rule as a result of these comments.

Comment (9): We received several comments that alleged the proposed rule is, or certain parts of the proposed rule are, a violation of the Service's mandate to ensure that the biological integrity, diversity, and environmental health of the Refuge System are maintained for the benefit of present and future generations of Americans (16 U.S.C 668dd(a)(4)(B)).

Our Response: We do not allow hunting on a refuge if it is found incompatible with that individual refuge's purposes or with the mission of the Refuge System. Part of the mission of the Refuge System is to ensure that the biological integrity, diversity, and environmental health of the Refuge System are maintained for the benefit of present and future generations of Americans (16 U.S.C. 668dd(a)(4)(B)). Therefore, each Service station manager uses his or her ''sound professional judgment'' (see the definition of this term in the Service Manual at 603 FW 2.6.U., available online at *https://www.fws.gov/policy/603fw2.html*) in making these inherently complex management decisions to ensure that each proposed action complies with this mandate. Each manager incorporates field experience, knowledge of refuge resources, considerations of the refuge's role within an ecosystem, applicable laws, and best available science in making these decisions. Service biologists and wildlife professionals, in consultation with the State, determine the optimal number of each game animal that should reside in an ecosystem and then establish hunt parameters (*e.g.,* bag limits, sex ratios) based on those analyses. We carefully consider how a proposed hunt fits with individual refuge goals, objectives, and strategies before allowing the hunt. The new or expanded hunting and/or fishing opportunities in this rule are not expected to individually or collectively result in significant adverse direct, indirect, or cumulative impacts to hunted populations of migratory birds and resident wildlife, nonhunted migratory and resident wildlife, endangered and threatened species, habitat and plant resources, or other natural resources. We analyzed these impacts not only in each refuge's NEPA document, but also in the 2020–2021 cumulative impacts report.

We did not make any changes to the rule as a direct result of these comments, but changes that we made for other reasons may reduce the potential for even minimal biological and environmental impacts.

Comment (10): We received several comments expressing concern that specific stations amended either their compatibility determinations (CDs) or CCPs without sufficient explanation in order to open or expand hunting or fishing opportunities on a refuge.

Our Response: Based on these comments, we have reviewed our CDs and CCPs in connection with all opening and expansions in this rule, and, as a result, for each opening or expansion we have either modified the relevant regulations or determined that no changes were necessary. Both the Administration Act (16 U.S.C. 668dd(e)) and ANILCA anticipate that revisions may need to be made to CCPs from ''time to time'' based on new information. Service policy allows minor revisions to CCP objectives and strategies as long as they do not significantly change the management direction of the refuge (603 FW 2). A refuge manager always may reevaluate the compatibility of a use at any time, but must review a CD every 15 years for wildlife-dependent recreational opportunities (603 FW 2.11.H.(1)). When making revisions to a CCP or CD we must document the reasons for the change, make the revised CCP publicly available or put forward the CD for public comment, and comply with NEPA and the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*), as amended, for any resulting changes in management actions taken by the Service. In the case of this rule, we took the additional step of inviting public comment on even minor changes to CCPs.

We did make one regulatory change to the rule based on these comments. Specifically, in the regulations governing Quivira NWR in Kansas, we expressly added a requirement for a State-issued permit for the take of furbearers to clarify consistency with the refuge's CCP and with the Kansas Department of Wildlife, Parks and Tourism.

For any nonregulatory changes based on these comments, such as clarification in environmental analysis documents, please see the specific station's response to comments, available online here: *https://www.fws.gov/refuges/hunting/rules-regulations-and-improved-access/.*

Comment (11): We received several comments concerned with the direct, indirect, and cumulative impacts of the April 9, 2020, proposed rule on migratory birds, particularly as related to the requirements of the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703–712), the Service's February 3, 2020, proposed rule defining the scope of the MBTA (85 FR 5915), and that proposed rule's associated draft environmental impact statement (EIS). A few of these commenters were particularly concerned about those refuges whose purposes include ''inviolate sanctuaries for migratory birds'' or that have been designated as Important Bird Areas (IBAs) by the Audubon Society.

Our Response: All of the migratory bird hunting opportunities in the Service are done within the frameworks set by the Service in compliance with the MBTA. These frameworks set season lengths, bag limits, and areas for migratory game bird hunting and ensure that hunting will not have adverse impacts on the populations of the various species of migratory birds through rigorous biological monitoring, information collection, and data review. To determine the appropriate frameworks for each species, the Service considers factors such as population size and trend, geographical distribution, annual breeding effort, the condition of breeding and wintering habitat, the number of hunters, and the anticipated harvest. After frameworks are established for season lengths, bag limits, and areas for migratory game bird hunting, States may select season dates, bag limits, and other regulatory options for the hunting seasons. States may always be more conservative in their selections than the Federal frameworks, but never more liberal. For more information on this process, see the 2020–2021 cumulative impacts report on *http://www.regulations.gov* under Docket No. FWS–HQ–NWRS–2020–0013.

Although it does not directly affect migratory bird hunting, the Service is developing a rulemaking that limits the scope of the Migratory Bird Treaty Act (MBTA) to actions directed at migratory birds, thus excluding incidental take as a violation of the MBTA. The draft EIS associated with this proposed rule analyzed the impacts of incidental take on migratory bird populations at a continental scale and found that the preferred alternative, to promulgate regulations that define the scope of the MBTA to exclude incidental take, would likely lead to an increase in incidental take over time, without specifying what bird taxa may be the most affected or where. Consistent with this draft EIS, the Service anticipates that the proposed MBTA rule will have

minor impacts to migratory game birds that occur on NWRs. If the proposed rule defining the scope of the MBTA becomes final and impacts to migratory game birds occur as a result, we anticipate any impacts that might occur as a result of that proposed rule will be detected through the system of population monitoring and modeling cooperatively maintained by the Flyways. Any such impacts would then be addressed by adapting, as needed, migratory game bird management to meet obligations under the MBTA.

The expansion of hunting of migratory game birds on NWRs indicate that the proposed harvests, or intentional take, of each species will constitute a negligible component of both national and flyway harvest. Migratory game bird hunting regulations are established within the above discussed frameworks compliant with NEPA to ensure that adverse impacts will not accumulate over time; thus, the proposed harvest will have a negligible impact on migratory bird resources within NWRs.

In addition to all hunting for migratory game birds being set within this national framework, each station must also ensure that the hunting or fishing opportunity is compatible, or in the case of NFHs not detrimental, to the purpose of that station, and comply with applicable provisions of NEPA, the ESA, and other applicable laws and policy before opening or expanding migratory bird game hunting. This thorough process ensures that the Service has analyzed the potential impacts of the proposed hunting or fishing opportunity and determined that the opportunity would not have a significant impact on any migratory bird species, not just the targeted species.

Where inviolate sanctuaries occur on NWRs, all uses must be evaluated for appropriateness and, if necessary, compatibility. The language within the Administration Act only applies to those lands with the designation of inviolate sanctuary for migratory birds. With this in mind, other uses (*e.g.,* big game hunting, hiking, auto tours, etc.) can be allowed as long as they are compatible. When determining compatibility, the Service must consider the high bar that the inviolate sanctuary designation established.

In addition, refuges with this designation will have to evaluate the influence of uses occurring or potentially occurring on other portions of the refuge and how they may affect the inviolate sanctuaries. Although this designation sets a higher level of consideration, it is clear that Congress intended for these areas to be considered for use when compatible. In the case of IBA designations from the Audubon Society, while several refuges in the rule do have these IBA designations, these designations do not place any additional legal restrictions related to migratory birds on management of these refuges. As discussed previously, each station goes through several different processes, including compatibility determinations, NEPA compliance, and ESA compliance to ensure that the hunting and fishing opportunities proposed would have no significant impacts on populations of migratory birds in compliance with the Service's mandates under the MBTA, Administration Act, or other applicable laws and policies.

We did not make any changes to the rule as a result of these comments.

Comment (12): We received several comments arguing that we should have prepared an environmental impact statement (EIS) instead of station-specific environmental analyses combined with a national cumulative impact report. Some of these comments also argued that specific stations should have prepared an EIS where we prepared an environmental assessment (EA) or an EA where we prepared a categorical exclusion.

Our Response: The Service disagrees with the assertion that we should prepare an EIS before proposing expanded hunting and fishing opportunities on refuges or hatcheries. We completed individual EAs for, or applied categorical exclusions to, 147 refuges and hatcheries, in compliance with NEPA, to evaluate the impacts of opening or expanding hunting and fishing opportunities on the stations through this rulemaking. These EAs and categorical exclusions underwent regional and national review to address and consider these actions from a local, regional, multi-State, and/or flyway perspective, and to consider the cumulative impacts from this larger geographical context. The 2020–2021 cumulative impacts report concludes, after analyzing the impacts, collectively, of all EAs and categorical exclusions prepared in connection with this rule, that the rule would not have significant impacts at the local, regional, or national level. The commenters who have raised these environmental analysis concerns have provided no additional information that would change this analysis or our conclusion. As discussed above, we annually conduct management activities on refuges and hatcheries that minimize or offset impacts of hunting and fishing on physical and cultural resources, including establishing designated areas for hunting; restricting levels of use; confining access and travel to designated locations; providing education programs and materials for hunters, anglers, and other users; and conducting law enforcement activities.

In this rulemaking, the Service is expanding opportunities for recreational hunting and fishing. Expanding opportunities does not necessarily result in increased impacts to refuge resources. We anticipate that for some refuges, these expansions will not result in changes in usage of the refuge. In other cases, these expansions may lead to some increase in use of refuges, but these changes would likely by minor. Opening of new refuges may attract people to the refuge, but these hunters and/or anglers were likely already participating elsewhere on State or other Federal lands. Overall, considering the decreasing trends in hunting and fishing generally, and decreasing trends of these activities on refuges specifically, we do not expect this final rule to have a significant impact on the environment. As noted in our cumulative impacts report, hunter participation trends have been generally declining, some refuges attract a very small number of participants, and often participation rates decline over the course of a season.

Finally, a Federal court found that this approach, using a bottom-up analysis to assess the cumulative impact of increased hunting and fishing across the entire Refuge System, was an appropriate way for the Service to analyze the impacts of the rule in compliance with NEPA (see *Fund for Animals* v. *Hall,* 777 F. Supp. 2d 92, 105 (D.D.C. 2011)).

In response to comments, we reviewed all EAs and categorical exclusions. The Service disagrees with the assertion that, for any of the stations in this rule, we should have prepared an EIS instead of an EA or an EA instead of a categorical exclusion. We did, however, determine that the use of a categorical exclusion to expand existing migratory bird and upland game hunting at Alamosa and Monte Vista NWRs may require additional consideration. While this does not result in any changes to the rule that are codified in the Code of Federal Regulations, the proposed expansions of 1,079 acres at Alamosa NWR and 472 acres at Monte Vista NWR for migratory bird and upland game hunting will not be adopted.

We did not make any changes to the rule as result of these comments.

Comment (13): Many commenters expressed concern over the use of lead ammunition and/or lead fishing tackle on refuges and hatcheries. Some

individual commenters objected to these potential sources of lead at a particular refuge or hatchery, and multiple organizations were concerned about lead nationwide and referred us to scientific literature on the subject.

Our Response: The Service shares the commenters' concerns regarding the bioavailability of lead in the environment. See, *e.g.,* Nancy Golden, et al., ''A Review and Assessment of Spent Lead Ammunition and Its Exposure and Effects to Scavenging Birds in the United States,'' which is available online at *https://www.fws.gov/midwest/refuges/Review%20and%20Assessment%20paper.pdf.* Historically, the principal cause of lead poisoning in waterfowl was the collection of high densities of lead shot in wetland sediments associated with migratory bird hunting activities (Kendall et al. 1996). In 1991, as a result of high bird mortality, the Service instituted a nationwide ban on the use of lead shot for hunting waterfowl and coots (50 CFR 32.2(k)). The Service requires any new shot types for waterfowl and coot hunting to undergo rigorous testing in a three-tier approval process that involves an ecological risk assessment and an evaluation of the candidate shot's physical and chemical characteristics, short- and long-term impacts on reproduction in waterbirds, and potential toxic impacts on invertebrates (50 CFR 20.134). Because of this rigorous testing, the shot toxicity issue of the past is now substantially less of an ecological concern.

However, there remains a concern about the bioavailability of spent lead ammunition (bullets) and sinkers on the environment, endangered and threatened species, birds, mammals, humans, and other fish and wildlife susceptible to biomagnification. For example, as one commenter noted, ''The impacts of lost lead tackle can be significant; for example, ingested lead fishing tackle is the leading cause of mortality in adult common loons'' (Grade, T. et al., 2017, in Population-level effects of lead fishing tackle on common loons. The Journal of Wildlife Management 82(1): 155–164.) The impacts of lead on human health and safety have been a focus of several scientific studies. As related to hunting and fishing, studies have found the ingestion of animals harvested via the use of lead ammunition increased levels of lead in the human body (*e.g.,* Buenz, E. (2016). Lead exposure through eating wild game. American Journal of Medicine, 128: 458.).

We share the commenters' concerns about the adverse impacts of lead. We have reviewed the literature provided during the public comment period and have updated our station-specific analyses, as well as the national cumulative impact report as appropriate.

Although there is not a Service-wide ban on lead ammunition for non-migratory bird hunting activities or on lead sport fishing tackle, the Service has taken specific steps to limit the use of lead in hunting and fishing activities on refuges and hatcheries. Notably, we continue, in these annual rulemakings updating the regulations for hunting and sport-fishing on NWRs and NFHs, to phase out the use of lead on Service lands. On several refuges and hatcheries, the Service does prohibit the use of lead tackle or ammunition; since 2015, not counting this rule, 122 refuges and wetland management districts have implemented restrictions on the use of lead ammunition and lead sport fishing tackle for upland game, migratory bird, or sport fishing harvest activities. In this rule, Stillwater NWR prohibits the use of lead shot for hunting upland game; 21 other stations only allow nontoxic shot for upland, big game, and/or turkey hunting; and 10 refuges and hatcheries limit the use of lead tackle in sport fishing. Three of these stations have both a hunting and a fishing lead restriction, so there are 29 total stations with lead restrictions in this rule.

The Service continues to educate hunters and anglers on the impacts of lead on the environment, and particularly on human health and safety concerns of ingesting animals harvested with lead ammunition. We always encourage hunters and fishers to voluntarily use nontoxic ammunition and tackle for all harvest activities. Lead alternatives to both ammunition and tackle are becoming more widely available and used by hunters and anglers; however, they remain more expensive.

The Service believes it is important to encourage refuge-State partnerships to reach decisions on lead usage. We continue to research this issue and engage with States and other partners to promote the use of non-lead ammunition and tackle. We share a strong partnership with the States in managing wildlife, and, therefore, we are proceeding with the phase-out of toxic ammunition in a coordinated manner with each respective State wildlife agency. For example, in California, the use of lead ammunition is prohibited Statewide including on all Service lands, largely in response to the adverse impacts of lead on the endangered California condor (*Gymnogyps californianus*).

At those stations where the Service is continuing to allow lead ammunition and tackle in order to be consistent with the States, the number of new hunters or anglers expected to use lead bullets or lead tackle as a result of the new or expanded opportunities is anticipated to be very low, so the resulting addition of lead into the environment should be negligible or minor. Where lead ammunition or tackle is still allowed (although discouraged) on Service lands, the addition of lead and the associated impacts to the environment are negligible when compared to the lead in the environment as a result from other fishing, hunting, or other activities in the local, regional, and national area.

We disagree with the assertion of some commenters that any use of lead shot in connection with opening and expanding hunting and fishing on the refuges and fish hatcheries in this rulemaking will harm endangered or threatened species. Each refuge and hatchery carefully evaluated possible impacts on endangered and threatened species as part of the NEPA process. As discussed above, on refuges, where lead ammunition or tackle is allowed, we found that the low number of hunters and anglers using lead ammunition or tackle would result in no more than a negligible increase of lead in the environment when compared to the lead ammunition and tackle being used in the surrounding areas. In addition, every refuge and hatchery looked at the impacts of these new or expanded hunting and fishing opportunities, including the allowance or prohibition of lead, on endangered and threatened species in compliance with requirements under section 7 of the ESA. The ESA requires Federal agencies to ensure that the actions they carry out, fund, or authorize do not jeopardize the continued existence of endangered or threatened species (listed species). For each refuge, the Service determined that the proposed action was not likely to adversely affect any listed species. We have reviewed commenters' concerns regarding insufficient analyses on the impact of lead in certain station-specific NEPA documents, and we have clarified or added additional analyses where appropriate.

We have also updated the 2020–2021 cumulative impacts report to clarify and discuss additional information on the impacts of lead brought to our attention through the public comment period. While we will continue to phase out the use of lead ammunition and tackle on Service lands in cooperation with our State partners, we did not make any changes to the rule as a direct result of these comments. We have, however,

added new prohibitions for use of toxic shot for multiple hunts at Coldwater River, Patoka River, Ottawa, and Horicon NWRs in this rule. Therefore, this rule contains a total of 33 lead-limiting hunting and fishing provisions at 29 stations.

Comment (14): We received several comments that claimed the Service had not adequately addressed the cumulative impacts to endangered and threatened species. Some of these comments pointed to one or more particular species.

Our Response: In compliance with section 7 of the ESA, every station determined that their proposed actions would have either ''no effect'' or were ''not likely to adversely affect'' endangered and threatened species or designated critical habitat. Because endangered and threatened species are usually highly localized, minor or negligible impacts on an endangered or threatened species at a local or even regional scale would likely have no cumulative impact on national populations of those species.

While there may be some minor, localized, and temporary (short-term) impacts to endangered and threatened species as a result of hunting or fishing activities, every station ensured that these impacts were minimized and, in many cases, offset them through a variety of management activities. For example, one commenter expressed concerns over the cumulative impact to the endangered northern aplomado falcon (*Falco femoralis septentrionalis*) at Lower Rio Grande Valley NWR and Laguna Atacosta NWR. The majority of hunts at these refuges are not taking place during the nesting season and are not occurring in areas utilized by aplomado falcons. Hunts are occurring in association with brush habitats and not within the coastal prairie habitats utilized by the aplomado falcon. Over the course of nearly three decades, no adverse effects to aplomado falcons from the conduct of the hunts on refuges in south Texas or elsewhere has ever been documented.

We did not make any changes to the rule as a result of these comments.

Comment (15): We received many comments expressing concern about opening and expanding opportunities for hunting of predator species. Several of these comments objected to all proposed hunting of a predator species on a Service station and named all such stations. Some commenters alleged that we did not give enough consideration to the impacts of those proposed hunts, and that the hunts conflicted with the Service's mandates under the Administration Act to maintain the biological integrity, diversity, and environmental health of the refuge. Some commenters were also concerned that the cumulative impacts report was not sufficient in its analysis of furbearer species specifically.

Our Response: Refuge managers consider predator management decisions on a case-by-case basis. As with all species, a refuge manager makes a decision about managing predator populations, which are included in the category of resident wildlife, including allowing predatory species to be hunted, only after careful examination to ensure the action would comply with relevant laws, policies, and directives. The Administration Act, as amended, directs the Service to manage refuges for ''biological integrity, diversity, and environmental health.'' Predators play a critical role in the integrity, diversity, and overall health of ecosystems, so before allowing predators to be hunted, a refuge manager must ensure that these actions do not threaten the integrity, diversity, or health of the refuge ecosystem. The manager must also determine that the action is compatible with refuge purposes and the mission of the Refuge System, and in keeping with the refuge's CCP and other step-down plans. In addition, the refuge manager analyzes the impacts of the actions on the environment through the NEPA process and section 7 of the ESA. Therefore, a refuge manager must take many steps to ensure that any opportunity for hunting predators on a refuge meets the Service's applicable laws and policies.

The Administration Act, as amended, also mandates that regulations permitting hunting or fishing of fish and resident wildlife within the Refuge System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans (16 U.S.C. 668dd(m)). Therefore, all the opportunities for hunting predators in this rule that are intended to bring greater consistency with State fish and wildlife laws, regulations, and management plans are part of realizing the Service's mission. Moreover, these, as with all predator hunting determinations and all hunting and fishing determinations, were only made after careful consideration by the refuge manager to ensure that such actions would not threaten the integrity, diversity, and overall health of the ecosystem and were compatible with both the purpose of the refuge and the mission of the Refuge System. For NFHs, the hatchery manager made the decision that such opportunities were not detrimental to the propagation of fish, wildlife, or aquatic species (50 CFR 70.1). Finally, both the NEPA process and the rulemaking process provide the opportunity for the public to provide comments and any additional information on impacts of our actions. We considered the additional information provided from the public on this issue during these public comment periods and determined that they did not affect our initial determinations that these small and minor opportunities for hunting predators on specific refuges or hatcheries will have no more than minor impacts on the population health of these species or other wildlife at the local, regional, or national level.

To clarify, our determination of the rule's impact on furbearers, like many other resident wildlife species in this rule, is not based on bag limits, but rather on the limited number of hunters that we expect to pursue these opportunities as a result of the rule. Hunting for furbearers (including some predators) on refuges is often limited by season date ranges and hours of day. In other cases, the terrain and habitat of the refuge or hatchery are not conducive to these types of hunting opportunities. Therefore, it is our determination that this rule, while bringing greater alignment with State hunting regulations, will not result in significant impacts to predator or furbearer species. We have updated the 2020–2021 cumulative impacts report to clarify these points of public concern.

We did not make any changes to the rule as a result of these comments.

Comment (16): We also received various comments expressing the sentiment that ''trophy hunting,'' trapping, baiting, and hounding of predators are ''unsportsmanlike'' activities and inappropriate uses on Service lands.

Our Response: The Service does not attempt to define or authorize ''trophy hunting'' in any of our laws, regulations, or policies concerning hunting. We follow State hunting and fishing regulations (except for where we determine it is necessary to be more restrictive on individual stations), including State regulations concerning responsible hunting, or prohibitions on wanton waste (defined as ''to intentionally waste something negligently or inappropriately''). We only allow hunting on refuges and hatcheries when we have determined that the opportunity is sustainable and compatible.

The use of dogs for hounding is prohibited on refuges by 50 CFR 26.21(b) unless authorized by station-specific regulations, and many refuges

only authorize the use of dogs for retrieval of migratory birds, upland game birds, and small game. Most refuges that allow dogs require the dogs to be under the immediate control of the hunter at all times, or leashed unless actively retrieving an animal. There are also some hatcheries that allow hounding. All of them do so in order to provide complete consistency with State regulations in the interest of effective law enforcement, as the hatcheries that allow this activity are small and are only providing access on their land for hounding because they are surrounded by State land that allows this practice. In cases where there may be concerns with use of dogs impacting the management and purpose of the hatchery, those hatcheries have also been closed to hounding.

In States where baiting is allowed, some refuges have elected to be more restrictive and not support this method of hunting. In cases where hatcheries have allowed this activity, they do not expect the hunting activity for species such as bear will occur, and thus no baiting would occur on the hatchery. Some hatcheries allow this use to be in complete consistency with State regulations for law enforcement reasons.

Trapping is not a valid method of take as part of hunting programs in the Refuge System. Under the Improvement Act, trapping is not considered a priority wildlife-dependent recreational use of the Refuge System. Trapping on refuges is generally only implemented to accomplish specific wildlife management objectives. These objectives vary between refuges and are often an essential tool in meeting refuge management objectives (*e.g.,* trapping of predators may be necessary to accomplish waterfowl production objectives or to protect an endangered species).

We did not make any changes to the rule as a result of these comments.

Comment (17): Several commenters raised the issue of the impact of the rule on wilderness, particularly as defined by the 1964 Wilderness Act (16 U.S.C. 1131–1136). Some of these comments focused on wilderness concerns at specific refuges, including Cabeza Prieta NWR in Arizona.

Our Response: Hunting and fishing are generally compatible wildlife-dependent recreational activities allowed in many wilderness areas managed by both the Service and other land management agencies, such as the Bureau of Land Management and the National Park Service. However, in order to be compatible with wilderness purpose and values, hunting and fishing activites within wilderness areas are subject to certain limitations, including foot or nonmotorized watercraft access only, primitive weapons only, and in some cases special use permit requirements that ensure wilderness values are protected. Because hunting and fishing in wilderness is not easily accessible and has many restrictions, we anticipate the number of hunters or anglers in wilderness to be very low, and we determined there will be no significant impacts to wilderness areas or wilderness values from this rule. For example, the wilderness area at Cabeza Prieta NWR is fairly accessible to visitors due to the unique non-wilderness road corridors along El Camino del Diablo and Christmas Pass Road. Yet, due to the rugged terrain and extreme weather conditions, the Service does not anticipate hunters traveling more than 5 miles from these roads. Therefore, increased hunting opportunities will potentially affect a maximum of 19 percent of the 860,000-acre refuge. Hunting will be limited to foot access only to ensure wilderness values are protected. We anticipate the number of hunters will be low, and there will be negligible increase in impacts to the refuge's wilderness area.

We did not make any changes to the rule as a result of these comments.

Comment (18): A couple commenters had questions about permitting for hunting and fishing at certain refuges.

Our Response: First, the best source for answers to detailed questions on permitting at a given refuge is still the refuge website, brochures, station signage, and/or station staff. Second, these inquiries may have been prompted by the fact that in this rule we made a significant number of regulatory changes related to permits, many of them specifying the particular Federal form required. The forms that the Service uses to issue permits must be approved by the Office of Management and Budget (OMB) and assigned an OMB control number. Therefore, the rule ensures that our regulations list the approved form number of the permit, which displays a valid OMB control number, that is required at the station. These clarifying changes to our regulations should benefit all hunters and anglers who visit the refuges and hatcheries. Each station has further instructions on the permit process at that station's office, listed in the station's hunting or fishing brochure, and/or on various signs and placards located around the station.

Comment (19): We received many comments that expressed concern over some aspect of public safety. Commenters raised concerns about openings or expansions of hunting at several stations based on the potential for trespassing, the location of refuges in crowded areas, potential conflicts with other visitors to the refuge, or the need for adequate funding and/or staffing. In particular, the most common specific concern was that the increase in openings and expansions of hunting and sport fishing would overwhelm existing law enforcement capacity. These concerns were expressed for multiple specific stations and as a nationwide issue, but we received the most comments about public safety concerns both nationally and locally around hunting at Sachuest Point NWR.

Our Response: The Service considers public safety to be a top priority. In order to open or expand hunting or sport fishing on a refuge, we must find the activity compatible. In order to find an activity compatible, the activity must not ''materially interfere or detract from'' public safety, wildlife resources, or the purpose of the refuge (see the Service Manual at 603 FW 2.6.B., available online at *https://www.fws.gov/policy/603fw2.html*). For this rulemaking, we specifically analyzed the possible impacts of the changes to hunting programs at each refuge and hatchery on visitor use and experience, including public safety concerns and possible conflicts between user groups.

Hunting of resident wildlife on refuges generally occurs consistent with State regulations, which are designed to protect public safety. Refuges may also develop refuge-specific hunting regulations that are more restrictive than State regulations in order to help meet specific refuge objectives, including protecting public safety. Refuges use many techniques to ensure the safety of hunters and visitors, such as requiring hunters to wear blaze orange, controlling the density of hunters, limiting where firearms can be discharged (*e.g.,* not across roads, away from buildings), and using time and space zoning to limit conflicts between hunters and other visitors. It is worth noting that injuries and deaths related to hunting are extremely rare, both for hunters themselves and for the nonhunting public.

However, public comment is important in making sure we have considered all available information and concerns before making a final decision on a proposed opening or expansion. For Sachuest Point NWR, the Service proposed a non-annual, short-duration, limited (maximum 8 hunters), mentored firearms hunt for white-tailed deer, with the chance to opportunistically hunt coyote or fox while deer hunting. Opposition to the proposal was widespread, including from the

municipality, State representatives, and the State's congressional delegation. The refuge received over 600 comments on the proposed hunt at the refuge, and 97 percent of those commenters were opposed to the plan, with particular concerns about public safety and impacts to recently restored marshland. For these reasons, the hunt unit area is being decreased from 223 acres to 150 acres to exclude areas near town beaches and the salt marsh, and the allowed method of take is changed from firearms to archery only. For Bosque del Apache NWR, we are not adopting the proposed hunting of dark goose, American coot, common moorhen, common snipe, duck, and merganser in order to ensure no negative impacts to public safety or to important habitat on the refuge. This means we are removing 663 acres for migratory bird hunting on Bosque del Apache NWR from what we proposed on April 9, 2020 (85 FR 20030). This final rule also incorporates changes from the proposed rule to the designated areas where hunting can occur for public safety reasons at three other refuges that are not codified in the Code of Federal Regulations but that will be reflected on the refuges' websites, in their brochures, and on their signage. Specifically, from the designated hunting areas we proposed on April 9, 2020 (85 FR 20030): (1) We removed 16 acres from the designated hunting area for John H. Chafee NWR in response to public safety concerns, including a comment from local law enforcement; (2) we removed 16 acres from the designated hunting area for Ottawa NWR in order to reduce the risk of trespassing through adjacent lands in the interest of public safety; and (3) we removed 80 acres from the designated hunting area for LaCreek NWR in order to reduce the risk of trespassing on adjacent lands in the interest of public safety.

For the rest of the proposed openings or expansions of hunting in our April 9, 2020, proposed rule (85 FR 20030), we have determined that there are sufficient protections in place as part of the hunt program at that station to ensure public safety. For more information on the Service's efforts to ensure public safety at a particular station, please see that station's hunt plan, compatibility determination, and associated NEPA analysis.

Regarding concerns about lack of funding or staffing, Service policy (603 FW 2.12.A.(7)) requires station managers to determine that adequate resources (including personnel, which in turn includes law enforcement) exist or can be provided by the Service or a partner to properly develop, operate, and maintain the use in a way that will not materially interfere with or detract from fulfillment of the refuge purpose(s) and the Service's mission. If resources are lacking for establishment or continuation of wildlife-dependent recreational uses, the refuge manager will make reasonable efforts to obtain additional resources or outside assistance from States, other public agencies, local communities, and/or private and nonprofit groups before determining that the use is not compatible. When Service law enforcement resources are lacking, we are often able to rely upon State fish and game law-enforcement capacity to assist in enforcement of hunting and fishing regulations. For all 147 stations opening or expanding hunting and/or sport fishing in this rule, we have determined that we have adequate resources, including law enforcement personnel, to develop, operate, and maintain the proposed hunt programs.

We did not make any additional changes (other than those described in this response) to the rule as a result of these comments.

Comment (20): Many commenters stated and even put forward statistics on the fact that the majority of Americans do not hunt. Most of these commenters were also of the opinion that allowing hunting would impede ''non-consumptive'' uses of refuges, including photography and wildlife viewing. A few of these commenters mentioned our obligation to manage the refuges in the interest of multiple uses, particularly those listed in the Administration Act.

Our Response: Congress, through the Administration Act, as amended, envisioned that hunting, fishing, wildlife observation and photography, and environmental education and interpretation would all be treated as priority public uses of the Refuge System. Therefore, the Service facilitates all of these uses on refuges, as long as they are found compatible with the purposes of the specific refuge and the mission of the Refuge System. For this rulemaking, we specifically analyzed the possible impacts of the changes to hunting programs at each refuge and hatchery on visitor use and experience, including public safety concerns and possible conflicts between user groups.

The refuges and hatcheries in this rulemaking use a variety of techniques to reduce user conflict, such as specific hunt seasons, limited hunting hours, restricting which parts of the station are open to hunting, and restricting the number of hunters. Station managers also use public outreach tools, such as signs and brochures, to make users aware of hunting and their options for minimizing conflict. Most stations have station-specific regulations to improve the quality of the hunting experience as well as provide for quality wildlife-dependent experiences for other users. The Service is aware of several studies showing a correlation between increased hunting and decreased wildlife sightings, which underscores the importance of using the aforementioned techniques, particularly time and space zoning of hunting, to ensure a quality experience for all refuge and hatchery visitors. More information on how a specific station facilitates various wildlife-dependent recreation opportunities can be found in the station's CCP, hunt plan, and/or station-specific associated NEPA document. The public may contact the specific refuge or hatchery for any of these materials, and the NEPA documents associated with this rule are available here for all stations: *https://www.fws.gov/refuges/hunting/rules-regulations-and-improved-access/*.

In response to public comments, this rule incorporates changes to Bosque del Apache NWR's refuge-specific hunting regulations to help address impacts on other wildlife-dependent recreation users and partners working on the refuge, as well as possible impacts to habitat on the refuge. In addition, we have made modifications to the designated hunting area, in order to reduce risk of conflict with other priority public uses, at Lee Metcalf NWR that are not codified in the Code of Federal Regulations but that will be reflected on the refuge's website, in its brochures, and on its signage. Specifically, from the designated hunting area we proposed on April 9, 2020 (85 FR 20030), we removed 1,463 acres at Lee Metcalf NWR in the interest of balancing priority public uses.

Comment (21): One comment centered on the impact of muzzleloaders (firearms loaded through the open end of the barrel, as opposed to modern breech-loaded firearms) on wildlife and public health and safety for a long list of refuges. A few of the refuges named do not allow muzzleloader firearms, with this rule or otherwise, but the majority of those listed do under this rule.

Our Response: We have determined that the allowance of muzzleloader rifles as a method of take at these refuges is compatible with the purposes of those refuges and the mission of the Refuge System. We have also determined that allowing this method of take will have negligible impacts on wildlife and public safety for the following reasons:

(a) Numbers of hunters using muzzleloaders on the specific refuges named in the comment and on Service lands in general are expected to remain low. The 2016 National Survey of Hunting and Fishing reported that only 12 percent of all hunters reported using muzzleloaders.

(b) Noise produced by muzzleloading and modern rifles and shotguns of the same caliber and barrel length are similar in decibel range (approximately 150–160 dB for shotguns). However, the noise produced by these weapons has quite different characteristics. Black powder used in muzzleloaders makes a much lower frequency noise of longer duration. Smokeless cartridges used in modern firearms have a faster burn, which gives a much higher pitched noise that is much shorter. The high-pitched crack of modern firearms is more damaging to hearing, and likely more disturbing to wildlife than the lower-pitched sound of black-powder weapons.

(c) Muzzleloading weapons have a shorter effective range and require a closer approach to game than when using modern firearms. In addition, the long reloading time of muzzleloaders (approximately 30 seconds) means that hunters typically wait for better opportunities, and fewer shots are fired.

(d) Muzzleloaders use a variety of propellants, including black powder, a mixture of potassium nitrate, charcoal, and sulfur. Black powder does produce relatively large quantities of smoke when fired. If combustion of black powder is complete, smoke would contain primarily nitrogen and carbon dioxide. However, since combustion is incomplete, black powder combustion produces hydrogen sulfide, sulfur oxides, carbon monoxide, and nitrogen oxides. (See Del'Aria, Cynthia and Opperman, David A. 2017. ''Pyrotechnics in the Entertainment Industry: An Overview.'' pp. 791–802 In: Sataloff, Robert T. (ed) 2017. Professional Voice, Fourth Edition: The Science and Art of Clinical Care (3 vol). Plural Publishing.) These compounds are toxic if breathed in high concentrations; however, in field conditions encountered when hunting, black powder smoke disperses rapidly. Total amounts produced as a result of hunting activity would be negligible, and therefore effects to wildlife would also be negligible.

(e) Muzzleloaders do take significantly more knowledge to operate than modern firearms, and involve greater risk. However, a political and social research firearm injury surveillance study, which accumulated data from 1993 to 2008, reported that firearm-related incidents (all firearms) occurred in only 9 out of every 1 million hunting days. (See Loder, Randall T. and Farren, Neil. 2014. ''Injuries from firearms in hunting activities.'' Injury: International Journal of the Care of the Injured 45(8): 1207–1214. Online at: *https://doi.org/10.1016/j.injury.2014.04.043*.) In 2017, there were over 17 million hunters with firearms according to the National Sporting Goods Association (NSGA), and only 35 injuries occurred per 100,000 participants, of which a vast majority were not serious injuries. (See Target Tamers. 2020. ''Hunting Accident Statistics: Fatalities, Injuries, and Tree Stand Accidents.'' Online at: *https://www.targettamers.com/guides/hunting-accident-statistics/#_ftn24*.) Thus, while hunting with any type of firearm involves risk, overall it is an extremely safe activity.

We did not make any changes to the rule as a result of this comment.

Comment (22): We received one comment stating there was no mention of ''catch and release'' in the proposed rule and asking us to ''advocate for'' this method of fishing in the interest of maintaining fish populations.

Our Response: We agree with the commenter that catch-and-release restrictions can be a good way to both allow fishing and ensure population health of the targeted species. We do have catch-and-release restrictions on many of our stations. For example, we have three stations (Assabet River NWR, Cherry Valley NWR, and Wallkill River NWR) in this rule that retain their regulations allowing only catch-and-release fishing. Where catch-and-release is not required, it usually means that, consistent with the State, the fishery populations are healthy enough to sustain some take or that the targeted species are nonnative.

Comment (23): Two comments, one of them referencing the other, advocate for falconry as an approved method of take in alignment with State regulations, specifically in the State of Arizona.

Our Response: We allow hunting of resident wildlife on NWRs only if such activity has been determined compatible with the established purpose(s) of the refuge and the mission of the Refuge System as required by the Administration Act. Service policy, as outlined in our Service manual at 605 FW 2.7.M. (Special Hunts), stipulates, ''We will address special types of hunts, such as falconry, in the hunt section of the visitor service plan (VSP).'' In other words, each refuge manager, when developing their step-down VSP (which would include a hunt plan, if appropriate) from their CCP, must first determine if hunting is compatible. Assuming it is found to be compatible, the refuge manager would next determine the conduct of the hunt, which might include the use of falconry. A refuge manager has discretion to restrict hunting and types of hunting, including falconry, if, for example, endangered or threatened species are present, the cumulative impacts of a type of hunt have not been analyzed or are not available, or if a type of special hunt is not compatible with the refuge purpose. Thus, this issue is decided individually on a refuge-by-refuge basis. The Service remains committed to opening hunting methods, including falconry and especially those methods allowed by State regulations, whenever it is possible to do so at a given refuge in a manner consistent with all purposes and objectives of the refuge, in the professional judgment of the refuge manager.

We did not make any changes to the rule as a result of these comments.

Comment (24): One commenter requested that we change our regulations on the use of dogs for hunting to be more consistent Service-wide and to align them with State regulations.

Our Response: Even though State regulations may allow dogs during hunting activities, our general refuge regulations prohibit all domesticated animals at 50 CFR 26.21(b) unless authorized by refuge-specific regulations. While refuges adopt State hunting and fishing regulations to the extent practicable, they must also comply with the general refuge regulations. Therefore, in order to allow dogs during hunting activities, each refuge must authorize the use of dogs during hunting activities in their refuge-specific entries at 50 CFR part 32. As explained above, all uses on refuges must be found compatible and must not conflict with refuge objectives. Some refuges have found that the use of dogs during hunting activities must be limited or not authorized in order to avoid conflict with refuge objectives. Where we do allow the use of dogs while hunting, we attempt to have consistency with regulations between refuges, especially within States and geographic regions.

As an example of such efforts, the Northeast Region, based on conversations and cooperation with Northeast Association of Fish & Wildlife Agencies leadership, evaluated its current practices and ultimately proposed in our April 9, 2020, proposed rule (85 FR 20030) to allow some use of dogs while hunting to increase consistency. Nearly all refuges in the

Northeast Region will soon be aligned with their respective State's regulations on the use of dogs during hunting seasons for big game, upland game, and migratory game birds.

We did not make any changes to the rule as a direct result of this comment, but we did make some changes to regulations related to the use of dogs for other reasons, and these changes may increase consistency across stations and further align with State regulations.

Comment (25): We received one comment that urged the development of a user fee that would be consistently applied for all refuges and hatcheries and for all recreational uses.

Our Response: The Service collects entrance and recreation fees under the authorities of the Refuge Revenue Sharing Act of 1935 (16 U.S.C. 715s) and the Federal Lands Recreation Enhancement Act (FLREA; 16 U.S.C. 6801 *et seq.*). Service policy requires refuge managers to consider two factors in determining fees for any activity: Fair market value and costs involved in providing the use. Because fair market value and refuge costs can differ among localities, there is often a range of different fees for similar activities in different locations. For locations that collect fees under FLREA, public comment periods are required when refuges initiate fees and to change the types and amounts of fees. We encourage public participation in this process.

We did not make any changes to the rule as a result of this comment.

Comment (26): A number of commenters mentioned climate change, as a general environmental issue, as something we should consider in developing this rule. A few of these commenters specifically argued that we did not fully consider the impacts of this rule in the context of the separate impacts of climate change on fish, wildlife, and other refuge resources in our cumulative impacts report.

Our Response: The Service considers the impacts of climate change on the management of wildlife and responds to a changing climate through its annual process of setting hunting and fishing seasons. Hunting seasons are based on biological monitoring and coordination with our State partners. In some circumstances, seasons may be adjusted based on predicted harvest rates, population levels, seasonal factors, and other assessments. While this process is not necessarily climate-based, over time, as the variables mentioned above change, the Service responds by altering its regulations accordingly. These regulatory changes are only incremental changes that build on previous changes. Any major changes in station or environmental conditions, such as an unsustainable decrease in a species population or sizeable increases in refuge or hatchery acreage or public uses, would trigger additional planning, NEPA review, Compatibility Determinations, and ESA section 7 evaluation processes. The Service may reevaluate compatibility at any time if conditions warrant. These required planning and management processes ensure that adverse impacts will not accumulate over time.

As a result of these comments, we have updated the 2020–2021 cumulative impacts report to further clarify our approach to considering climate change. We did not make any changes to the rule as a result of these comments.

Comment (27): Several comments noted the potential benefits of this rule in reducing the spread of wildlife diseases due to the increase in hunting opportunities. One of these comments further urged us to ensure that our regulations provide flexibility for individual stations to address chronic wasting disease in deer populations.

Our Response: We agree that in States where chronic wasting disease (CWD) is prevalent, hunting can be a useful emergency management tool for reducing the spread and prevalence of CWD. Population reduction can minimize disease transmission and selective culling of deer in areas where CWD occurs and can control the prevalence of the disease (Mateus-Pinilla, N., M.O. Ruiz, P. Shelton, and J. Novakofski. 2013. Evaluation of a wild white-tailed deer population management program for controlling chronic wasting disease in Illinois, 2003–2008. Preventative Veterinary Medicine, 110(3–4): 541–548). For many of the refuges in affected States, there are strategies to coordinate with the State on responses to CWD outbreaks outlined in the station's hunt plan or CD. Beyond opening additional emergency hunts, stations can, when necessary, coordinate with States to monitor for CWD and provide additional staff support and resources for the State's response to an outbreak.

We did not make any changes to the rule as a result of these comments.

Comment (28): We received two comments that touched on the proposed rule's discussion of the economic impacts of the rule. One commenter argued that we must include local economies with no expected changes to revenues as a result of the proposed rule alongside those that may see changes because omitting them ''skews the results'' in our conclusion that the rule will not significantly affect a substantial number of small entities. The second commenter claimed that we must conduct a Regulatory Flexibility Act analysis for this rule and that it must include the impact of the rule on non-consumptive users.

Our Response: For the first comment, if we were to include estimates of zero impact for any number of local economies in areas unaffected by the rule, it would not change our estimate of the maximum nationwide economic impact and would not change anything about the potential economic significance of the rule.

Regarding the second comment, a Regulatory Flexibility Act analysis is required for some rulemakings, but this rulemaking does not require such an analysis because we can certify that it will not significantly affect a substantial number of small entities. The commenter is correct that non-consumptive users are an important user group at our refuges and hatcheries, and they do bring benefits to local economies. However, the commenter's argument that we need to consider economic impacts of the rule on non-consumptive users, and presumably that it would change our finding on significance of the rule's impact if we did, does not persuade us for two key reasons. First, if the impacts the commenter describes, lost revenue for local economies from fewer non-consumptive use days at refuges and hatcheries, were to occur as a result of this rule, they would be offset by the increased revenues that we have calculated for the added hunting and fishing use days. This means that calculating both impacts, again assuming there were lost non-consumptive use days, could never find as much of an impact as calculating one or the other alone. Calculating impacts related to both user groups would be inefficient. Second, calculating only the economic impact of the rule's effects on non-consumptive users of the refuges would not likely result in a higher estimate of maximum nationwide economic impact because there are no expected effects on this user group, which means the estimated economic impacts would be zero. As discussed above in our response to Comment *(20),* this rule is not expected to significantly impact non-consumptive users. None of the provisions in this rule regulate non-consumptive uses of the refuge, and all openings and expansions of hunting and fishing are assessed for compatibility with non-consumptive uses. The Service has put in place many restrictions on hunting and fishing programs, including some added in response to comments on this rule, in

order to ensure that we balance the various priority wildlife-dependent recreation uses on all refuges and hatcheries. We do not expect the rule to effect non-consumptive use of the refuges and hatcheries, and we fully expect the trends of increasing non-consumptive use mentioned by the commenter to continue alongside the implementation of the rule.

We did not make any changes to the rule, including to our discussion of the Regulatory Flexibility Act analysis and the Secretary's certification that this rule will not have a significant impact on a substantial number of small entities, as a result of these comments.

Comment (29): A few comments maintained that we need to account for the ongoing impacts to habitat and wildlife from border operations and border wall construction in assessing the hunting and fishing opportunities at our refuges on the border with Mexico (*i.e.,* Lower Rio Grande Valley, Laguna Atascosa, and Cabeza Prieta NWRs). These commenters argue that the combined impacts of border operations and increased hunting and fishing pose too much of a risk to habitats and to certain species, particularly endangered and threatened species.

Our Response: The Service disagrees with commenters that opening these areas to hunting would have more than minor cumulative impacts on habitat and species. In general, the potential impacts of providing additional hunting opportunities, which are minimal and temporary in nature, are negligible to minor for both habitats and species. The refuge-specific documents at Cabeza Prieta, Buenos Aires, and Lower Rio Grande Valley NWRs have been updated to further clarify the anticipated impacts and how they have been minimized. Specifically at Lower Rio Grande Valley NWR, hunt tracts, with the exception of La Casita East, are removed by several miles (25–30 miles) from the border. Therefore, since the effects of hunting and border wall activities are, for the most part, separated by substantial distances, the refuge does not anticipate that hunting activities (including through vehicle traffic or foot traffic) would contribute to any cumulative impacts to species from border activities and development occurring along or within the Rio Grande tracts of the refuge. At Cabeza Prieta NWR, hunter use days would predominantly occur from October through February when wildlife, including Sonoran pronghorn, are less likely to be stressed by environmental conditions. Cabeza Prieta NWR does not allow hunters access via motorized transport or mechanized equipment within designated wilderness or on any administrative roads or trails within designated wilderness. Additionally, the terrain at Cabeza Prieta NWR is very rough and mountainous, with hot Sonoran desert conditions. Therefore, most hunting will likely occur within 5 miles of the public roads that run through non-wilderness corridors. Additionally, there are a number of mitigation measures put in place to reduce adverse effects on pronghorn, which include restricting dove hunting to late season only, enforced speed limits, and no hunting zones around captive breeding facilities. Even though these activities are occurring in the same area, we expect a very limited number of hunters. This means that the minimal human activity associated with hunting is not likely to significantly add to disturbance of pronghorn, even when considered in the context of border-related activities. The vast size of the refuge (860,000 acres) also weighs in favor of our assessment that any impacts of these potentially overlapping human activities would be negligible. Finally, these refuges use an adaptive management approach, as do all of our stations, and will make all necessary adjustments to their hunt programs should they determine that hunting activities are adversely impacting a listed species.

Comment (30): A significant number of comments advocated for openings and expansions of additional waterfowl hunting opportunities. Most of these specifically requested opportunities in the State of California and the Southeastern United States.

Our Response: We appreciate the support for and interest in waterfowl hunting in California and in the Southeast. We are committed to evaluating additional waterfowl hunting opportunities on refuges wherever it is compatible with refuge purposes, sanctuary requirements, local conditions, and other objectives and obligations of the Refuge System. These requests for additional openings and expansions will have to be a consideration for future rulemakings, as they have not yet been evaluated and thus cannot be accommodated between a proposed and final rule. Nevertheless, given the degree of public interest, it is appropriate to note some considerations specific to waterfowl hunting in California and the southeastern United States.

In California, for a variety of reasons, our ability to further expand some of the highlighted opportunities at our NWRs is limited. These reasons include, but are not limited to, limited access, unreliable water supplies, and recovery of endangered species. Also, despite the high demand during opening weekend, we have many waterfowl hunt opportunities throughout the season in California that are undersubscribed. In the Southeast, many NWRs face limits in opening and expanding beyond current opportunities as many are closed or partially closed to migratory bird hunting in order to meet inviolate sanctuary requirements or because of a specific establishing purpose inconsistent with waterfowl hunting. Yet, there are many more refuges in the region that are accessible and open to waterfowl hunting, with regulations that are aligned or closely aligned to State regulations.

We did not make any changes to the rule as a result of these comments.

Alaska

Comment (31): We received multiple comments that we failed to provide credible scientific evidence that camelids present a disease threat to wildlife in Arctic National Wildlife Refuge (Arctic NWR).

Our Response: We disagree with these comments. The Service must make decisions on what uses to allow on a refuge consistent with principles of sound fish and wildlife management and administration, available science and resources, and adherence to the requirements of ANILCA, the Administration Act, and other applicable laws.

While few peer-reviewed studies have directly investigated the transmission of pathogens from camelids to wild sheep, there have been assessments that advise caution. Schwantje and Stephen (2003) stated that llamas commonly carry pathogens that can cause disease in wild ungulates (H. Schwantje and C. Stephen. 2003. Communicable disease risks to wildlife from camelids in British Columbia. British Columbia Ministry of Water, Land and Air Protection Biodiversity Branch, Victoria, BC). They expressed particular concern for fecal-borne disease, such as Johne's disease and *Pasteurella* spp. Johne's disease is fatal, is easily transmitted among ruminants, is long-lived in the environment, and has no known treatment. In another risk assessment by the Centre for Coastal Health (2017), seven common camelid pathogens were identified that could potentially present significant risks to wild sheep populations: *Mannheimia haemolytica, Pasteurella* spp., contagious ecthyma, bovine viral diarrhea virus, *Mycobacterium avium paratuberculosis* (Johne's disease), bluetongue virus, and *Mycobacterium bovis.* They concluded that *Mannheimia haemolytica, Pasteurella* spp., contagious ecthyma,

and Johne's disease were of particular concern. Both studies expressed concern regarding disease transmission from contact between camelids and wild sheep and their habitat (Centre for Coastal Health. 2017. Risk assessment on the use of South American camelids for back country trekking in British Columbia. British Columbia Ministry of Forests, Lands, Natural Resource Operations and Rural Development Division of Wildlife conservation, Alaska Department of Fish and Game). These assessments informed the Service's decision to prohibit camelids on Arctic NWR.

Limited clinical/pen testing studies have been conducted that co-mingle various domestic (including llamas) and wild animals in an effort to detect disease transmission (Foreyt, W. J. 1994. Effects of controlled contact exposure between healthy bighorn sheep and llamas, domestic goats, mountain goats, cattle, domestic sheep, or mouflon sheep. Northern Wild Sheep and Goat Council Proceedings 9: 7–14.). While this limited study suggests that llamas do not likely pose as serious of a threat to wild sheep as do domestic sheep, it fails to provide compelling evidence that llamas do not pose any risk of pathogen transmission to wild sheep. There were several limitations of the study: (1) It was a symposium presentation, not a peer-reviewed paper; (2) it limited investigation to the transmission of *Pasteurella haemolytica* and did not investigate other pathogens of concern; (3) it is unclear the total numbers of animals that were involved in the study; and (4) it is unclear if the llamas housed with the sheep were in fact infected with *Pasteurella haemolytica.*

We did not make any changes to the rule as a result of these comments.

Comment (32): We received several comments questioning the Service's risk tolerance and precautionary approach to prohibiting camelids on the Arctic NWR.

Our Response: As discussed above, the Service must make decisions on what uses to allow on a refuge consistent with principles of sound fish and wildlife management and administration, available science and resources, and adherence to the requirements of ANILCA, the Administration Act, and other applicable laws.

Vast, natural, and wild, Arctic NWR serves a distinctive function in the National Wildlife Refuge System. As a completely intact ecosystem, Arctic NWR offers the opportunity to preserve a range of tangible and intangible values in addition to the traditional fish, wildlife, and habitat values and focal species conservation found on most refuges. One of the core purposes of the Arctic NWR, as directed by ANILCA's section 303(2)(B)(i), is to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, Dall's sheep.

With that mandate in mind, Arctic NWR sought further professional guidance, including from the Western Association of Fish and Wildlife Agencies (WAFWA) Wild Sheep Working Group's ''Recommendations for Domestic Sheep and Goat Management in Wild Sheep Habitat.'' Those recommendations state: ''We recommend that wild sheep managers design and implement management strategies by taking the first step of assessing and prioritizing conservation value and relative importance of wild sheep populations. The greater the conservation value and the greater the risk of association with domestic sheep or goats, the more aggressive and comprehensive a strategy to ensure effective separation should be.'' The Arctic NWR places the highest importance and conservation value on the area's wildlife, including Dall's sheep. Therefore, a most aggressive and comprehensive ''effective separation'' strategy is warranted. Furthermore, the WAFWA document provides an additional recommendation relating to disease transmission risk mitigation: ''It is generally acknowledged that thinhorn sheep (*Ovis dalli* spp.) in Alaska and northwestern Canada are likely naïve to exposure to many organisms commonly carried by domestic species, compared to wild sheep occurring in southern Canada and the continental [United States]. Until this is confirmed and the effects of exposure to infectious organisms are clearly understood, it is essential that no association occurs between thinhorn sheep and domestic sheep or goats'' (Garde, E., S. Kutz, H. Schwantje, A. Veitch, E. Jenkins, and B. Elkin. 2005. Examining the risk of disease transmission between wild Dall's sheep and mountain goats and introduced domestic sheep, goats and llamas in the Northwest Territories. Northwest Territories Agricultural and Policy Framework and Environment and Natural Resources Government of the Northwest Territories, Yellowknife, Canada; CAST (Council for Agricultural Science and Technology). 2008. Pasteurellosis transmission risks between domestic and wild sheep. CAST Commentary QTA 2008–1. Council for Agricultural Science and Technology, Ames, Iowa). In light of this acknowledged potential for exposure, the Service finds that precluding any association between Dall's sheep and domestic sheep or goats within the Arctic NWR is warranted at this time.

The Service also included camelid species in this rule because they too have been documented as carriers of pathogens that could potentially harm Dall's sheep. Preventing the introduction (*e.g.,* pathway management) of invasive species and pathogens is the first line and most cost-effective defense against biological invasion. The cost of managing pathogen(s) that may be transmitted by domestic sheep, goats, and camelids through other means (*i.e.,* eradicating or controlling) is exponentially higher. Additionally, there is uncertainty that the recovery of these populations would be achievable if the Dall's sheep populations were to be infected with any of these pathogens. Response and recovery efforts would be made even more difficult considering the Arctic NWR's vast size and remoteness, and the overall difficulty of accessing the sheep and their habitats. Much of the sheep habitat is in designated Wilderness, adding a layer of administrative complexity to any kind of management response to a disease outbreak. To conserve the natural diversity of the Arctic NWR and integrity of Dall's sheep populations in the Arctic NWR, the best course of action is to prevent the introduction of pathogens until there is more information available on how or if pathogens can be effectively managed through other mitigation strategies.

A study that helps illustrate the value of prevention (Cassirer et al. 2018. Pneumonia in bighorn sheep: Risk and resilience. The Journal of Wildlife Management, 82(1): 32–45) found that no vaccine or antibiotic treatment has controlled infection in domestic or wild sheep, and management actions to mitigate morbidity and mortality in wild sheep populations once exposed have been unsuccessful. This is true for populations in the lower 48 States where access and associated logistics for such efforts are relatively feasible. Sheep populations in the Brooks Range are considerably more challenging to access and attempt to treat for disease, supporting the decision that prevention is the best course of action.

Comment (33): We received a comment noting that llamas and horses are both widely separated from wild sheep taxonomically and that consequently these species enjoy strong species barriers against disease transmission that the Service failed to recognize by ''mis-categorizing camelids

with domestic sheep and goats as a common disease risk.'' The commenter stated that domestic sheep and goats (bovids) are not widely separated from wild sheep (also bovids) taxonomically, and consequently they do not enjoy the same species barriers against disease transmission to wild sheep that horses and llamas do.

Our Response: We agree with the commenter that llamas and horses are separated from wild sheep taxonomically. The inclusion of camelid species with domestic sheep and goat species in this rule is not due to taxonomic association. Camelids are included because, similar to domestic sheep and goats, they can harbor the pathogens that are of high risk for enzootic disease outbreak in native wildlife populations. These diseases include *Mannheimia haemolytica, Pasteurella* spp., contagious ecthyma, bovine viral diarrhea virus, bluetongue virus, and *Mycobacterium bovis. Mannheimia haemolytica, Pasteurella* spp., contagious ecthyma, and Johne's disease are of particular concern for native ungulate species in Alaska.

Comment (34): We received several comments expressing concern that camelids were being treated differently than other pack animals. Several commenters stated that if camelids are identified as an ''unreasonable risk'' by the Service, the Service should also consider the unreasonable disease risk posed by humans and other pack animals.

Our Response: As discussed above, there is potentially great risk to Dall's sheep from sheep, goats, and camelids due to the suite of pathogens they can carry. Similar risks do not exist with respect to other common pack animals, such as horses and mules, or humans. Therefore, we did not make any changes to the rule based on these comments.

Comment (35): One commenter noted that *Mycoplasma ovipneumoniae* has recently been identified in Dall's sheep in the northern Brooks Range and, according to the Alaska Department of Fish and Game (ADFG), evidence suggests they (wild ungulates) may have been carriers all along; therefore, there is no need to prohibit llamas on Arctic NWR. The commenter also noted that additional evidence from ADFG suggested that moose and caribou also carry the pathogen and may be potential vectors.

Our Response: Multiple strains of *Mycoplasma ovipneumoniae* have been identified. The *Mycoplasma ovipneumoniae* that ADFG documented in Dall's sheep is apparently a unique Alaska wildlife-only strain that has not been found in any domestic animals, and there is no known cross immunity from different strains. Domestic pack animals can transmit other strains of *Mycoplasma ovipneumoniae* or other diseases and parasites that are novel to the Arctic NWR populations and pose serious risks to these populations. Furthermore, ADFG has not suggested that Alaska's moose and caribou carry the pathogen, nor are they considered potential vectors to Dall's sheep (Dr. Kimberlee Beckmen, June 9, 2020, pers. comm.).

Several studies highlight the vulnerability of wild sheep to novel strains of *Mycoplasma ovipneumoniae.* Cassirer et al. (2017) state that transmission of pathogens carried by domestic sheep and goats pose a severe threat to bighorn sheep populations (Cassirer, E.F., K.R. Manlove, R.K. Plowright, and T.E. Besser. 2017. Evidence for strain-specific immunity to pneumonia in bighorn sheep. The Journal of Wildlife Management, 81(1): 133–143). Large die-offs occur from pneumonia caused by exposure to *Mycoplasma ovipneumoniae.* This is further complicated by the fact that some of the survivors from these epidemics are asymptomatic, but can pass this pathogen on to other sheep, including new lambs. These lambs usually succumb to pneumonia and die. Additionally, they cited a situation in Hells Canyon in which a novel *Mycoplasma ovipneumoniae* strain introduced by domestic goats caused high levels of morbidity and mortality among adult sheep in the population. In another study, researchers sampled 137 animals in 24 flocks of domestic sheep and goats for *Mycoplasma ovipneumoniae* and found that 37.5 percent of the flocks tested positive. Additionally, they found that 78 percent of these animals had incidences of escape from their pens, thus potentially transmitting this pathogen to wild sheep (Heinse, L.M., Hardesty, L.H., and Harris R.B. 2016. Risk of pathogen spillover to bighorn sheep from domestic sheep and goat flocks on private land. Wildlife Society Bulletin, 40(4): 625–633).

Kamathet al. (2019) examined the pneumonia-associated bacterium *Mycoplasma ovipneumoniae* in domestic sheep, domestic goats, bighorn sheep, and mountain goats across the western United States using samples collected from 1984 to 2017. They found that there was a much higher genetic diversity of *Mycoplasma ovipneumoniae* (*i.e.,* many more strains) in domestic animals than in wild populations of bighorn sheep and mountain goats. They concluded that ''the ability to predict [*Mycoplasma ovipneumoniae*] spillover into wildlife populations may remain a challenge given the high strain diversity in domestic sheep and need for more comprehensive pathogen surveillance'' (Kamath, P.L., K. Manlove, E.F. Cassirer, P.C. Cross, and T.E. Besser. 2019. Genetic structure of Mycoplasma ovipnumoniae informs pathogen spillover dynamics between domestic and wild Caprinae in the western United States. Scientific Reports, 9:15318).

Comment (36): Multiple commenters stated that the Service's assertion that the proposed regulation is better aligned with ADFG regulations and WAFWA recommendations is inaccurate, because neither ADFG regulations nor WAFWA recommendations prohibit the use of camelids.

Our Response: The Service agrees with commenters that we were not clear in the assertions made regarding alignment with ADFG regulations and WAFWA recommendations. The amendment to the Arctic NWR regulations does align with ADFG regulations to the extent that it restricts the use of domestic sheep and goats when hunting Dall's sheep, mountain goats, and musk ox in Alaska. The prohibition on camelids on the Arctic NWR is more protective than ADFG's current regulations, which are silent on camelid species. While WAFWA recommendations do not specifically address camelids, they advise wildlife managers to maximize effective separation between wild sheep and potential disease vectors. As camelids are potential disease vectors, the Service has determined that prohibiting camelids on the Arctic NWR is necessary in order to more closely align with WAFWA's recommendations.

Comment (37): We received a few comments that the proposed prohibition would not expand public use opportunities, but instead would restrict these activities in remote areas where pack animals might be necessary for public access.

Our Response: The Service finds that the prohibition on certain domestic pack animals in the Arctic NWR is an appropriate measure to conserve Dall's sheep. Ensuring the health and population of Alaska wildlife ensures that wildlife-dependent public use opportunities can continue into the future. While the prohibition does restrict rather than expand certain public use opportunities, it will help preserve wildlife-dependent public uses such as hunting, wildlife observation, and wildlife photography (priority public uses defined by the Improvement

Act) by preventing disease transfer to Dall's sheep and other wildlife species.

Comment (38): We received a request to amend our proposal to allow the use of camelids for public uses on Arctic NWR a case-by-case basis through a refuge permit or, similarly, to allow pack goat use through implementation of ''best management practices.''

Our Response: The Service considered amending the regulations in a manner that could allow for future uses of these pack animals through an Arctic NWR-administered permit program but decided against doing so. As discussed in our response to Comment *(32),* preventing the introduction (*e.g.,* pathway management) of invasive species and pathogens is the first line and most cost-effective defense against biological invasion. The cost of managing pathogen(s) once transmitted to wild sheep by domestic sheep, goats, and camelids (*i.e.,* eradicating or controlling) is exponentially higher. Additionally, there is uncertainty that if the Dall's sheep populations were to be infected with any these pathogens, the recovery of these populations would be achievable. To conserve the natural diversity of the Arctic NWR and integrity of Dall's sheep populations on the refuge, the best course of action is to prevent the introduction of pathogens until there is more information available on how (or if) pathogens can be effectively managed through other mitigation strategies. As a permitting system would not necessarily prevent the introduction of pathogens and would do nothing to help control an outbreak or mitigate adverse effects to Dall's sheep, the Service chose not to include a permit option in this final rule.

The Service reviewed the North American Packgoat Association (NAPgA) ''best management practices'' (BMP) document submitted by the commenter and determined that the referenced practices fail to adequately address disease risk mitigation of pack goats beyond careful owner oversite (identification and control), co-mingling mitigation, and lost goat response. Consistent with the reasoning described above, the Service chose not to make an exception in this final rule for pack goat use that adheres to the NAPgA's BMP document standards.

Therefore, we did not make any changes to the rule as a result of this comment.

Comment (39): Several commenters expressed concerns that the llama packing user group was not informed of or included in the 2011–2015 public review process for the Arctic NWR's CCP and associated NEPA process that ultimately determined that camelid use on the refuge would be prohibited.

Our Response: The public process that resulted in the 2015 Arctic NWR CCP and Record of Decision (ROD) involved both a 90-day public comment period on the 2011 draft Arctic NWR CCP and associated draft environmental impact statement (draft EIS) (see 76 FR 50490; August 15, 2011) and various public meetings, which the Service informed the public of through extensive outreach. In addition to the 90-day public comment period on the draft CCP and draft EIS, the Service held two open houses, six public hearings, and four community meetings. Through the public comment period, the Service received 612,285 public comments on the draft CCP/draft EIS, 6 of which requested that the Service prohibit certain domestic pack animals due to their potential threat as a wildlife disease vector.

Public comment periods allow agencies to learn more from the public, Alaska Native Tribal governments and corporations, and other agencies, and to refine their proposals as appropriate. Because of this, the agency's final action, which is only made after the conclusion of the public comment period, may be different from the agency's original proposal. In the case of the Arctic NWR CCP, the original proposed action did not contain a prohibition on pack llama use on the refuge, but after reviewing the public comments and additional scientific literature, and considering the purposes of the Arctic NWR, the Service determined that a change to the CCP was warranted, and incorporated a proposed prohibition into the final EIS.

On January 27, 2015, we published a notice of availability (80 FR 4303) of the revised CCP and final EIS for the Arctic NWR; that notice announced a 30-day public review period for those documents, which began when the Environmental Protection Agency published its requisite notice on February 6, 2015 (80 FR 6705). This review period provided the public with an opportunity to understand changes made between the draft CCP/draft EIS and the revised CCP/final EIS, to read responses to public comments on the draft CCP/draft EIS, and to learn about the Service's preferred alternative. That revised CCP includes references to the additional information that informed the inclusion of camelids. This process was consistent with both the Service's planning laws (16 U.S.C. 3101 *et seq.*) and policies (602 FW 3), as well as the requirements of NEPA (42 U.S.C. 4332).

Comment (40): We received several comments that the inclusion of a proposed closure of a use on Arctic NWR (*i.e.,* the prohibition on domestic sheep, goats, and camelids) within the station-specific rulemaking does not adhere to rulemaking and closure procedures for Alaska refuges as provided by ANILCA.

Our Response: The Service has done extensive outreach on the amendment to the regulations, including, but not limited to, announcing the proposed amendment on the Arctic NWR's public website; mailing and emailing affected Tribal governments, user groups, wildlife organizations, and other partners and stakeholders; informing and communicating with both the ADFG and Alaska's congressional representatives; publishing the proposed rule in the **Federal Register** (85 FR 20030; April 9, 2020) with a 60-day public comment period; holding a virtual public hearing on May 13, 2020 (due to the COVID–19 pandemic it could not be held safely in person); publishing notice of the proposed Arctic NWR regulation and virtual public hearing in both regional and local newspapers; posting notice of the proposed Arctic NWR regulation at community post offices; and announcing the proposed Arctic NWR regulation via two public service announcements run on KUAC (Fairbanks). We received numerous comments on the proposed rule, including the Arctic NWR regulation, and offer our responses to those comments in this rule. Therefore, we have fully satisfied the requirements for notice-and-comment rulemaking under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

The commenters state that the prohibition of certain domestic pack animals in the Arctic NWR constitutes a ''closure'' that triggers additional notice and public hearing requirements under ANILCA. The Service remains in full compliance with ANILCA because we conducted the types of public outreach specified at section 1110(a) of ANILCA and the associated implementing regulations (*i.e.,* 43 CFR 36.11 and 50 CFR 36.42). Regardless, the State of Alaska has requested that the promulgation of regulations for NWRs in Alaska be conducted under separate rulemaking processes, and not be included in the larger annual hunting and fishing rulemaking for the Refuge System. They state this is preferable because of the unique public input and notice requirements mandated by ANILCA and the associated implementing regulations. We agree, and we intend to conduct rulemaking

for NWRs in Alaska separately from the annual station-specific regulations in the future.

Comment (41): We have received comments from the State of Alaska and AFWA directing our attention to the recent *Sturgeon* v. *Frost* decision of the U.S. Supreme Court. 139 S. Ct. 1066 (2019). These comments note that the Supreme Court held the National Park Service cannot impose regulations on lands it does not own and reaffirmed the State of Alaska's right to manage fish, wildlife, and public access over non-Federal lands, including submerged lands.

Our Response: We agree with the ADFG and AFWA that the State of Alaska has the right to manage fish, wildlife, and public access over non-Federal lands, including submerged lands owned by the State of Alaska. We value the partnership with the State of Alaska for managing the wildlife, lands, and waters within Alaska NWRs for the benefit of the American public. The Alaska regulation in this rule applies to federally owned lands in the Arctic NWR and does not impose restrictions on non-Federal lands, including State of Alaska-owned submerged lands and is, therefore, consistent with the *Sturgeon* v. *Frost* decision.

Changes From Proposed Rule

Based on consultation with States and other partners, comments we received on the proposed rule, and comments we received on NEPA documents for individual refuges and hatcheries, we made a number of changes between the proposed rule and this final rule, some of which have been discussed above under Summary of Comments and Responses.

For one, we have added regulatory text to open hunts for species that we reason should have been included alongside other new hunts at the same refuge. Regulatory language allowing hunting for bear at Oxbow NWR, quail at Valentine NWR, pronghorn antelope at Fort Niobrara NWR, and for dove and quail at Tallahatchie River are included in this final rule. We also corrected *Table 1* below to reflect an expansion of elk hunting at Monte Vista NWR, which does not require a change to the regulatory text because we are only expanding an existing hunt to new acres. We have conducted the same NEPA processes for these species as all of the other species in this rule, and they have been subject to public review and comment through that process. In the case of bear at Oxbow NWR, opening hunting of this species in this rule will maintain consistency, as bear hunting is opened at three refuges (Great Meadows NWR, Assabet River NWR, and Oxbow NWR) in close proximity to each other in the Eastern Massachusetts National Wildlife Refuge Complex. The refuge did receive NEPA process public comments in support of and in opposition to the opening of bear hunting at each of these three refuges in the complex, including Oxbow. None of these comments raised concerns particular to Oxbow; they were relevant to all three refuges.

Conversely, we are not adopting 23 proposed hunting opportunities for particular species at four refuges in this final rule. At Cabeza Prieta NWR, as summarized in response to Comment *(5)* above, we are not adopting the proposed hunting of ringtail cat, badger, and skunk due to cultural concerns in consultation with the Tohono O'odham Nation of Arizona. At Bosque del Apache NWR, as summarized in response to Comment *(19)* above, we are not adopting the proposed hunting of dark goose, American coot, common moorhen, common snipe, duck, and merganser in response to public comments and in order to ensure no negative impacts to public safety or to important habitat. At Alamosa and Monte Vista NWRs, as mentioned in response to *Comment (12)* above, we are not adopting proposed expansions onto new acres for the hunting of the same seven species (rabbit, duck, dark geese, light geese, coot, dove, and snipe) at both refuges because the categorical exclusions for these expansions may require further consideration.

Also, as mentioned in response to comments above, we are adding a special permit requirement for the take of furbearers at Quivira NWR. Requiring this Kansas Department of Wildlife, Parks and Tourism (KDWPT) permit will further alignment of our regulations with the State of Kansas and is consistent with the refuge CCP.

Another change made, again as mentioned in response to comments above, is that we added regulatory language for Coldwater River, Patoka River, Ottawa, and Horicon refuges that results in this final rule having four more regulatory provisions limiting the use of lead shot than were in the proposed rule. These changes were not directly in response to public comments received that expressed concern about lead ammunition, but they do reduce the number of openings and expansions under this rule for which hunters may use lead ammunition.

We made multiple regulatory changes that affect the hours and seasons for hunts or for related activities such as constructing stands and blinds. These changes were each made to better align with State regulations, to promote intrastate alignment of station-specific regulations, or in response to comments. For example, as discussed above, the hours of the day open to weekend alligator hunting at Banks Lake NWR were adjusted based on a comment from the Georgia Department of Natural Resources to align with Georgia's alligator daily hunting hours. Another example is that, after extensive public response to proposed big game hunting at Sachuest Point NWR, we added a provision explicitly stating these hunts will be periodic rather than annual and will be strictly limited to a small number of hunters.

Similarly, we added regulations that limit the method or manner of take as a response to public comments or for clarification of refuge policy. This includes making the mentored deer hunting at Sachuest Point NWR archery only, limiting the number of individuals that can participate in muzzleloader deer hunting at Fort Niobrara NWR by instituting a limited permit lottery, prohibiting handgun and rifle hunting of upland and big game at Assabet and Oxbow refuges, allowing only shotgun when hunting migratory birds at Turnbull NWR, and revising the proposed feral hog hunt at Bosque del Apache NWR into incidental take of feral hog during other big game seasons. Note also that we made several changes that clarified the use of dogs. In some cases this was in response to public comments, while in others it was to promote intrastate alignment of station-specific regulations. For example, in response to public comments, for LaCreek NWR, the rule now clarifies that the current use of dogs when hunting is expanded to newly opened areas and that the use of dogs while predator hunting is prohibited; whereas changes clarifying that dogs can only be used in the context of bird hunting were made for Buenos Aires, Fallon, and Stillwater refuges.

At LaCreek and Laguna Atascosa refuges, specifically, we added regulations concerning field dressing of certain hunting take as a result of public comments and to balance refuge uses.

Next, we made several changes to regulations that concerned various methods of transportation. These changes were made either in consultation with and to further align with States or in response to public comments. These changes include not adopting the proposed use of bicycles at Bosque del Apache NWR, clarifying motorized vessel and airboat regulations at Loxahatchee NWR, and allowing boat use for access purposes at LaCreek NWR.

At Montezuma and North Platte refuges, we clarified regulations for youth and special hunts.

Additionally, as referenced in response to Comment *(18),* above, we made numerous changes throughout the rule, in addition to regulatory revisions already proposed, to ensure the specific required forms, which display a valid OMB control number, are indicated whenever our regulations mention the need for one of our Federal permits. This reflects a nationwide effort to be clear in our regulations regarding which Federal permit form is being referenced in a given regulation to promote public understanding and compliance.

Finally, we also made various nonsubstantive, editorial corrections and clarifying revisions throughout the rule. These changes ensure clarity and accuracy for the benefit of the public in relying on the regulatory text and the benefit of the stations in administering the regulations.

Effective Date

We are making this rule effective upon publication (see **DATES**, above). We provided a 60-day public comment period for the April 9, 2020, proposed rule (85 FR 20030). We have determined that any further delay in implementing these station-specific hunting and sport fishing regulations would not be in the public interest, in that a delay would hinder the effective planning and administration of refuges' and hatcheries' hunting and sport fishing programs. This rule does not impact the public generally in terms of requiring lead time for compliance. Rather, it primarily relieves restrictions in that it allows activities on refuges and hatcheries that we would otherwise prohibit. Therefore, we find good cause under 5 U.S.C. 553(d)(3) to make this rule effective upon publication.

Amendments to Existing Regulations

Updates to Hunting and Fishing Opportunities on NWRs and NFHs

This document codifies in the Code of Federal Regulations all of the Service's hunting and/or sport fishing regulations that are updated since the last time we published a rule amending these regulations (84 FR 47640; September 10, 2019) and that are applicable at Refuge System and Hatchery System units previously opened to hunting and/or sport fishing. We do this to better inform the general public of the regulations at each station, to increase understanding and compliance with these regulations, and to make enforcement of these regulations more efficient. In addition to now finding these regulations in 50 CFR parts 32 and 71, visitors to our refuges and hatcheries may find them reiterated in literature distributed by each station or posted on signs.

TABLE 1—CHANGES FOR 2020–2021 HUNTING/SPORT FISHING SEASON

Station	State	Migratory bird hunting	Upland game hunting	Big game hunting	Sport fishing
Abernathy Fish Technology Center.	Washington	Closed	Closed	Closed	A.
Alamosa	Colorado	Already Open	Already Open	Already Open	B.
Arthur R. Marshall Loxahatchee.	Florida	D	Closed	C	D.
Assabet River	Massachusetts	C	C	C/D	Already Open.
Balcones Canyonlands	Texas	Already Open	Already Open	D	Closed.
Bamforth	Wyoming	Closed	A	A	Closed.
Banks Lake	Georgia	Closed	Closed	B	Already Open.
Berkshire NFH	Massachusetts	Closed	Closed	Closed	A.
Big Branch Marsh	Louisiana	E	C/E	Already Open	Already Open.
Bitter Lake	New Mexico	E	Already Open	D	Closed.
Black Bayou Lake	Louisiana	Already Open	Already Open	E	Already Open.
Blackwater	Maryland	D	Closed	D	Already Open.
Block Island	Rhode Island	B	Closed	D	Already Open.
Bogue Chitto	Louisiana and Mississippi	E	E	E	Already Open.
Bombay Hook	Delaware	C/D	C/D	D	B.
Bosque del Apache	New Mexico	C/D	C/D	C/D/E	Already Open.
Browns Park	Colorado	Already Open	Already Open	C	Already Open.
Buenos Aires	Arizona	C	C	C	Closed.
Buffalo Lake	Texas	B	C/D	Already Open	Closed.
Cabeza Prieta	Arizona	B	B	C	Closed.
Canaan Valley	West Virginia	D	D	D	B.
Carolina Sandhills	South Carolina	Already Open	C	Already Open	Already Open.
Catahoula	Louisiana	C	Already Open	Already Open	Already Open.
Cedar Island	North Carolina	E	Closed	Closed	Closed.
Cibola	Arizona and California	D	C/D	D	Already Open.
Clarks River	Kentucky	Already Open	C	Already Open	Already Open.
Cokeville Meadows	Wyoming	C	Already Open	Already Open	B.
Coldwater River	Mississippi	C	C	Already Open	Already Open.
Crab Orchard	Illinois	D/E	Already Open	D/E	Already Open.
Crescent Lake	Nebraska	C/D	D	C	E.
Dahomey	Mississippi	C	C	E	Already Open.
Deer Flat	Idaho and Oregon	Already Open	Already Open	Already Open	D.
Dwight D. Eisenhower NFH	Vermont	Closed	Closed	Closed	A.
Edwin B. Forsythe	New Jersey	Already Open	Already Open	Already Open	D.
Eufaula	Georgia and Alabama	E	Already Open	Already Open	Already Open.
Everglades Headwaters	Florida	A	A	A	A.
Fallon	Nevada	A	A	A	Closed.
Fish Springs	Utah	C	B	B	Closed.
Flint Hills	Kansas	Already Open	C	E	Already Open.
Fort Niobrara	Nebraska	B	B	C/E	Already Open.

TABLE 1—CHANGES FOR 2020–2021 HUNTING/SPORT FISHING SEASON—Continued

Station	State	Migratory bird hunting	Upland game hunting	Big game hunting	Sport fishing
Great Meadows	Massachusetts	D	B	C/D	Already Open.
Great River	Illinois and Missouri	C	Already Open	E	Already Open.
Hart Mountain	Oregon	B	C/D	Already Open	Already Open.
Horicon	Wisconsin	C	C	C	Already Open.
Hutton Lake	Wyoming	Already Open	B	B	Closed.
Iroquois	New York	D/E	E	E	Already Open.
John W. and Louise Seier	Nebraska	A	A	A	Closed.
John H. Chafee	Rhode Island	A	A	A	A.
Jordan River NFH	Michigan	A	A	A	Closed.
Kirwin	Kansas	C	C/E	D	E.
Kootenai	Idaho	C	Already Open	Already Open	D.
LaCreek	South Dakota	D	C/D	C/D	Already Open.
Laguna Atascosa	Texas	Closed	Closed	C	Already Open.
Lamar NFH	Pennsylvania	Closed	Closed	Closed	A.
Leavenworth NFH	Washington	B	B	B	Already Open.
Lee Metcalf	Montana	Already Open	B	D	D.
Leslie Canyon	Arizona	A	A	A	Closed.
Little White Salmon NFH	Washington	B	B	B	Already Open.
Lower Rio Grande Valley	Texas	D/E	B	C/D/E	Closed.
Marais des Cygnes	Kansas	C/E	C/E	E	Already Open.
Mattamuskeet	North Carolina	E	Closed	Already Open	Already Open.
Merced	California	C	Closed	Closed	Closed.
Middle Mississippi River	Illinois and Missouri	C	C	Already Open	Already Open.
Minidoka	Idaho	C/D	C/D	C/D/E	Already Open.
Monte Vista	Colorado	Already Open	Already Open	D	Closed.
Montezuma	New York	C	B	E	D.
Muscatatuck	Indiana	B	C	E	Already Open.
Nestucca Bay	Oregon	C	Closed	Closed	Already Open.
Ninigret	Rhode Island	Closed	B	C/E	Already Open.
Northern Tallgrass Prairie	Minnesota	D	D	D	D.
North Platte	Nebraska	Closed	C/E	D/E	Already Open.
Ottawa	Ohio	D	D	D	Already Open.
Overflow	Arkansas	C	Already Open	Already Open	Closed.
Oxbow	Massachusetts	D	C/D/E	C/D/E	Already Open.
Pahranagat	Nevada	Already Open	D	Closed	Already Open.
Pathfinder	Wyoming	C	Already Open	Already Open	Closed.
Patoka River	Indiana	C/D	C/D	D	D.
Quivira	Kansas	C	C	B	Already Open.
Rachel Carson	Maine	Already Open	Already Open	Already Open	D.
Rydell	Minnesota	B	B	E	Already Open.
Sachuest Point	Rhode Island	Closed	B	B	Already Open.
San Diego Bay	California	Closed	Closed	Closed	A.
San Luis	California	Already Open	D	Closed	Already Open.
Savannah	South Carolina and Georgia	Already Open	C	C	Already Open.
Seatuck	New York	Closed	Closed	B	Already Open.
Spring Creek NFH	Washington	B	B	B	Already Open.
Stewart B. McKinney	Connecticut	D/E	Closed	B	Closed.
Stillwater	Nevada	Already Open	Already Open	C	Closed.
St. Marks	Florida	Already Open	D/E	D/E	Already Open.
St. Vincent	Florida	Closed	E	E	Already Open.
Swan River	Montana	Already Open	Closed	C	Already Open.
Swanquarter	North Carolina	E	Closed	Closed	Closed.
Tallahatchie	Mississippi	C	C	E	Already Open.
Tennessee	Tennessee	C/D	C/E	E	Already Open.
Tensas River	Louisiana	Already Open	C	Already Open	Already Open.
Tishomingo	Oklahoma	Already Open	Closed	Already Open	E.
Trustom Pond	Rhode Island	C	Closed	Closed	Already Open.
Turnbull	Washington	E	Closed	Already Open	Closed.
Two Rivers	Illinois and Missouri	D	D	D	Already Open.
Umbagog	New Hampshire and Maine	Already Open	Already Open	Already Open	B.
Union Slough	Iowa	C	C	Already Open	Already Open.
Valentine	Nebraska	C/D	C	C	Already Open.
Wapato Lake	Oregon	A	Closed	Closed	Closed.
Wertheim	New York	Closed	Closed	C/E	Already Open.
Willapa	Washington	Already Open	Already Open	D	Already Open.
Willard NFH	Washington	Closed	Closed	Closed	A.

Key:
A = New station opened (Opening).
B = New activity on a station previously open to other activities (Opening).
C = Station already open to activity but added new species to hunt (Opening).

D = Station already open to activity, but added new lands/waters or modified areas open to hunting or fishing (Expansion).
E = Station already open to activity, but existing opportunity expanded through season dates, method of take, bag limits, quota permits, youth hunt, etc. (Expansion).

The changes for the 2020–2021 hunting/fishing season noted in the table above are each based on a complete administrative record which, among other detailed documentation, also includes a hunt plan, a compatibility determination (for refuges), and the appropriate National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) analysis, all of which were the subject of a public review and comment process. These documents are available here: *https://www.fws.gov/refuges/hunting/rules-regulations-and-improved-access/.*

Through these openings and expansions, we are opening or expanding hunting or sport fishing on 2,264,796 acres of NWRs and, as discussed below, opening 47,419 acres on limited-interest easement NWRs. We are also opening hunting or sport fishing on 1,484 acres of the National Fish Hatchery System. These totals combine for an overall total of 2,313,699 acres opened or expanded to hunting or sport fishing by this rule.

Limited-Interest Openings in North Dakota

We are also opening limited-interest NWRs (easement refuges) to hunting and fishing in accordance with State regulations and with access controlled by the current landowners. These easement refuges in North Dakota are a unique mix of government-owned and private property that were established during the 1930s in response to drought and economic depression in North Dakota. The Easement Refuge Program began in 1935, and executed agreements that granted the Federal Government migratory bird and flowage easements, many of them perpetual, for the purposes of water conservation, drought relief, and migratory bird and wildlife conservation. The overarching purpose of the program is management of migratory birds, with these easements serving as breeding grounds for many migratory waterfowl. The easements thus established were later formally designated NWRs and became the 41 easement refuges that the Service now administers (and which the Service retains the right to close to hunting/fishing, and later open, for wildlife, safety, or other reasons).

We are opening all 41 of these easement refuges to upland game and big game hunting, with migratory bird hunting prohibited due to the migratory bird management purpose of these refuges. This rule also opens 38 of the easement refuges to sport fishing, as the remaining 3 are already open to sport fishing. This opens a total of 47,419 acres to hunting and fishing, subject to the permission of current landowners.

Other Updates to the Regulations for NWRs

We are making one change to 50 CFR part 36, the regulations concerning Alaska NWRs. Specifically, we are prohibiting domestic sheep, goats, and camelids on the Arctic National Wildlife Refuge. The purpose of this prohibition is to prevent the spread of diseases and parasites to native wildlife populations, including mountain goats, musk oxen, and especially Dall's sheep. Dall's sheep in Alaska, including on the Arctic National Wildlife Refuge, are free of domestic livestock diseases and are believed to have very low immunity to many of these diseases. Domestic sheep, goats, and camelids (*e.g.,* llamas and alpacas) are recognized as being at high risk for carrying disease organisms, often asymptomatically, that are highly contagious and cause severe illness or death in Dall's sheep.

Fish Advisory

For health reasons, anglers should review and follow State-issued consumption advisories before enjoying recreational sport fishing opportunities on Service-managed waters. You can find information about current fish-consumption advisories on the internet at: *http://www.epa.gov/fish-tech.*

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rulemaking is not significant.

Executive Order (E.O.) 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs

This final rule is not an Executive Order (E.O.) 13771 (82 FR 9339, February 3, 2017) regulatory action because this rule is not significant under E.O. 12866.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act [SBREFA] of 1996) (5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant impact'' and a threshold for a ''substantial number of small entities.'' See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

As a preface to this analysis, we note that this rule opens 41 easement refuges to hunting and/or sport fishing, but because these openings are subject to individual landowner permission, we are not including them in the calculation of the rule's estimated economic impact. We anticipate negligible economic impact due to limited demand from hunters and anglers in the area. In our EAs analyzing these openings, we provided an estimate for biological evaluation purposes of the hunting and fishing use days for all 41 easement refuges cumulatively. We have not converted those estimates of potential use days into dollar figures for

this rule because it is difficult to predict whether private landowners will grant access and because it may not be justifiable to use the same impact calculation methods to these lands with uncertain, privately controlled access as we do for the other lands in this rule with public access.

This final rule opens or expands hunting and sport fishing on 97 NWRs and 9 NFHs. As a result, visitor use for wildlife-dependent recreation on these stations will change. If the stations establishing new programs were a pure addition to the current supply of those activities, it would mean an estimated maximum increase of 25,702 user days (one person per day participating in a recreational opportunity; see Table 2). Because the participation trend is flat in these activities since 1991, this increase in supply will most likely be offset by other sites losing participants. Therefore, this is likely to be a substitute site for the activity and not necessarily an increase in participation rates for the activity.

TABLE 2—ESTIMATED MAXIMUM CHANGE IN RECREATION OPPORTUNITIES IN 2020–2021

[Dollars in thousands]

Station	Additional hunting days	Additional fishing days	Additional expenditures
Abernathy Fish Technology Center (FTC)	.....	.....	.....
Alamosa	.....	200	$6.9
Arthur R. Marshall (ARM) Loxahatchee	57	242	10.3
Assabet River	195	.....	6.5
Balcones Canyonlands	30	.....	1.0
Bamforth	25	.....	0.8
Banks Lake	6	.....	0.2
Berkshire NFH	.....	365	12.6
Big Branch Marsh	38	.....	1.3
Bitter Lake	16	.....	0.5
Black Bayou Lake	.....	.....	.....
Blackwater	.....	.....	.....
Block Island	67	.....	2.2
Bogue Chitto	75	.....	2.5
Bombay Hook	50	365	14.3
Bosque del Apache	1,472	.....	49.0
Browns Park	40	.....	1.3
Buenos Aires	100	.....	3.3
Buffalo Lake	12	.....	0.4
Cabeza Prieta	1,505	.....	50.1
Canaan Valley	.....	365	12.6
Carolina Sandhills	.....	.....	.....
Catahoula	.....	.....	.....
Cedar Island	150	.....	5.0
Cibola	800	.....	26.6
Clarks River	760	.....	25.3
Cokeville Meadows	5	30	1.2
Coldwater River	.....	.....	.....
Crab Orchard	21	.....	0.7
Crescent Lake	200	600	27.4
Dahomey	172	.....	5.7
Deer Flat	.....	120	4.2
Dwight D. Eisenhower NFH	.....	365	12.6
Edwin B. Forsythe	.....	.....	.....
Eufaula	1	.....	.....
Everglades Headwater	140	365	17.3
Fallon	3,883	.....	129.2
Fish Springs	21	.....	0.7
Flint Hills	50	.....	1.7
Fort Niobrara	60	.....	2.0
Great Meadows	178	.....	5.9
Great River	55	.....	1.8
Hart Mountain	100	.....	3.3
Horicon	110	.....	3.7
Hutton Lake	100	.....	3.3
Iroquois	160	.....	5.3
John W. and Louise Seier	200	.....	6.7
John H. Chafee	153	365	17.7
Jordan NFH	17	.....	0.6
Kirwin	245	.....	8.2
Kootenai	.....	50	1.7
LaCreek	275	.....	9.1
Laguna Atascosa	75	.....	2.5
Lamar NFH	.....	365	12.6
Leavenworth NFH	.....	.....	.....
Lee Metcalf	60	.....	2.0
Leslie Canyon	116	.....	3.9
Little White Salmon NFH	50	.....	1.7

TABLE 2—ESTIMATED MAXIMUM CHANGE IN RECREATION OPPORTUNITIES IN 2020–2021—Continued

[Dollars in thousands]

Station	Additional hunting days	Additional fishing days	Additional expenditures
Lower Rio Grande Valley	48	.....	1.6
Marais des Cygnes	25	.....	0.8
Mattamuskeet	64	.....	2.1
Merced	50	.....	1.7
Middle Mississippi River	35	.....	1.2
Minidoka	100	.....	3.3
Monte Vista	.....	.....	.....
Montezuma	211	.....	7.0
Muscatatuck	53	.....	1.8
Nestucca Bay	32	.....	1.1
Ninigret	46	.....	1.5
North Platte	27	.....	0.9
Northern Tallgrass Prairie	82	7	3.0
Ottawa	20	.....	0.7
Overflow	.....	.....	.....
Oxbow	207	.....	6.9
Pahranagat	99	.....	3.3
Pathfinder	20	.....	0.7
Patoka River	89	15	3.5
Quivira	425	.....	14.1
Rachel Carson	.....	.....	.....
Rydell	110	.....	3.7
Sachuest Point	30	.....	1.0
San Diego Bay	.....	365	12.6
San Luis	50	.....	1.7
Savannah	1,245	.....	41.4
Seatuck	90	.....	3.0
Spring Creek NFH	20	.....	0.7
St. Marks	520	.....	17.3
St. Vincent	300	.....	10.0
Stewart B. McKinney	262	.....	8.7
Stillwater	63	.....	2.1
Swan River	15	.....	0.5
Swanquarter	75	.....	2.5
Tallahatchie	172	.....	5.7
Tennessee	265	.....	8.8
Tensas	9	.....	0.3
Tishomingo	.....	525	18.2
Trustom Pond	.....	.....	.....
Turnbull	120	.....	4.0
Two Rivers	162	.....	5.4
Umbagog	.....	365	12.6
Union Slough	15	.....	0.5
Valentine	750	.....	25.0
Wapato Lake	2,304	.....	76.7
Wertheim	81	.....	2.7
Willapa	492	.....	16.4
Willard NFH	.....	.....	.....
Total	20,628	5,074	862.1

To the extent visitors spend time and money in the area of the station that they would not have spent there anyway, they contribute new income to the regional economy and benefit local businesses. Due to the unavailability of site-specific expenditure data, we use the national estimates from the 2016 National Survey of Fishing, Hunting, and Wildlife Associated Recreation to identify expenditures for food and lodging, transportation, and other incidental expenses. Using the average expenditures for these categories with the maximum expected additional participation of the Refuge System and the Hatchery System yields approximately $862,100 in recreation-related expenditures (see Table 2, above). By having ripple effects throughout the economy, these direct expenditures are only part of the economic impact of these recreational activities. Using a national impact multiplier for hunting activities (2.51) derived from the report ''Hunting in America: An Economic Force for Conservation'' and for fishing activities (2.51) derived from the report ''Sportfishing in America'' yields a total maximum economic impact of approximately $3.4 million (2019 dollars) (Southwick Associates, Inc., 2018). Using a local impact multiplier would yield more accurate and smaller results. However, we employed the national impact multiplier due to the difficulty in developing local multipliers for each specific region.

Since we know that most of the fishing and hunting occurs within 100 miles of a participant's residence, then it is unlikely that most of this spending will be ''new'' money coming into a local economy; therefore, this spending

will be offset with a decrease in some other sector of the local economy. The net gain to the local economies will be no more than $3.4 million, and likely less. Since 80 percent of the participants travel less than 100 miles to engage in hunting and fishing activities, their spending patterns will not add new money into the local economy and, therefore, the real impact will be on the order of about $680,000 annually.

Small businesses within the retail trade industry (such as hotels, gas stations, taxidermy shops, bait-and-tackle shops, and similar businesses) may be affected by some increased or decreased station visitation. A large percentage of these retail trade establishments in the local communities around NWRs and NFHs qualify as small businesses (see Table 3, below). We expect that the incremental recreational changes will be scattered, and so we do not expect that the rule will have a significant economic effect on a substantial number of small entities in any region or nationally. As noted previously, we expect at most $862,100 to be spent in total in the refuges' local economies. The maximum increase will be less than four-tenths of 1 percent for local retail trade spending (see Table 3, below). Table 3 does not include entries for those NWRs and NFHs for which we project no changes in recreation opportunities in 2020–2021; see Table 2, above.

TABLE 3—COMPARATIVE EXPENDITURES FOR RETAIL TRADE ASSOCIATED WITH ADDITIONAL STATION VISITATION FOR 2020–2021

[Thousands, 2019 dollars]

Station/county(ies)	Retail trade in 2012 [1]	Estimated maximum addition from new activities	Addition as percent of total	Establishments in 2012 [1]	Establishments with fewer than 10 employees in 2012 [1]
Alamosa:					
Alamosa, CO	$312,549	$3.5	<0.01	85	62
Conejos, CO	40,009	3.5	0.01	18	12
ARM Loxahatchee:					
Palm Beach, FL	21,936,473	10.3	<0.01	5,236	3,925
Assabet River:					
Middlesex, MA	23,767,638	6.5	<0.01	5,156	3,594
Balcones Canyonlands:					
Travis, TX	17,352,705	0.3	<0.01	3,469	2,432
Burnet, TX	687,767	0.3	<0.01	182	148
Williamson, TX	9,559,523	0.3	<0.01	1,277	840
Bamforth:					
Albany, WY	533,993	0.8	<0.01	141	103
Banks Lake:					
Lanier, GA	D	0.2	D	21	17
Berkshire NFH:					
Berkshire, MA	2,134,074	12.6	<0.01	711	508
Big Branch Marsh:					
St. Tammany, LA	3,953,819	1.3	<0.01	915	656
Bitter Lake:					
Chaves, NM	996,707	0.5	<0.01	233	153
Block Island:					
Washington, RI	1,865,967	2.2	<0.01	548	394
Bogue Chitto:					
St. Tammany, LA	3,953,819	0.8	<0.01	915	656
Washington, LA	330,750	0.8	<0.01	138	104
Pearl River, MS	531,519	0.8	<0.01	172	128
Bombay Hook:					
Kent, DE	2,996,217	14.3	<0.01	561	368
Bosque del Apache:					
Socorro, NM	133,401	49.0	0.04	39	31
Browns Park:					
Moffat, CO	224,866	1.3	<0.01	72	58
Buenos Aires:					
Pima, AZ	12,668,688	3.3	<0.01	2,770	1,857
Buffalo Lake:					
Randall, TX	2,009,993	0.4	<0.01	352	247
Cabeza Prieta:					
Yuma, AZ	2,222,557	25.0	<0.01	449	302
Pima, AZ	12,668,688	25.0	<0.01	2,770	1,857
Canaan Valley:					
Tucker, WV	55,811	12.6	0.02	28	18
Cedar Island:					
Carteret, NC	1,083,228	5.0	<0.01	363	276
Cibola:					
La Paz, AZ	485,448	13.3	<0.01	81	57
Imperial, CA	1,867,209	13.3	<0.01	446	297
Clarks River:					
Marshall, KY	436,873	8.4	<0.01	103	54
Graves, KY	449,527	8.4	<0.01	123	90
McCracken, KY	1,824,502	8.4	<0.01	411	256
Cokeville Meadows:					

TABLE 3—COMPARATIVE EXPENDITURES FOR RETAIL TRADE ASSOCIATED WITH ADDITIONAL STATION VISITATION FOR 2020–2021—Continued

[Thousands, 2019 dollars]

Station/county(ies)	Retail trade in 2012 [1]	Estimated maximum addition from new activities	Addition as percent of total	Establishments in 2012 [1]	Establishments with fewer than 10 employees in 2012 [1]
Lincoln, WY	201,089	1.2	<0.01	79	54
Crab Orchard:					
Williamson, IL	1,243,002	0.2	<0.01	271	185
Union, IL	186,073	0.2	<0.01	64	47
Jackson, IL	1,122,791	0.2	<0.01	225	143
Crescent Lake:					
Garden, NE	13,232	27.4	0.21	12	8
Dahomey:					
Bolivar, MS	413,290	5.7	<0.01	161	120
Deer Flat:					
Canyon, ID	2,393,412	2.1	<0.01	485	351
Malheur, OR	595,184	2.1	<0.01	120	78
Dwight D. Eisenhower NFH:					
Rutland, VT	1,205,694	12.6	<0.01	411	303
Eufaula:					
Quitman, GA	13,494	<0.1	<0.01	10	10
Stewart, GA	19,042	<0.1	<0.01	15	15
Barbour, AL	229,916	<0.1	<0.01	94	77
Russell, AL	556,440	<0.1	<0.01	155	120
Everglades Headwater:					
Polk, FL	7,232,622	8.7	<0.01	1,756	1,317
Okeechobee, FL	565,749	8.7	<0.01	157	120
Fallon:					
Churchill, NV	261,819	129.2	0.05	69	50
Fish Springs:					
Juab, UT	127,530	0.7	<0.01	33	23
Flint Hills:					
Coffey, KS	123,995	0.8	<0.01	50	35
Lyon, KS	549,988	0.8	<0.01	162	121
Fort Niobrara:					
Cherry, NE	97,237	2.0	<0.01	38	27
Great Meadows:					
Middlesex, MA	23,767,638	5.9	<0.01	5,156	3,594
Great River:					
Pike, IL	194,031	0.6	<0.01	53	36
Clark, MO	130,470	0.6	<0.01	36	28
Shelby, MO	65,630	0.6	<0.01	35	25
Hart Mountain:					
Lake, OR	83,366	3.3	<0.01	30	22
Horicon:					
Dodge, WI	927,521	1.8	<0.01	234	159
Fond du Lac, WI	1,561,559	1.8	<0.01	354	225
Hutton Lake:					
Albany, WY	533,993	3.3	<0.01	141	103
Iroquois:					
Genesee, NY	874,965	2.7	<0.01	219	163
Orleans, NY	281,049	2.7	<0.01	95	65
John W. and Louise Seier:					
Rock, NE	7,556	6.7	0.09	7	5
John H. Chafee:					
Washington, RI	1,865,967	17.7	<0.01	548	394
Jordan River NFH:					
Antrim, MI	188,903	0.6	<0.01	88	77
Kirwin:					
Phillips, KS	57,317	8.2	0.01	35	27
Kootenai:					
Boundary, ID	111,427	1.7	<0.01	47	37
LaCreek:					
Bennett, SD	36,017	9.1	0.03	15	9
Laguna Atascosa:					
Cameron, TX	4,593,067	2.5	<0.01	1,119	758
Lamar NFH:					
Clinton, PA	648,726	12.6	<0.01	121	82
Lee Metcalf:					
Ravalli, MT	368,170	2.0	<0.01	166	124
Leslie Canyon:					
Cochise, AZ	1,411,126	3.9	<0.01	408	301

TABLE 3—COMPARATIVE EXPENDITURES FOR RETAIL TRADE ASSOCIATED WITH ADDITIONAL STATION VISITATION FOR 2020–2021—Continued

[Thousands, 2019 dollars]

Station/county(ies)	Retail trade in 2012 [1]	Estimated maximum addition from new activities	Addition as percent of total	Establishments in 2012 [1]	Establishments with fewer than 10 employees in 2012 [1]
Little White Salmon NFH:					
Skamania, WA	28,090	1.7	0.01	21	18
Lower Rio Grande Valley:					
Willacy, TX	131,872	0.5	<0.01	32	24
Hildalgo, TX	175,611	0.5	<0.01	26	20
Starr, TX	484,809	0.5	<0.01	135	98
Marais des Cygnes:					
Linn, KS	59,571	0.8	<0.01	35	25
Mattamuskeet:					
Hyde, NC	33,868	2.1	0.01	36	35
Merced:					
Merced, CA	2,181,912	1.7	<0.01	528	348
Middle Mississippi River:					
Monroe, IL	536,378	0.4	<0.01	96	72
Randolph, IL	415,738	0.4	<0.01	100	62
Jefferson, MO	435,265	0.4	<0.01	128	92
Minidoka:					
Power, ID	32,991	0.8	<0.01	16	13
Cassia, ID	360,659	0.8	<0.01	116	89
Blaine, ID	332,491	0.8	<0.01	183	153
Minidoka, ID	175,875	0.8	<0.01	62	47
Montezuma:					
Cayuga, NY	973,987	2.3	<0.01	260	195
Seneca, NY	545,489	2.3	<0.01	183	114
Wayne, NY	915,984	2.3	<0.01	267	181
Muscatatuck:					
Jackson, IN	660,019	0.9	<0.01	183	140
Jennings, IN	219,265	0.9	<0.01	66	58
Nestucca Bay:					
Lincoln, OR	646,693	1.1	<0.01	307	251
Ninigret:					
Washington, RI	1,865,967	1.5	<0.01	548	394
North Platte:					
Scotts Bluff, NE	D	0.9	D	178	128
Northern Tallgrass Prairie:					
Pipestone, MN	150,875	1.0	<0.01	52	40
Pope, MN	154,224	1.0	<0.01	41	32
Swift, MN	104,292	1.0	<0.01	45	32
Ottawa:					
Ottawa, OH	476,239	0.7	<0.01	144	109
Oxbow:					
Middlesex, MA	23,767,638	3.4	<0.01	5,156	3,594
Worcester, MA	12,155,780	3.4	<0.01	2,572	1,788
Pahranagat:					
Lincoln, NV	D	3.3	D	16	6
Pathfinder:					
Natrona, WY	1,656,388	0.3	<0.01	363	262
Carbon, WY	340,129	0.3	<0.01	86	73
Patoka River:					
Pike, IN	80,767	1.7	<0.01	31	23
Gibson, IN	620,865	1.7	<0.01	120	84
Quivira:					
Stafford, KS	38,722	4.7	0.01	17	13
Rice, KS	55,698	4.7	0.01	39	31
Reno, KS	911,013	4.7	<0.01	265	194
Rydell:					
Polk, MN	369,241	3.7	<0.01	109	74
Sachuest Point:					
Newport, RI	1,243,192	1.0	<0.01	430	332
San Diego Bay:					
San Diego, CA	44,302,582	12.6	<0.01	9,219	6,314
San Luis:					
Merced, CA	2,181,912	1.7	<0.01	528	348
Savannah:					
Chatham, GA	4,739,604	13.8	<0.01	1,198	851
Effingham, GA	399,251	13.8	<0.01	108	79
Jasper, SC	640,060	13.8	<0.01	104	80

TABLE 3—COMPARATIVE EXPENDITURES FOR RETAIL TRADE ASSOCIATED WITH ADDITIONAL STATION VISITATION FOR 2020–2021—Continued

[Thousands, 2019 dollars]

Station/county(ies)	Retail trade in 2012 [1]	Estimated maximum addition from new activities	Addition as percent of total	Establishments in 2012 [1]	Establishments with fewer than 10 employees in 2012 [1]
Seatuck:					
Suffolk, NY	26,383,026	3.0	<0.01	6,524	3,904
Spring Creek NFH:					
Skamania, WA	28,090	0.3	<0.01	21	18
Klickitat, WA	71,785	0.3	<0.01	47	36
St. Marks:					
Wakulla, FL	186,734	5.8	<0.01	62	49
Jefferson, FL	98,784	5.8	0.01	43	35
Taylor, FL	230,580	5.8	<0.01	86	67
St. Vincent:					
Franklin, FL	108,995	10.0	0.01	67	52
Stewart B. McKinney:					
Fairfield, CT	16,888,208	2.9	<0.01	3,459	2,453
New Haven, CT	12,880,670	2.9	<0.01	2,901	2,015
Middlesex, CT	2,452,586	2.9	<0.01	659	455
Stillwater:					
Churchill, NV	261,819	2.1	<0.01	69	50
Swan River:					
Lake, MT	66,984	0.5	<0.01	30	23
Swanquarter:					
Hyde, NC	33,868	2.5	0.01	36	35
Tallahatchie:					
Tallahatchie, MS	60,260	2.9	<0.01	40	36
Grenada, MS	462,248	2.9	<0.01	120	90
Tennessee:					
Henry, TN	545,041	2.2	<0.01	139	98
Benton, TN	167,976	2.2	<0.01	59	47
Decator, TN	85,132	2.2	<0.01	45	35
Hunphreys, TN	206,806	2.2	<0.01	65	54
Tensas:					
Madison, LA	176,886	0.1	<0.01	38	27
Richland, LA	278,783	0.1	<0.01	65	49
Franklin, LA	279,412	0.1	<0.01	78	55
Tensas, LA	30,800	0.1	<0.01	15	14
Tishomingo:					
Johnston, OK	68,010	9.1	0.01	35	31
Marshall, OK	177,989	9.1	0.01	53	42
Turnbull:					
Spokane, WA	7,305,612	4.0	<0.01	1,617	1,108
Two Rivers:					
Jersey, IL	256,816	1.3	<0.01	69	49
Calhoun, IL	30,438	1.3	<0.01	15	9
Greene, IL	139,806	1.3	<0.01	49	32
St. Charlies, MO	5,536,064	1.3	<0.01	1,085	695
Umbagog:					
Oxford, ME	680,802	6.3	<0.01	222	163
Coos, NH	630,944	6.3	<0.01	184	143
Union Slough:					
Kossuth, IA	274,837	0.5	<0.01	93	69
Valentine:					
Cherry, NE	97,237	25.0	0.03	38	27
Wapato Lake:					
Washington, OR	9,342,147	38.3	<0.01	1,573	1,002
Yamhill, OR	987,290	38.3	<0.01	283	201
Wertheim:					
Suffolk, NY	26,383,026	2.7	<0.01	6,524	3,904
Willapa:					
Pacific, WA	120,098	16.4	0.01	89	68

[1] U.S. Census Bureau. "D" denotes sample size too small to report data.

With the small change in overall spending stemming from this rule, it is unlikely that a substantial number of small entities will have more than a small impact from the spending change near the affected stations. Therefore, we certify that this final rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). A regulatory flexibility analysis is not required.

Accordingly, a small entity compliance guide is not required.

Small Business Regulatory Enforcement Fairness Act

This final rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. We anticipate no significant employment or small business effects. This rule:

a. Will not have an annual effect on the economy of $100 million or more. The minimal impact will be scattered across the country and will most likely not be significant in any local area.

b. Will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. This final rule will have only a slight effect on the costs of hunting opportunities for Americans. If the substitute sites are farther from the participants' residences, then an increase in travel costs will occur. The Service does not have information to quantify this change in travel cost but assumes that, since most people travel less than 100 miles to hunt, the increased travel cost will be small. We do not expect this rule to affect the supply or demand for hunting opportunities in the United States, and, therefore, it should not affect prices for hunting equipment and supplies, or the retailers that sell equipment.

c. Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This rule represents only a small proportion of recreational spending at NWRs. Therefore, this final rule will have no measurable economic effect on the wildlife-dependent industry, which has annual sales of equipment and travel expenditures of $72 billion nationwide.

Unfunded Mandates Reform Act

Since this rule applies to public use of federally owned and managed refuges, it will not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The final rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (E.O. 12630)

In accordance with E.O. 12630, this rule does not have significant takings implications. This final rule affects only visitors at NWRs and NFHs, and describes what they can do while they are on a Service station.

Federalism (E.O. 13132)

As discussed under *Regulatory Planning and Review* and *Unfunded Mandates Reform Act,* above, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement under E.O. 13132. In preparing this rule, we worked with State governments.

Civil Justice Reform (E.O. 12988)

In accordance with E.O. 12988, the Department of the Interior has determined that this rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Energy Supply, Distribution or Use (E.O. 13211)

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this final rule adds 8 NWRs and 41 limited-easement NWRs to the list of refuges open to hunting and sport fishing, opens or expands hunting or sport fishing at 89 other NWRs, and opens 9 NFHs to hunting and/or sport fishing, it is not a significant regulatory action under E.O. 12866, and we do not expect it to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Consultation and Coordination With Indian Tribal Governments (E.O. 13175)

In accordance with E.O. 13175, we have evaluated possible effects on federally recognized Indian tribes and have determined that there are no effects. We coordinate recreational use on NWRs and NFHs with Tribal governments having adjoining or overlapping jurisdiction before we finalize the regulations.

Paperwork Reduction Act (PRA)

This final rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB). All information collections require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB has reviewed and approved the information collection requirements associated with hunting and sport fishing activities across the National Wildlife Refuge System and assigned the following OMB control numbers:

- 1018–0140, ''Hunting and Sport Fishing Application Forms and Activity Reports for National Wildlife Refuges, 50 CFR 25.41, 25.43, 25.51, 26.32, 26.33, 27.42, 30.11, 31.15, 32.1 to 32.72'' (Expires 07/30/2021),
- 1018–0102, ''National Wildlife Refuge Special Use Permit Applications and Reports, 50 CFR 25, 26, 27, 29, 30, 31, 32, & 36'' (Expires 08/31/2020),
- 1018–0135, ''Electronic Federal Duck Stamp Program'' (Expires 01/31/2023),
- 1018–0093, ''Federal Fish and Wildlife Permit Applications and Reports—Management Authority; 50 CFR 13, 15, 16, 17, 18, 22, 23'' (Expires 08/31/2020), and
- 1024–0252, ''The Interagency Access Pass and Senior Pass Application Processes'' (Expires 08/31/2020).

Endangered Species Act Section 7 Consultation

We comply with section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), when developing CCPs and step-down management plans—which would include hunting and/or fishing plans—for public use of refuges and hatcheries, and prior to implementing any new or revised public recreation program on a station as identified in 50 CFR 26.32. We have completed section 7 consultation on each of the affected stations.

National Environmental Policy Act

We analyzed this rule in accordance with the criteria of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(C)), 43 CFR part 46, and 516 Departmental Manual (DM) 8.

A categorical exclusion from NEPA documentation applies to publication of amendments to station-specific hunting and fishing regulations because they are technical and procedural in nature, and the environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis (43 CFR 46.210 and 516 DM 8). Concerning the actions that are the subject of this rulemaking, we have complied with NEPA at the project level when developing each station's regulatory changes. This is consistent with the Department of the Interior instructions

for compliance with NEPA where actions are covered sufficiently by an earlier environmental document (43 CFR 46.120).

Prior to the addition of a refuge or hatchery to the list of areas open to hunting and fishing in 50 CFR parts 32 and 71, we develop hunting and fishing plans for the affected stations. We incorporate these proposed station hunting and fishing activities in the station CCP and/or other step-down management plans, pursuant to our refuge planning guidance in 602 Fish and Wildlife Service Manual (FW) 1, 3, and 4. We prepare these CCPs and step-down plans in compliance with section 102(2)(C) of NEPA, the Council on Environmental Quality's regulations for implementing NEPA in 40 CFR parts 1500 through 1508, and the Department of Interior's NEPA regulations 43 CFR part 46. We invited the affected public to participate in the review, development, and implementation of these plans. Copies of all plans and NEPA compliance are available from the stations at the addresses provided below.

Available Information for Specific Stations

Individual refuge and hatchery headquarters have information about public use programs and conditions that apply to their specific programs and maps of their respective areas. We have also created the following website to house all NEPA documents for the openings and expansions in this rule from each refuge: *https://www.fws.gov/refuges/hunting/rules-regulations-and-improved-access/*. To find out how to contact a specific refuge or hatchery, contact the appropriate Service office for the States listed below:

Hawaii, Idaho, Oregon, and Washington. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, Eastside Federal Complex, Suite 1692, 911 NE 11th Avenue, Portland, OR 97232–4181; Telephone (503) 231–6214.

Arizona, New Mexico, Oklahoma, and Texas. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, P.O. Box 1306, 500 Gold Avenue SW, Albuquerque, NM 87103; Telephone (505) 248–6937.

Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437–1458; Telephone (612) 713–5360.

Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico, and the Virgin Islands. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Atlanta, GA 30345; Telephone (404) 679–7166.

Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, MA 01035–9589; Telephone (413) 253–8307.

Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 134 Union Blvd., Lakewood, CO 80228; Telephone (303) 236–8145.

Alaska. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 1011 E. Tudor Rd., Anchorage, AK 99503; Telephone (907) 786–3545.

California and Nevada. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room W–2606, Sacramento, CA 95825; Telephone (916) 414–6464.

Primary Author

Katherine Harrigan, Division of Natural Resources and Conservation Planning, National Wildlife Refuge System, is the primary author of this rulemaking document.

List of Subjects

50 CFR Part 32

Fishing, Hunting, Reporting and recordkeeping requirements, Wildlife, Wildlife refuges.

50 CFR Part 36

Alaska, Recreation and recreation areas, Reporting and recordkeeping requirements, Wildlife refuges.

50 CFR Part 71

Fish, Fishing, Hunting, Wildlife.

Regulation Promulgation

For the reasons set forth in the preamble, we amend title 50, chapter I, subchapters C and E of the Code of Federal Regulations as follows:

Subchapter C—The National Wildlife Refuge System

PART 32—HUNTING AND FISHING

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

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd–668ee, and 715i; Pub. L. 115–20, 131 Stat. 86.

■ 2. Amend § 32.7 by:
■ a. Redesignating paragraph (c)(8) as paragraph (c)(9) and adding a new paragraph (c)(8);
■ b. Redesignating paragraphs (e)(17) through (22) as paragraphs (e)(18) through (23) and adding a new paragraph (e)(17);
■ c. Redesignating paragraphs (i)(5) through (14) as paragraphs (i)(6) through (15) and adding a new paragraph (i)(5);
■ d. Redesignating paragraphs (aa)(4) through (6) as paragraphs (aa)(5) through (7) and adding a new paragraph (aa)(4);
■ e. Redesignating paragraphs (bb)(3) through (6) as paragraphs (bb)(4) through (7) and adding a new paragraph (bb)(3);
■ f. Revising paragraph (hh);
■ g. Redesignating paragraph (kk)(20) as paragraph (kk)(21) and adding a new paragraph (kk)(20);
■ h. Redesignating paragraphs (mm)(2) through (4) as paragraphs (mm)(3) through (5) and adding a new paragraph (mm)(2); and
■ i. Redesignating paragraphs (xx)(1) through (5) as paragraphs (xx)(2) through (6) and adding a new paragraph (xx)(1).

The additions and revision read as follows:

§ 32.7 What refuge units are open to hunting and/or sport fishing?

* * * * *

(c) * * *

(8) Leslie Canyon National Wildlife Refuge.

* * * * *

(e) * * *

(17) San Diego Bay National Wildlife Refuge.

* * * * *

(i) * * *

(5) Everglades Headwaters National Wildlife Refuge.

* * * * *

(aa) * * *

(4) John W. and Louise Seier National Wildlife Refuge.

* * * * *

(bb) * * *

(3) Fallon National Wildlife Refuge.

* * * * *

(hh) *North Dakota.* (1) Appert Lake National Wildlife Refuge.

(2) Ardoch National Wildlife Refuge.
(3) Arrowwood National Wildlife Refuge.
(4) Arrowwood Wetland Management District.
(5) Audubon National Wildlife Refuge.
(6) Audubon Wetland Management District.
(7) Bone Hill National Wildlife Refuge.
(8) Brumba National Wildlife Refuge.
(9) Buffalo Lake National Wildlife Refuge.
(10) Camp Lake National Wildlife Refuge.
(11) Canefield Lake National Wildlife Refuge.
(12) Chase Lake National Wildlife Refuge.
(13) Chase Lake Wetland Management District.
(14) Cottonwood Lake National Wildlife Refuge.
(15) Crosby Wetland Management District.
(16) Dakota Lake National Wildlife Refuge.
(17) Des Lacs National Wildlife Refuge.
(18) Devils Lake Wetland Management District.
(19) Half Way Lake National Wildlife Refuge.
(20) Hiddenwood Lake National Wildlife Refuge.
(21) Hobart Lake National Wildlife Refuge.
(22) Hutchinson Lake National Wildlife Refuge.
(23) J. Clark Salyer National Wildlife Refuge.
(24) J. Clark Salyer Wetland Management District.
(25) Johnson Lake National Wildlife Refuge.
(26) Kulm Wetland Management District.
(27) Lake Alice National Wildlife Refuge.
(28) Lake George National Wildlife Refuge.
(29) Lake Ilo National Wildlife Refuge.
(30) Lake National Wildlife Refuge.
(31) Lake Nettie National Wildlife Refuge.
(32) Lake Otis National Wildlife Refuge.
(33) Lake Patricia National Wildlife Refuge.
(34) Lake Zahl National Wildlife Refuge.
(35) Lambs Lake National Wildlife Refuge.
(36) Little Goose Lake National Wildlife Refuge.
(37) Long Lake National Wildlife Refuge.
(38) Long Lake Wetland Management District.
(39) Lords Lake National Wildlife Refuge.
(40) Lost Lake National Wildlife Refuge.
(41) Lostwood National Wildlife Refuge.
(42) Lostwood Wetland Management District.
(43) Maple River National Wildlife Refuge.
(44) Pleasant Lake National Wildlife Refuge.
(45) Pretty Rock National Wildlife Refuge.
(46) Rabb Lake National Wildlife Refuge.
(47) Rock Lake National Wildlife Refuge.
(48) Rose Lake National Wildlife Refuge.
(49) School Section National Wildlife Refuge.
(50) Sheyenne Lake National Wildlife Refuge.
(51) Sibley Lake National Wildlife Refuge.
(52) Silver Lake National Wildlife Refuge.
(53) Slade National Wildlife Refuge.
(54) Snyder Lake National Wildlife Refuge.
(55) Springwater National Wildlife Refuge.
(56) Stewart Lake National Wildlife Refuge.
(57) Stoney Slough National Wildlife Refuge.
(58) Storm Lake National Wildlife Refuge.
(59) Sunburst Lake National Wildlife Refuge.
(60) Tewaukon National Wildlife Refuge.
(61) Tewaukon Wetland Management District.
(62) Tomahawk National Wildlife Refuge.
(63) Upper Souris National Wildlife Refuge.
(64) Wild Rice National Wildlife Refuge.
(65) Willow Lake National Wildlife Refuge.
(66) Wintering River National Wildlife Refuge.
(67) Wood Lake National Wildlife Refuge.

* * * * *

(kk) * * *

(20) Wapato Lake National Wildlife Refuge.

* * * * *

(mm) * * *

(2) John H. Chafee National Wildlife Refuge.

* * * * *

(xx) * * *

(1) Bamforth National Wildlife Refuge.

* * * * *

■ 3. Amend § 32.22 by:
■ a. Revising paragraphs (b), (c), (d)(1) introductory text, (d)(1)(i), (d)(1)(iv), (d)(2)(i) and (ii), (d)(3), and (d)(4);
■ b. Redesignating paragraph (h) as paragraph (i); and
■ c. Adding a new paragraph (h).

The revisions and addition read as follows:

§ 32.22 Arizona.

* * * * *

(b)*Buenos Aires National Wildlife Refuge*—(1) *Migratory game bird hunting.*We allow hunting of goose, duck, coot, merganser, moorhen (gallinule), common snipe, and mourning, white-winged, and Eurasian collared-dove on designated areas of the refuge subject to the following conditions:

(i) We allow portable or temporary blinds and stands, but you must remove them at the end of each day's hunt (see § 27.93 of this chapter).

(ii) We prohibit falconry.

(iii) We allow dogs only for the retrieval of birds.

(2)*Upland game hunting.*We allow hunting of black-tailed and antelope jackrabbit; cottontail rabbit; badger; bobcat; coati; kit and gray fox; raccoon; ringtail; coyote; and hog-nosed, hooded, spotted, and striped skunk on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) through (iii) of this section apply.

(ii) We prohibit night hunting from ½ hour after legal sunset until ½ hour before legal sunrise the following day.

(3)*Big game hunting.*We allow hunting of mule and white-tailed deer, javelina, mountain lion, and feral hog on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) and (b)(2)(ii) of this section apply.

(ii) We prohibit the use of dogs when hunting big game.

(4) [Reserved]

(c)*Cabeza Prieta National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of mourning dove on designated areas of the refuge subject to the following conditions:

(i) We require hunters to obtain a Barry M. Goldwater Range Entry Permit (Department of Defense form/requirement) from the refuge.

(ii) We prohibit falconry.

(iii) We allow dogs only for the pointing and retrieval of birds.

(iv) We allow hunting only during the late season dove hunt.

(2) *Upland game hunting.* We allow hunting of Gambel's quail, Eurasian

collared-dove, desert cottontail rabbit, antelope and black-tailed jackrabbit, coyote, bobcat, and fox in designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(i) through (iii) of this section apply.

(ii) We do not allow wheeled carts in designated Wilderness.

(iii) We prohibit night hunting from ½ hour after legal sunset until ½ hour before legal sunrise the following day.

(3)*Big game hunting.*We allow hunting of desert bighorn sheep, mule deer, and mountain lion on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(i) and (c)(2)(ii) of this section apply.

(ii) We require Special Use Permits for all hunters (FWS Form 3–1383–G), guides (FWS Form 3–1383–C), and stock animals (FWS Form 3–1383–G).

(iii) We prohibit the use of dogs when hunting big game.

(4) [Reserved]

(d) * * *

(1)*Migratory game bird hunting.*We allow hunting of goose, duck, coot, moorhen (gallinule), common snipe, mourning and white-winged dove, and Eurasian collared-dove on designated areas of the refuge subject to the following conditions:

(i) We allow only shotgun and archery.

* * * * *

(iv) The Hart Mine Marsh area is open to entry from 10 a.m. to 3 p.m. from October 1 through March 14.

* * * * *

(2) * * *

(i) For cottontail rabbit, we allow only shotgun, archery, handgun, rifle, and muzzleloader.

(ii) For quail, we allow only shotgun, archery, and handgun shooting shot.

* * * * *

(3) *Big game hunting.* We allow hunting of mule deer on designated areas of the refuge subject to the following condition: We allow rifle, shotgun, handgun, muzzleloader, and archery, except for archery-only hunts.

(4) *Sport fishing.* We allow sport fishing and frogging subject to the following condition: Cibola Lake is open to fishing and frogging from March 15 through September 30.

* * * * *

(h) *Leslie Canyon National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of mourning, white-winged, and Eurasian collared-dove on designated areas of the refuge subject to the following conditions:

(i) We prohibit falconry.

(ii) We prohibit the use of dogs.

(iii) We prohibit pneumatic weapons.

(2) *Upland game hunting.* We allow hunting of Gambel's and scaled quail; cottontail; black-tailed jackrabbit; gray fox; coati; badger; striped, hooded, spotted, and hog-nosed skunk; bobcat; raccoon; ring-tailed cat; and coyote on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (h)(1)(i) through (iii) of this section apply.

(ii) We prohibit night hunting.

(iii) We will allow hunting of these upland game species only when the State season dates overlap with a general or archery State deer and/or javelina hunt season.

(3) *Big game hunting.* We allow hunting of mule deer, white-tailed deer, javelina, and black bear on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (h)(2)(i) and (ii) of this section apply.

(ii) We will allow hunting of black bear only when the State season dates overlap with a general or archery State deer and/or javelina hunt season.

(4) [Reserved]

* * * * *

■ 4. Amend § 32.23 by revising paragraphs (d)(1) introductory text, (d)(1)(ii), (v), and (vii), and (g)(1) introductory text to read as follows:

§ 32.23 Arkansas.

* * * * *

(d) * * *

(1) *Migratory game bird hunting.* We allow hunting of waterfowl (ducks, mergansers, and coots) on designated areas of the refuge subject to the following conditions:

* * * * *

(ii) We allow waterfowl hunting from legal shooting hours until 12 p.m. (noon).

* * * * *

(v) Waterfowl hunters may enter the North Unit, Jack's Bay Hunt Area, and Levee Hunt Area no earlier than 4 a.m.

* * * * *

(vii) We allow waterfowl hunting on outlying tracts; paragraph (d)(1)(v) of this section applies.

* * * * *

(g) * * *

(1) *Migratory game bird hunting.* We allow hunting of American woodcock, duck, goose, and coot on designated areas of the refuge subject to the following conditions:

* * * * *

■ 5. Amend § 32.24 by:

■ a. Revising paragraphs (l)(1) introductory text, (m)(1)(viii), and (m)(2)(i);

■ b. Redesignating paragraphs (q) through (v) as paragraphs (r) through (w);

■ c. Adding a new paragraph (q); and

■ d. Revising newly redesignated paragraphs (r)(1)(vii), (s)(2)(ii), and (v)(2)(ii).

The revisions and addition read as follows:

§ 32.24 California.

* * * * *

(l) * * *

(1) *Migratory game bird hunting.* We allow hunting of goose, duck, coot, snipe, and moorhen on designated areas of the refuge subject to the following conditions:

* * * * *

(m) * * *

(1) * * *

(viii) Hunters must enter and exit the hunting area from the three designated hunt parking lots, which we open 1½ hours before legal sunrise and close 1 hour after legal sunset each hunt day.

* * * * *

(2) * * *

(i) We limit hunting to junior hunters possessing a valid State Junior Hunting License and refuge Junior Pheasant Hunt Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

* * * * *

(q) *San Diego Bay National Wildlife Refuge.* (1)–(3) [Reserved]

(4) *Sport fishing.* We allow sport fishing from boats and other flotation devices on designated areas of the refuge subject to the following condition: We prohibit shoreline fishing.

(r) * * *

(1) * * *

(vii) We prohibit the use of motorized boats and other flotation devices in the free-roam units with the exception of the Freitas Unit.

* * * * *

(s) * * *

(2) * * *

(ii) The conditions set forth at paragraphs (s)(1)(ii) and (iii) of this section apply.

* * * * *

(v) * * *

(2) * * *

(ii) The conditions set forth at paragraphs (v)(1)(i) through (viii) of this section apply.

* * * * *

■ 6. Amend § 32.25 by revising paragraph (a)(2), adding paragraph

(a)(4), and revising paragraphs (d)(3) and (e)(2) to read as follows:

§ 32.25 Colorado.

* * * * *

(a) * * *

(2) *Upland game hunting.* We allow hunting of cottontail rabbit, and black-tailed and white-tailed jackrabbit, on designated areas of the refuge subject to the following condition: The only acceptable methods of take are shotgun, rifle firing rimfire cartridges less than .23 caliber, hand-held bow, pellet gun, slingshot, and hawking/falconry.

* * * * *

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: We prohibit launching or removing any type of watercraft from the refuge on the Rio Grande or Chicago Ditch.

* * * * *

(d) * * *

(3) *Big game hunting.* We allow hunting of pronghorn antelope, moose, mule deer, and elk on designated areas of the refuge.

* * * * *

(e) * * *

(2) *Upland game hunting.* We allow hunting of cottontail rabbit, and black-tailed and white-tailed jackrabbit, on designated areas of the refuge subject to the following condition: The only acceptable methods of take are shotgun, rifle firing rimfire cartridges less than .23 caliber, hand-held bow, pellet gun, slingshot, and hawking/falconry.

* * * * *

■ 7. Revise § 32.26 to read as follows:

§ 32.26 Connecticut.

The following refuge units are open for hunting and/or fishing as governed by applicable Federal and State regulations, and are listed in alphabetical order with additional refuge-specific regulations.

(a) *Silvio O. Conte National Fish and Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory game birds on designated areas of the refuge subject to the following conditions:

(i) We allow refuge access 1½ hours prior to legal sunrise until 1½ hours after legal sunset.

(ii) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of upland game on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (a)(1)(i) and (ii) of this section apply.

(3) *Big game hunting.* We allow hunting of big game on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (a)(1)(i) and (ii) of this section apply.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (a)(1)(i) of this section applies.

(ii) We prohibit launching of motorboats from the refuge.

(iii) We prohibit the use of reptiles and amphibians as bait.

(b) *Stewart B. McKinney National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, coot, merganser, brant, sea duck, and goose on designated areas of the refuge subject to the following conditions:

(i) For the Great Meadows unit, we will limit hunt days to Tuesdays, Wednesdays, and Saturdays during the regular duck, sea duck, and brant seasons.

(ii) We allow the use of dogs consistent with State regulations.

(iii) We allow the use of temporary tree stands and blinds, which must be removed at the end of each day's hunt (see § 27.93 of this chapter).

(2) [Reserved]

(3) *Big game hunting.* We allow archery hunting of white-tailed deer and wild turkey on designated areas of the refuge subject to the following condition: The condition set forth at paragraph (b)(1)(iii) of this section applies.

(4) [Reserved]

■ 8. Revise § 32.27 to read as follows:

§ 32.27 Delaware.

The following refuge units are open for hunting and/or fishing as governed by applicable Federal and State regulations and are listed in alphabetical order with additional refuge-specific regulations.

(a) *Bombay Hook National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory game birds on designated areas of the refuge subject to the following conditions:

(i) We require a refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) for waterfowl hunting.

(ii) You must complete and return a Migratory Bird Hunt Report (FWS Form 3–2361), available at the refuge administration office or on the refuge's website, within 15 days of the close of the season.

(iii) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of grey squirrel, cottontail rabbit, ring-necked pheasant, bobwhite quail, raccoon, opossum, coyote, and red fox on designated areas of the refuge subject to the following condition: The condition set forth at paragraph (a)(1)(iii) of this section applies.

(3) *Big game hunting.* We allow hunting of turkey and deer on designated areas of the refuge subject to the following conditions:

(i) We require a refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(ii) Hunting on the headquarters deer hunt area will be by lottery. You must obtain and possess a refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) from the refuge office or website and have the permit in your possession while hunting.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: We prohibit the use of lead fishing tackle on the refuge.

(b) *Prime Hook National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow the hunting of waterfowl, coot, mourning dove, snipe, and woodcock on designated areas of the refuge subject to the following conditions:

(i) You must obtain and possess a refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) from the refuge office or website and have the permit in your possession while hunting.

(ii) You must complete and return a Migratory Bird Hunt Report (FWS Form 3–2361), available at the refuge administration office or on the refuge's website, within 15 days of the close of the season.

(iii) We allow State certified hunters with disabilities hunting privileges in the Disabled Waterfowl Draw Area subject to the following condition: We do not allow assistants to enter a designated disabled hunting area unless they are accompanied by a certified disabled hunter.

(iv) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of rabbit, quail, pheasant, and red fox on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (b)(1)(i) and (iv) of this section apply.

(3) *Big game hunting.* We allow hunting of white-tailed deer and turkey on designated areas of the refuge subject to the following conditions:

(i) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or

cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(ii) Hunting on the headquarters deer hunt area will be by lottery.

(iii) The condition set forth at paragraph (b)(1)(i) of this section applies.

(4) *Sport fishing.* We allow sport fishing and crabbing on designated areas of the refuge subject to the following conditions:

(i) On Turkle and Fleetwood ponds, we allow boats only with electric trolling motors.

(ii) You must attend all crabbing and fishing gear at all times.

(iii) You must remove all personal property at the end of each day's fishing activity (see §§ 27.93 and 27.94 of this chapter).

■ 9. Amend § 32.28 by:
■ a. Revising paragraph (a);
■ b. Redesignating paragraphs (e) through (n) as paragraphs (f) through (o);
■ c. Adding a new paragraph (e);
■ d. Revising newly redesignated paragraphs (i)(2)(i) and (i)(3)(i);
■ e. In newly redesignated paragraph (j):
■ i. Revising paragraphs (j)(1)(ii) and (x);
■ ii. Adding paragraph (j)(1)(xi);
■ iii. Revising paragraphs (j)(3)(iv) through (viii) and (x);
■ iv. Removing paragraph (j)(3)(xiv);
■ v. Redesignating paragraphs (j)(3)(xv) through (xix) as paragraphs (j)(3)(xiv) through (xviii);
■ vi. Revising newly redesignated paragraphs (j)(3)(xv) and (j)(3)(xviii); and
■ f. Revising newly redesignated paragraphs (m)(2)(iii) and (vii), (m)(3) introductory text, (m)(3)(i), (ii), (iv), (viii) and (ix), and (n)(3)(vii).

The revisions and additions read as follows:

§ 32.28 Florida.

* * * * *

(a) *Arthur R. Marshall Loxahatchee National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck and coot on designated areas of the refuge subject to the following conditions:

(i) You must possess and carry a signed current refuge hunt permit (signed brochure) while hunting. You must have on your person all applicable licenses and permits.

(ii) We prohibit hunting from all refuge structures, canals, and levees; within ½ mile of canoe trails, campsites, and boat ramps; and in areas posted as closed. We allow motorized vessels in the Motorized Zone, south of latitude line 26°27.130. We allow nonmotorized vessels in the Refuge Interior. We allow only one motorized vessel per party.

(iii) Hunters may only enter and leave the refuge at designated entrances.

(iv) We allow only temporary blinds of native vegetation.

(v) Hunters must remove decoys and other personal property from the hunting area at the end of each day's hunt (see § 27.93 of this chapter).

(vi) Hunters may only use boats equipped with factory-manufactured, water-cooled outboard motors; boats with electric motors; and nonmotorized boats. We prohibit boats with air-cooled engines, fan boats, hovercraft, and personal watercraft (jet skis, jet boats, wave runners, etc.). We allow airboats by permit only (Special Use Permit (FWS Form 3–1383–G)). We will issue airboat permits through a separate lottery. There is a 35 miles per hour (mph) speed limit in all waters of the refuge. A 500-foot (150-meter) ''idle speed zone'' is at each of the refuge's three boat ramps.

(vii) Hunters operating boats in the Refuge Interior, outside of the perimeter canal, are required to display a 10-inches by 12-inches (25-centimeters by 30-centimeters) orange flag 10 feet (3 meters) above the vessel's waterline.

(viii) We will allow the use of airboats for a limited number of duck and coot hunters by permit (Special Use Permit (FWS Form 3–1383–G)) during Phase 2 of the State duck and coot season only. We will issue airboat permits through a separate lottery. Contact the Refuge headquarters for airboat permitting information.

(ix) Motorized vessels used while hunting must be stopped and shut off for 15 minutes prior to shooting. Permitted motorized vessels must be in place 1 hour before legal sunrise and not move until 1 hour after legal sunrise.

(x) All hunters must leave the hunt area once their bag/tag limit has been reached.

(xi) We prohibit unrestricted airboat travel not associated with hunting.

(xii) All hunters younger than age 18 must be supervised by a licensed and permitted adult age 21 or older, and must remain with the adult while hunting. Hunters younger than age 18 must have completed a hunter education course.

(xiii) No entry and/or limited activity buffer zones or closures may be created to protect endangered or threatened species and other species.

(xiv) Licenses, permits, equipment, and effects and vehicles, vessels, and other conveyances are subject to inspection by law enforcement officers.

(2) [Reserved]

(3) *Big game hunting.* We allow hunting of alligator, white-tailed deer, and feral hog on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (a)(1)(i) and (iii), (v) through (vii), and (x) and (xi) of this section apply.

(ii) We prohibit hunting from all refuge structures and levees; within ½ mile of canoe trails, campsites, and boat ramps; and in areas posted as closed. We allow motorized vessels in the Motorized Zone, south of latitude line 26°27.130. We allow alligator hunting in the Motorized Zone and perimeter canal south of latitude line 26°27.130. We allow nonmotorized vessels in the Refuge Interior. We allow only one motorized vessel per party.

(iii) We allow alligator hunting on the refuge 1 hour before legal sunset on Friday night through 1 hour after legal sunrise Saturday morning, and 1 hour before legal sunset on Saturday night through 1 hour after legal sunrise Sunday morning. We allow alligator hunting the first two weekends during Harvest Period 1 (August) and the first two weekends during Harvest Period 2 (September). Following the close of Harvest Period 2, the remaining weekends in October will be open for alligator harvest permittees who possess unused CITES tags (OMB Control No. 1018–0093). Specific dates for the alligator hunt are on the harvest permit issued by the State.

(iv) Alligator hunters age 18 and older must be in possession of all necessary State and Federal licenses, permits, and CITES tags, as well as a signed refuge hunt permit (signed brochure) while hunting on the refuge. They must possess an Alligator Trapping License with CITES tag or an Alligator Trapping Agent License (State-issued), if applicable.

(v) Persons younger than age 18 may not hunt but may only accompany an adult age 21 or older who possesses an Alligator Trapping Agent License (State-issued).

(vi) You may take alligators using hand-held snare, harpoon, gig, snatch hook, artificial lure, manually operated spear, spear gun, or crossbow. We prohibit the taking of alligators using baited hook, baited wooden peg, or firearm. We allow the use of bang sticks (a hand-held pole with a pistol or shotgun cartridge on the end in a very short barrel) with approved nontoxic ammunition (see § 32.2(k)) only for taking alligators attached to a restraining line. Once an alligator is captured, it must be killed immediately. We prohibit catch-and-release of alligators. Once the

alligator is dead, you must lock a CITES tag through the skin of the carcass within 6 inches (15.2 centimeters) of the tip of the tail. The tag must remain attached to the alligator at all times.

(vii) We allow the use of airboats for a limited number of alligator hunters by permit (Special Use Permit (FWS Form 3–1383–G)). Airboat permits will be issued through a separate lottery. Contact the refuge headquarters for airboat permitting information.

(viii) Alligators must remain in whole condition while on refuge lands.

(ix) We allow a limited quota permit for the taking of white-tailed deer and incidental take of feral hog in the Refuge Interior, by airboat (requires Special Use Permit (FWS Form 3–1383–G)) and nonmotorized vessels only. Airboat access will be for deer hunt permit holders only.

(x) White-tailed deer and feral hog hunters age 18 and older must be in possession of all necessary State and Federal licenses, permits, as well as a current refuge hunt permit (signed brochure) while hunting on the refuge.

(xi) We have limited quota and specialty hunts for the taking of white-tailed deer, and incidental take of feral hogs during the deer hunts on the Strazzulla Marsh and the Cypress Swamp.

(xii) Motorized vessels used while deer hunting must be stopped and shut off for 15 minutes prior to shooting. Permitted motorized vessels must be in place 1 hour before legal sunrise and not move until 1 hour after legal sunrise.

(xiii) We close the Refuge Interior to all other uses during the limited quota white-tailed deer hunt in the Refuge Interior.

(xiv) White-tailed deer hunters younger than age 18 must be supervised by a licensed and permitted adult age 21 or older, and must remain with the adult while hunting. Hunters younger than age 18 must have completed a hunter education course.

(xv) We prohibit the use of dogs for the take or attempt to take of white-tailed deer and feral hogs. We allow the use of dogs for blood trailing only.

(xvi) We require nontoxic ammunition (see § 32.2(k)) when deer hunting on the refuge.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We allow fishing on all areas of the refuge, except those areas posted as closed to fishing or closed to the public.

(ii) Anglers may only use boats equipped with factory-manufactured-water-cooled outboard motors, boats with electric motors, and nonmotorized boats. We prohibit boats with air-cooled engines, fan boats, hovercraft, and personal watercraft (jet skis, jet boats, wave runners, etc.). We allow the use of airboats by permit only (Special Use Permit (FWS Form 3–1383–G)). Airboat permits will be issued through a separate lottery. Contact the refuge headquarters for airboat permitting information.

(iii) We allow motorized vessels in the Motorized Zone, south of latitude line 26°27.130, and perimeter canal. We allow only nonmotorized vessels in the Non Motorized Watercraft Zone, northern portion of Refuge Interior.

(iv) Anglers operating boats in the Refuge Interior, outside of the perimeter canal, are required to display a 10-inches by 12-inches (25 cm x 30 cm) orange flag 10-feet (3 meters) above the vessel's waterline.

(v) We only allow the use of rods and reels and poles and lines, and anglers must attend them at all times. We prohibit the possession or use of cast nets, seines, trot lines, jugs, and other fishing devices.

(vi) We allow frog gigging, bow fishing, and fish gigging in all areas open to sport fishing, except in the A, B, and C Impoundments and Strazzulla Marsh.

(vii) We prohibit frog gigging, bow fishing, and fish gigging from structures and from within ½ mile of refuge boat ramps, campsites, and canoe trails, and in areas posted as closed.

(viii) We allow the taking of frogs from July 16 through March 15 of each year.

(ix) The daily bag limit for frogs is 50 frogs per vessel or party.

(x) Fish and frogs must remain in whole condition while on refuge lands.

(xi) Frogs may only be taken by gig, blowgun, or hook and line, or by hand.

(xii) We limit frogging or fishing by airboat to nonhunting airboat permittees only.

(xiii) We prohibit commercial fishing, including unpermitted commercial guiding, and the taking of turtles and other wildlife (see § 27.21 of this chapter).

(xiv) We allow 17 fishing tournaments a year by Special Use Permit only (General Activities—Special Use Permit Application, FWS Form 3–1383–G).

* * * * *

(e) *Everglades Headwaters National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory game birds on designated areas of the refuge in accordance with State regulations and applicable State Wildlife Management Area regulations.

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the refuge in accordance with State regulations and applicable State Wildlife Management Area regulations.

(3) *Big game hunting.* We allow big game hunting on designated areas of the refuge in accordance with State regulations and applicable State Wildlife Management Area regulations.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge in accordance with State regulations and applicable State Wildlife Management Area regulations.

* * * * *

(i) * * *

(2) * * *

(i) The conditions set forth at paragraphs (i)(1)(i) through (viii) of this section apply.

* * * * *

(3) * * *

(i) The conditions set forth at paragraphs (i)(1)(i) through (viii) of this section apply.

* * * * *

(j) * * *

(1) * * *

(ii) You must carry (or hunt within 30 yards of a hunter who possesses) a valid State-issued Merritt Island Waterfowl Quota Permit, while hunting in areas 1 or 4 during the State's regular waterfowl season. The Waterfowl Quota Permit can be used for a single party consisting of the permit holder and up to three guests. The permit holder must be present. The Waterfowl Quota Permit is a limited entry quota permit, is zone-specific, and is nontransferable.

* * * * *

(x) You must stop at a posted refuge waterfowl check station and report statistical hunt information on the Migratory Bird Hunt Report (FWS Form 3–2361) to refuge personnel.

(xi) When inside the impoundment perimeter ditch, you may use gasoline or diesel motors. Outside the perimeter ditch, you must propel vessels by paddling, push pole, or electric trolling motor.

* * * * *

(3) * * *

(iv) We allow hunting within the State's deer season on specific days as defined by the refuge hunt brochure. Each hunt will be a 3-day weekend. Legal shooting hours are ½ hour before legal sunrise to ½ hour after legal sunset.

(v) Hunters possessing a valid permit (State-issued permit) may access the refuge no earlier than 4 a.m. and must leave the refuge no later than 2 hours after legal sunset. If you wish to track wounded game beyond 2 hours after legal sunset, you must gain consent from a Federal Wildlife Officer to do so.

(vi) We prohibit hunting from refuge roads or within 150 yards of roads open to public vehicle traffic or within 200 yards of a building or Kennedy Space Center facility.

(vii) Each permitted hunter may have one adult guest and one youth hunter per adult. All guests must remain within 30 yards of the permitted hunter. The party must share a single bag limit. Each adult may supervise one youth hunter and must remain within sight and normal voice contact.

(viii) You may set up stands or blinds up to 7 days prior to the permitted hunt; you must remove them on the last day of your permitted hunt. You must clearly mark stands and blinds with your Florida State customer identification (ID) number found on your hunting license. You may have no more than one stand or blind per person on the refuge at any time. You must place a stand or blind for a youth hunter within sight and normal voice contact of the supervisory hunter's stand and mark it with the supervisory hunter's Florida State customer ID number and the word ''YOUTH.''

* * * * *

(x) If you use flagging or other trail-marking material, you must print your Florida State customer ID number on each piece or marker. You may set out flagging and trail markers up to 7 days prior to the permitted hunt, and you must remove them on the last day of the permitted hunt.

* * * * *

(xv) You may field dress game; however, we prohibit cleaning game within 150 yards of any public area, road, game-check station, or gate. We prohibit dumping game carcasses on the refuge.

* * * * *

(xviii) You must stop at one of two check stations and report statistical hunt information on the Self-Clearing Check-In/Out Permit (FWS Form 3–2405).

* * * * *

(m) * * *

(2) * * *

(iii) You may only use .22 caliber or smaller rim-fire rifles, shotguns (#4 bird shot or smaller) (see § 32.2(k)), or muzzleloaders to harvest squirrel, rabbit, and raccoon. In addition, you may use shotgun slugs, buckshot, archery equipment including crossbows, center fire weapons, or pistols to take feral hogs.

* * * * *

(vii) You must check out all game taken at a game check station. You must use the State harvest recording system to check out all white-tail deer harvested on the refuge.

(3) *Big game hunting.* We allow hunting of white-tailed deer, feral hog, and turkey in areas and during seasons designated in the hunting brochure subject to the following conditions:

(i) We require State-issued refuge permits. Permits are nontransferable. Each hunter must possess and carry a signed permit when participating in a hunt.

(ii) The conditions set forth at paragraphs (m)(2)(ii) and (iv) through (vii) of this section apply.

* * * * *

(iv) There is a two deer limit per hunt, as specified at paragraph (m)(3)(vi) of this section, except during the youth hunt, when the limit is as specified at paragraph (m)(3)(vii) of this section. The limit for turkey is one per hunt.

* * * * *

(viii) Mobility-impaired hunters may have an assistant accompany them. You may transfer permits (State-issued permit) issued to assistants. We limit those hunt teams to harvesting white-tailed deer and feral hog within the limits provided at paragraph (m)(3)(vi) of this section.

(ix) You may harvest one bearded turkey per hunt. You may only use shotguns or archery equipment, including crossbows, to harvest turkey. We prohibit hunting after 1 p.m.

* * * * *

(n) * * *

(3) * * *

(vii) We limit weapons to primitive weapons (bow and arrow, muzzleloader, and crossbow) on the primitive weapons sambar deer hunt and the primitive weapons white-tailed deer hunt. We limit the archery hunt to bow and arrow, and crossbow. You may take feral hog and raccoon only with the weapons allowed for that period.

* * * * *

■ 10. Amend § 32.29 by:
■ a. Adding paragraph (a)(3);
■ b. Redesignating paragraph (h)(1)(iv) as paragraph (h)(1)(v);
■ c. Adding a new paragraph (h)(1)(iv);
■ d. Revising paragraphs (h)(2)(i), (h)(3) introductory text, and (h)(3)(i); and
■ e. Adding paragraph (h)(3)(vii).

The revisions and additions read as follows:

§ 32.29 Georgia.

* * * * *

(a) * * *

(3) *Big game hunting.* We allow alligator hunting on designated areas of the refuge subject to the following condition: We only allow alligator hunting during the first two weekends (from legal sunset Friday through legal sunrise Monday) of the State alligator season.

* * * * *

(h) * * *

(1) * * *

(iv) We allow the incidental take of armadillo, beaver, opossum, and raccoon during all refuge hunts (migratory bird, upland, and big game) with firearms and other equipment authorized for use on refuge lands in Georgia only.

* * * * *

(2) * * *

(i) The conditions set forth at paragraphs (h)(1)(i), (iii), and (iv) of this section apply.

* * * * *

(3) *Big game hunting.* We allow hunting of white-tailed deer, turkey, alligator, feral hog, and coyote on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (h)(1)(i), (iii), and (iv) of this section apply.

* * * * *

(vii) We prohibit catch-and-release of alligators.

* * * * *

■ 11. Amend § 32.31 by:
■ a. Removing paragraph (c)(3)(iv);
■ b. Redesignating paragraph (c)(3)(v) as paragraph (c)(3)(iv); and
■ c. Revising paragraphs (c)(4)(i), (e)(1) introductory text, (f)(1) introductory text, and (f)(2) and (3).

The revisions read as follows:

§ 32.31 Idaho.

* * * * *

(c) * * *

(4) * * *

(i) From October 1 through April 14, we allow ice fishing on the Lake Lowell Unit, unless otherwise posted by the Bureau of Reclamation.

* * * * *

(e) * * *

(1) *Migratory game bird hunting.* We allow hunting of goose, duck, coot, and snipe on designated areas of the refuge subject to the following conditions:

* * * * *

(f) * * *

(1) *Migratory game bird hunting.* We allow hunting of duck, goose, coot, snipe, dove, and crow on designated areas of the refuge subject to the following conditions:

* * * * *

(2) *Upland game hunting.* We allow hunting of pheasant, grouse, partridge (chukar and gray partridge), cottontail rabbit, and bobcat on designated areas of the refuge subject to the following condition: The condition set forth at

paragraph (f)(1)(i) of this section applies.

(3) *Big game hunting.* We allow hunting of deer and elk on designated areas of the refuge subject to the following condition: Deer and elk hunters may enter the hunt area from 1½ hours before legal hunting time to 1½ hours after legal hunting time.

* * * * *

■ 12. Amend § 32.32 by:
■ a. Revising paragraphs (b)(3)(iv)(A), (e)(1), (e)(3)(iii) and (v), (g), and (i)(2);
■ b. Removing paragraph (i)(3)(iii);
■ c. Redesignating paragraph (i)(3)(iv) as paragraph (i)(3)(iii); and
■ d. Revising paragraphs (k)(1), (2), and (3).

The revisions read as follows:

§ 32.32 Illinois.

* * * * *

(b) * * *

(3) * * *

(iv) * * *

(A) In the area west of Division Street and east of Blue Heron Marina;

* * * * *

(e) * * *

(1) *Migratory game bird hunting.* We allow hunting of migratory game birds on designated areas of the refuge subject to the following condition: On the Long Island Division, we allow hunting only from blinds constructed on sites posted by the Illinois Department of Natural Resources.

* * * * *

(3) * * *

(iii) On the Fox Island Division, Slim Island Division, Cherry Box Division, and Hickory Creek Division, we only allow archery deer hunting during the Statewide archery season. We prohibit archery hunting during the State firearm season.

* * * * *

(v) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

* * * * *

(g) *Kankakee National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of wild turkey on designated areas of the refuge subject to the following conditions:

(i) For hunting, you may possess only approved nontoxic shot shells while in the field (see § 32.2(k)).

(ii) You must remove all boats, decoys, blinds, blind materials, stands, platforms, and other hunting equipment (see §§ 27.93 and 27.94 of this chapter) brought onto the refuge at the end of each day's hunt.

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following condition: The condition set forth at paragraph (g)(2)(ii) of this section applies.

(4) [Reserved]

* * * * *

(i) * * *

(2) *Upland game hunting.* We allow hunting of small game, furbearers, and game birds on designated areas of the refuge subject to the following condition: We open the refuge divisions for upland game hunting from ½ hour before legal sunrise to ½ hour after legal sunset.

* * * * *

(k) *Two Rivers National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory game birds on designated areas of the refuge subject to the following conditions:

(i) Hunters must remove boats, decoys, blinds, blind materials, stands, and platforms brought onto the refuge at the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(ii) We allow the use of dogs while hunting, provided the dog is under the immediate control of the hunter at all times.

(2) *Upland game hunting.* We allow upland game hunting for wild turkey, small game, furbearers, and nonmigratory game birds on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (k)(1)(i) and (ii) of this section apply.

(ii) For hunting, you may use or possess only approved nontoxic shot shells while in the field, including shot shells used for hunting wild turkey (see § 32.2(k)).

(iii) We prohibit hunters using rifles or handguns with ammunition larger than .22 caliber rimfire, except they may use black powder firearms up to and including .50 caliber.

(iv) We allow the use of .22 and .17 caliber rimfire lead ammunition for the taking of small game and furbearers during open season.

(v) We allow hunting from legal sunrise to legal sunset.

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (k)(1)(i) of this section applies.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

* * * * *

■ 13. Amend § 32.33 by:
■ a. Revising paragraphs (b), (c)(1) introductory text, and (c)(2) introductory text;
■ b. Adding paragraph (c)(2)(iii);
■ c. Revising paragraph (c)(3)(i);
■ d. Redesignating paragraph (c)(3)(iv) as paragraph (c)(3)(v); and
■ e. Adding new paragraph (c)(3)(iv).

The revisions and additions read as follows:

§ 32.33 Indiana.

* * * * *

(b) *Muscatatuck National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, coot, merganser, woodcock, and dove on designated areas of the refuge subject to the following conditions:

(i) You must remove all boats, decoys, blinds, blind materials, stands, and platforms brought onto the refuge at the end of each day's hunt (see § 27.93 of this chapter).

(ii) We allow the use of dogs when hunting, provided the dogs are under the immediate control of the hunter at all times.

(iii) We prohibit hunting and the discharge of a firearm within 100 yards (30 meters) of any dwelling or any other building that people, pets, or livestock may occupy.

(2) *Upland game hunting.* We allow hunting of turkey, quail, squirrel, raccoon, opossum, coyote, fox, skunk, and rabbit on designated areas of the refuge subject to the following conditions:

(i) For hunting, you may use or possess only approved nontoxic shot shells while in the field, including shot shells used for hunting wild turkey (see § 32.2(k)).

(ii) We allow the use of rimfire weapons for upland/small game hunting.

(iii) We prohibit the use of centerfire rifles for any hunts on refuge property.

(iv) During spring turkey hunting, hunters must possess a State-issued hunting permit during the first 6 days of the season.

(v) We prohibit turkey hunting after 1 p.m. each day.

(vi) We allow the incidental take of coyote only during other refuge hunting seasons.

(vii) The conditions set forth at paragraphs (b)(1)(i) through (iii) of this section apply.

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) through (iii) and (b)(2)(i) through (iii) of this section apply.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(iii) We prohibit the use or possession of tree spikes, plastic flagging, and reflective tacks.

(iv) We prohibit firearms deer hunting during the State deer firearm season (archery and muzzleloader only).

(v) We close archery deer hunting during the State muzzleloader season.

(vi) We prohibit the possession of game trail cameras on the refuge.

(vii) We require you to remove arrows from crossbows during transport in a vehicle.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We prohibit the use of any type of motor.

(ii) We allow the use of kayaks, canoes, belly boats, or float tubes in all designated fishing areas.

(iii) We allow fishing only with rod and reel, or pole and line.

(iv) We prohibit harvest of frog and turtle (see § 27.21 of this chapter).

(v) We prohibit the use of lead fishing tackle.

(vi) We allow only youth age 15 and younger to fish in the Discovery Pond.

(c) * * *

(1) *Migratory game bird hunting.* We allow hunting of duck, goose, merganser, coot, woodcock, dove, snipe, rail, and crow on designated areas of the refuge and the White River Wildlife Management Area subject to the following conditions:

* * * * *

(2) *Upland game hunting.* We allow hunting of bobwhite quail, pheasant, cottontail rabbit, squirrel (gray and fox), red and gray fox, coyote, opossum, striped skunk, and raccoon subject to the following conditions:

* * * * *

(iii) You may only use or possess approved nontoxic shot shells (see § 32.2(k)) while in the field.

(3) * * *

(i) The condition set forth at paragraph (c)(2)(iii) applies while turkey hunting.

* * * * *

(iv) On the Columbia Mine Unit, if you use a rifle to hunt, you may use only rifles allowed by State regulations for hunting on public land.

* * * * *

■ 14. Amend § 32.34 by:

■ a. Revising paragraph (d)(1) introductory text;

■ b. Removing paragraph (d)(1)(i);

■ c. Redesignating paragraphs (d)(1)(ii) through (d)(1)(v) as paragraphs (d)(1)(i) through (d)(1)(iv); and

■ d. Revising paragraphs (d)(2) introductory text, (d)(2)(i), (g)(1) introductory text, (g)(1)(ii), (g)(2) introductory text, (g)(2)(ii), and (g)(3)(i).

The revisions read as follows:

§ 32.34 Iowa.

* * * * *

(d) * * *

(1) *Migratory game bird hunting.* We allow the hunting of dove, duck, goose, and coot on designated areas of the refuge subject to the following conditions:

* * * * *

(2) *Upland game hunting.* We allow hunting of ring-necked pheasant, bobwhite quail, pigeon, crow, cottontail rabbit, gray and fox squirrel, and wild turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (d)(1)(i) through (iv) of this section apply.

* * * * *

(g) * * *

(1) *Migratory game bird hunting.* We allow hunting of duck, goose, coot, rail (Virginia and sora only), woodcock, dove, crow, and snipe on designated areas of the refuge subject to the following conditions:

* * * * *

(ii) We allow boats or other floating devices when hunting. You may not leave boats unattended.

* * * * *

(2) *Upland game hunting.* We allow hunting of pheasant, gray partridge, cottontail rabbit, squirrel (fox and gray), groundhog, raccoon, opossum, fox, coyote, and skunk on designated areas of the refuge subject to the following conditions:

* * * * *

(ii) The conditions set forth at paragraphs (g)(1)(i), (ii), (iv), and (v) of this section apply.

(3) * * *

(i) The conditions set forth at paragraphs (g)(1)(i), (ii), (iv), and (v) of this section apply.

* * * * *

■ 15. Revising § 32.35 to read as follows:

§ 32.35 Kansas.

The following refuge units are open for hunting and/or fishing as governed by applicable Federal and State regulations, and are listed in alphabetical order with additional refuge-specific regulations.

(a) *Flint Hills National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of coot, crow, mourning dove, duck, goose, rail, woodcock, and snipe on designated areas of the refuge subject to the following conditions:

(i) You must remove portable hunting blinds and decoys at the end of each day's hunt (see § 27.93 of this chapter).

(ii) We only allow rimfire firearms, shotguns, and archery equipment.

(iii) We prohibit shooting from or over roads and parking areas.

(iv) We allow the use of dogs when hunting migratory birds.

(v) We close hunting areas on the north side of the Neosho River to all hunting from November 1 through March 1.

(2) *Upland game hunting.* We allow hunting of coyote, pheasant, prairie chicken, quail, rabbit, State-defined furbearers, and squirrel on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs when hunting upland game, except that we prohibit the use of dogs when hunting coyotes and furbearers.

(ii) Shooting hours for upland game species are ½ hour before legal sunrise until legal sunset.

(iii) We prohibit the harvest of beaver and otter.

(iv) The conditions set forth at paragraphs (a)(1)(ii) and (iii) of this section apply.

(3) *Big game hunting.* We allow hunting of white-tailed deer and turkey on designated areas of the refuge subject to the following conditions:

(i) You may possess only approved nontoxic shot for turkey hunting (see § 32.2(k)).

(ii) We allow one portable blind or stand per hunter. You may place a stand on the refuge no more than 14 days prior to the season, and you must remove it within 14 days of the close of the season. You must remove a portable blind at the end of each day's hunt (see § 27.93 of this chapter). You must label any portable blind or stand with the owner's name and Kansas Department of Wildlife, Parks and Tourism

(KDWPT) number. Labels must be clearly visible from the ground.

(iii) We prohibit the use of dogs when hunting turkey.

(iv) The condition set forth at paragraph (a)(1)(iii) of this section applies.

(v) We only allow muzzleloaders, shotguns, and archery equipment.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: We prohibit the take of reptiles and amphibians.

(b) *Kirwin National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of coot, crow, duck, goose, merganser, mourning dove, rail, snipe, and woodcock on designated areas of the refuge subject to the following conditions:

(i) You must remove portable hunting blinds and decoys at the end of each day's hunt (see § 27.93 of this chapter).

(ii) We prohibit shooting from or over roads and parking areas.

(iii) In Bow Creek, we allow hunting access by boat or on foot year round.

(iv) We allow the use of dogs when hunting migratory birds.

(2) *Upland game hunting.* We allow hunting of cottontail rabbit, jack rabbit, pheasant, prairie chicken, quail, State-defined furbearers, and squirrel (fox and grey) on designated areas of the refuge subject to the following conditions:

(i) We only allow shotguns and archery equipment when hunting upland game.

(ii) We allow the use of dogs when hunting upland game, except that we prohibit the use of dogs when hunting coyotes and furbearers.

(iii) Shooting hours for upland game species are ½ hour before legal sunrise until legal sunset.

(iv) We prohibit the harvest of beaver and otter.

(v) The condition set forth at paragraph (b)(1)(ii) of this section applies.

(3) *Big game hunting.* We allow hunting of deer and turkey on designated areas of the refuge subject to the following conditions:

(i) We only allow archery hunting of deer.

(ii) We allow one portable blind or stand per hunter. You may place a stand on the refuge no more than 14 days prior to the season, and you must remove it within 14 days of the close of the season. You must remove a portable blind at the end of each day's hunt (see § 27.93 of this chapter). You must label any portable blind or stand with the owner's name and KDWPT number. Labels must be clearly visible from the ground.

(iii) You must obtain a refuge-issued permit (FWS Form 3–2405, Self-Clearing Check-In/Out Permit) to hunt deer on the refuge.

(iv) The condition set forth at paragraph (b)(1)(ii) of this section applies.

(v) We prohibit the use of dogs when hunting turkey.

(vi) You may possess only approved nontoxic shot for turkey hunting (see § 32.2(k)).

(4) *Sport fishing.* We allow sport fishing on designated areas on the refuge subject to the following conditions:

(i) We only allow boats for activities related to fishing.

(ii) We prohibit boating for fishing between October 1 and April 1 when the reservoir water elevation falls below 1,722 feet (measured on October 1), except in the Bow Creek Hunting Unit. Boats may be launched only at Scout Cove during this period.

(iii) We allow boating for fishing year-round, on the entire reservoir, only when the reservoir water elevation is above 1,722 feet (measured on October 1).

(iv) We allow noncommercial collection of baitfish as governed by State regulations.

(v) We prohibit all activities associated with fishing tournaments, outside of sport fishing itself, to include organized gatherings, registrations, weigh-ins, and award presentations to be held or organized on the refuge.

(vi) We prohibit the take of reptiles and amphibians.

(c) *Marais des Cygnes National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of coot, crow, duck, goose, mourning dove, rail, snipe, and woodcock on designated areas of the refuge subject to the following conditions:

(i) You must remove portable hunting blinds and decoys at the end of each day's hunt (see § 27.93 of this chapter).

(ii) We prohibit shooting from or over roads and parking areas.

(iii) We allow the use of dogs when hunting migratory birds.

(iv) We only allow shotguns and archery equipment.

(2) *Upland game hunting.* We allow hunting of coyote, cottontail rabbit, State-defined furbearers, squirrel, and upland birds on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs when hunting upland game, except that we prohibit the use of dogs when hunting coyotes and furbearers.

(ii) Shooting hours for upland game species are ½ hour before legal sunrise until legal sunset.

(iii) We prohibit the harvest of beaver and otter.

(iv) The conditions set forth at paragraphs (c)(1)(i), (ii), and (iv) of this section apply.

(3) *Big game hunting.* We allow hunting of white-tailed deer and turkey on designated areas of the refuge subject to the following conditions:

(i) You must possess and carry a State-issued refuge access permit to hunt deer and spring turkey.

(ii) We allow one portable blind or stand per hunter. You may place a stand on the refuge no more than 14 days prior to the season, and you must remove it within 14 days of the close of the season. You must remove a portable blind at the end of each day's hunt (see § 27.93 of this chapter). You must label any portable blind or stand with the owner's name and KDWPT number. Labels must be clearly visible from the ground.

(iii) We prohibit the use of dogs when hunting turkey.

(iv) You may possess only approved nontoxic shot for turkey hunting (see § 32.2(k)).

(v) The condition set forth at paragraph (c)(1)(ii) of this section applies.

(vi) We only allow archery deer hunting, except during the January antlerless deer season when we allow the use of archery, muzzleloader, and shotgun.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: We prohibit the take of reptiles and amphibians.

(d) *Quivira National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of coot, crow, duck, goose, and mourning dove on designated areas of the refuge subject to the following conditions:

(i) We open refuge hunting areas from September 1 through February 28.

(ii) The refuge is open from 1½ hours before legal sunrise to 1½ hours after legal sunset.

(iii) We prohibit the retrieval of game from areas closed to hunting.

(iv) You must remove portable hunting blinds and decoys at the end of each day's hunt (see § 27.93 of this chapter).

(v) We prohibit shooting from or over roads and parking areas.

(vi) We allow the use of dogs when hunting migratory birds.

(vii) We only allow shotguns and archery equipment.

(2) *Upland game hunting.* We allow hunting of coyote, pheasant, quail, State-defined furbearers, squirrel, and rabbit on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (d)(1)(i) through (iii), (v), and (vii) of this section apply.

(ii) We allow the use of dogs when hunting upland game, except that we prohibit the use of dogs when hunting coyotes and furbearers.

(iii) We prohibit the harvest of beaver and otter.

(iv) You must possess a State-issued refuge access permit for coyote and State-defined furbearer hunting.

(3) *Big game hunting.* We allow hunting of white-tailed deer and turkey on designated areas of the refuge subject to the following conditions:

(i) You may possess only approved nontoxic ammunition for turkey and deer hunting (see § 32.2(k)).

(ii) You must possess a State-issued refuge access permit for deer and turkey hunting.

(iii) We allow one portable blind or stand per hunter. You may place a stand on the refuge no more than 14 days prior to the season, and you must remove it within 14 days of the close of the season. You must remove a portable blind at the end of each day's hunt (see § 27.93 of this chapter). You must label any portable blind or stand with the owner's name and KDWPT number. Labels must be clearly visible from the ground.

(iv) We prohibit the use of dogs when hunting turkey.

(v) The conditions set forth at paragraphs (d)(1)(i) through (iii) and (v) of this section apply.

(vi) We only allow muzzleloaders, shotguns, and archery equipment.

(4) *Sport fishing.* We allow sport fishing on all waters on the refuge subject to the following conditions:

(i) We prohibit taking of reptiles and amphibians.

(ii) We prohibit the use of trotlines and setlines.

(iii) We prohibit the use of seines for taking bait.

(iv) We prohibit fishing from water control structures and bridges.

(v) We restrict fishing in the designated ''Kid's Pond,'' approximately ¼ mile (.4 kilometers) west-southwest of headquarters, to youth age 14 and younger, and to a parent and/or guardian age 18 or older accompanying a youth.

(vi) The creel limit for the Kid's Pond is one fish per day.

(vii) The condition set forth at paragraph (d)(1)(ii) of this section applies.

(viii) The only live bait we allow is worms; we prohibit all other live bait.

■ 16. Amend § 32.36 by:

■ a. Revising paragraphs (a)(1)(iii), (v), and (vi);

■ b. Removing paragraphs (a)(1)(vii) and (viii); and

■ c. Revising paragraphs (a)(2) and (a)(3)(i).

The revisions read as follows:

§ 32.36 Kentucky.

* * * * *

(a) * * *

(1) * * *

(iii) We prohibit hunting within 100 feet (30 meters) of a residence and discharge of firearms within 200 feet (60 meters) of any home, the abandoned railroad tracks, graveled roads, and hiking trails.

* * * * *

(v) We allow the use of dogs for waterfowl, quail, snipe, dove, woodcock, squirrel, rabbit, raccoon, opossum, and fall turkey hunting. Dog owners/handlers must have a collar on each dog with the owner's contact information.

(vi) We allow waterfowl hunting from legal shooting time until 12 p.m. (noon).

(2) *Upland game hunting.* We allow hunting of squirrel, rabbit, quail, raccoon, opossum, coyote, bobcat, fox, skunk, otter, muskrat, mink, weasel, and beaver on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (a)(1)(i) through (v) of this section apply.

(ii) We allow coyote hunting under Statewide regulations during daylight hours only.

(3) * * *

(i) The conditions set forth at paragraphs (a)(1)(i) through (v) of this section apply.

* * * * *

■ 17. Amend § 32.37 by:

■ a. Revising paragraphs (a)(1) introductory text, (a)(2) introductory text, and (c)(1)(vi);

■ b. Adding new paragraph (d)(1)(ix);

■ c. Revising paragraphs (d)(3)(ii), (e)(1)(i) and (v), (e)(2) introductory text, and (e)(2)(ii);

■ d. Adding paragraph (e)(2)(v);

■ e. Revising paragraph (f)(3) introductory text;

■ f. Removing paragraph (f)(3)(iii);

■ g. Redesignating paragraph (f)(3)(iv) as (f)(3)(iii);

■ h. Revising paragraphs (g), (k)(1) introductory text, (k)(1)(x), (k)(3)(ii), (n)(1)(xiv), (n)(4)(ii), (p)(1)(vii) and (xii), and (q)(1)(iii);

■ i. Adding paragraphs (t)(1)(vi);

■ j. Revising paragraph (t)(2)(i); and

■ k. Adding paragraphs (t)(2)(v) and (t)(3)(xiii).

The revisions and additions read as follows:

§ 32.37 Louisiana.

* * * * *

(a) * * *

(1) *Migratory game bird hunting.* We allow hunting of mourning dove, duck, goose, coot, snipe, rail, gallinule, and woodcock on designated areas of the refuge subject to the following conditions:

* * * * *

(2) *Upland game hunting.* We allow hunting of squirrel, rabbit, and raccoon on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (a)(1)(i) and (ii) of this section apply.

* * * * *

(c) * * *

(1) * * *

(vi) Each person age 18 and older must possess a valid Annual Public Use Permit (signed brochure).

* * * * *

(d) * * *

(1) * * *

(ix) Each person age 18 and older, must possess a valid Annual Public Use Permit (signed brochure).

* * * * *

(3) * * *

(ii) We allow archery deer hunting according to the State of Louisiana archery season. Hunters may take deer of either sex as governed by State-approved archery equipment and regulations. We close refuge archery hunting during refuge deer gun hunts.

* * * * *

(e) * * *

(1) * * *

(i) We allow waterfowl hunting on Wednesdays, Thursdays, Saturdays, and Sundays from ½ hour before legal sunrise until 12 p.m. (noon), including waterfowl hunting during the State special teal season and State youth waterfowl hunt. We allow snipe, rail, and gallinule hunting on Wednesdays, Thursdays, Saturdays, and Sundays from ½ hour before legal sunrise until 2 p.m.

* * * * *

(v) An adult age 18 or older must supervise youth hunters age 17 and younger during all hunts. Youth hunter age and hunter education requirements are governed by State regulations. One adult may supervise two youths during small game hunts and migratory bird hunts, but is only allowed to supervise one youth during big game hunts. Youths must remain within normal voice contact and direct sight of the adult who is supervising them. Adult guardians are responsible for ensuring that youth hunters do not violate refuge rules.

* * * * *

(2) *Upland game hunting.* We allow hunting of squirrel, rabbit, raccoon, and

quail on designated areas of the refuge subject to the following conditions:

* * * * *

(ii) When hunting squirrel, rabbit, and raccoon, we allow the use of dogs only after the close of the State archery deer season. When hunting quail, you may only use dogs to locate, point, and retrieve.

* * * * *

(v) We only allow raccoon to be taken during the State rabbit season.

* * * * *

(f) * * *

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

* * * * *

(g) *Bogue Chitto National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, coot, and woodcock on designated areas of the refuge subject to the following conditions:

(i) We allow hunting from ½ hour before legal sunrise until 12 p.m. (noon), including during the State special teal season, State youth waterfowl hunt, and special light goose conservation season.

(ii) You must remove blinds and decoys by 1 p.m. each day (see § 27.93 of this chapter).

(iii) We prohibit goose hunting for that part of the season that extends beyond the regular duck season.

(iv) When hunting migratory game birds, you may only use dogs to locate, point, and retrieve game.

(v) Each person age 18 and older while hunting or fishing must possess a valid Annual Public Use Permit (signed brochure).

(vi) An adult age 18 or older must supervise youth hunters age 17 and younger during all hunts. Youth hunter age and hunter education requirements are governed by State regulations. One adult may supervise two youths during small game hunts and migratory bird hunts, but is only allowed to supervise one youth during big game hunts. Youths must remain within normal voice contact of the adult who is supervising them. Adult guardians are responsible for ensuring that youth hunters do not violate refuge rules.

(vii) We prohibit hunting or discharge of firearms (see § 27.42 of this chapter) within 150 feet (45.7 meters (m)) from the centerline of any public road, refuge road, designated or maintained trail, building, residence, designated camping area, or designated public facility, or from or across aboveground oil, gas, or electric facilities.

(viii) For the purpose of hunting, we prohibit possession of slugs, buckshot, and rifle and pistol ammunition, except during the deer gun and primitive firearm seasons (see § 32.2(k)).

(ix) You may use only reflective tacks as trail markers on the refuge.

(x) We allow the incidental take of feral hog during any open refuge hunting season with weapons approved for that season.

(2) *Upland game hunting.* We allow hunting of squirrel, rabbit, raccoon, and opossum on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs for rabbit, squirrel, raccoon, and opossum hunting on specific dates listed in the refuge hunt brochure.

(ii) During any open deer firearm or primitive firearm season on the refuge, all hunters, except waterfowl hunters and nighttime raccoon and opossum hunters, must wear hunter orange, blaze pink, or other such color as governed by State regulations.

(iii) The conditions set forth at paragraphs (g)(1)(v) through (x) of this section apply, except you may use .22-caliber rifles or smaller, and the nontoxic shot in your possession while hunting must be size 4 or smaller (see § 32.2(k)).

(iv) We will close the refuge to hunting (except waterfowl) and camping when the Pearl River reaches 15.5 feet (4.65 meters) on the Pearl River Gauge at Pearl River, Louisiana.

(v) During the dog season for squirrels and rabbits, all hunters, including archery hunters (while on the ground), except waterfowl hunters, must wear a cap or hat that is hunter-orange, blaze pink, or other such color as governed by State regulations.

(3) *Big game hunting.* We allow hunting of white-tailed deer, turkey, and feral hog on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (g)(1)(v) through (x) and (g)(2)(ii) through (iv) of this section apply.

(ii) Hunters may erect deer stands 48 hours before the deer archery season and must remove them from the refuge within 48 hours after this season closes (see § 27.93 of this chapter). We allow only one deer stand per hunter on the refuge. Deer stands must have the owner's State license/sportsmen's identification number clearly printed on the stand.

(iii) Deer hunters hunting from concealed blinds must display State Wildlife Management Area (WMA) hunter-orange or blaze-pink (as governed by State WMA regulations) above or around their blinds that is visible from 360 degrees.

(iv) We hold a special dog hog hunt in February. During this hunt, the following conditions apply, in addition to other applicable conditions in paragraph (g)(3) of this section:

(A) You must use trained hog-hunting dogs to aid in the take of hog.

(B) We allow take of hog from ½ hour before legal sunrise until ½ hour after legal sunset.

(C) You must possess only approved nontoxic shot, or pistol or rifle ammunition not larger than .22 caliber rim-fire to take the hog after it has been caught by dogs.

(v) You must kill all hogs prior to removal from the refuge.

(vi) We prohibit the use of deer and turkey gobbler decoys.

(4) *Sport fishing.* We allow only recreational fishing year-round on designated areas of the refuge subject to the following conditions:

(i) We only allow cotton limb lines.

(ii) We close the fishing ponds at the Pearl River Turnaround to fishing from April through the first full week of June and to boating during the months of April, May, June, and July.

(iii) When the Pearl River Turnaround area is open, we allow boats that do not have gasoline-powered engines attached in the fishing ponds at the Pearl River Turnaround. Anglers must hand-launch these boats into the ponds. When the fishing ponds at the Pearl River Turnaround are open, hook and line is the only legal method of take in those ponds.

(iv) The Pearl River Turnaround area, when open to fishing, is open ½ hour before legal sunrise to ½ hour after legal sunset.

(v) The conditions set forth at paragraphs (g)(1)(x) and (g)(2)(iv) of this section apply.

* * * * *

(k) * * *

(1) *Migratory game bird hunting.* We allow hunting of duck, goose, coot, and woodcock on designated areas of the refuge subject to the following conditions:

* * * * *

(x) We only allow the use of bright eyes or reflective tape for flagging or trail markers.

* * * * *

(3) * * *

(ii) We allow deer modern firearm hunting on the area south of the French Fork of the Little River for 2 days in December with these dates being set annually.

* * * * *

(n) * * *

(1) * * *

(xiv) We only allow the use of bright eyes or reflective tape for flagging or trail markers.

* * * * *

(4) * * *

(ii) We only allow fishing within the Coulee Des Grues Bayou from the bank adjacent to Little California Road.

* * * * *

(p) * * *

(1) * * *

(vii) We restrict the use of the ATV trails that are designated for physically challenged persons to individuals who possess a State-issued physically challenged program hunter permit or are age 60 or older.

* * * * *

(xii) We only allow the use of bright eyes or reflective tape for flagging or trail markers.

* * * * *

(q) * * *

(1) * * *

(iii) Each person age 18 and older must possess a valid Annual Public Use Permit (signed brochure).

* * * * *

(t) * * *

(1) * * *

(vi) We allow the incidental take of coyote, beaver, raccoon, and opossum when hunting for migratory bird species with firearms and archery equipment authorized for use.

(2) * * *

(i) We allow nighttime raccoon hunting in alignment with Big Lake Wildlife Management Area (WMA).

* * * * *

(v) We allow the incidental take of coyote, beaver, raccoon, and opossum when hunting for upland game species with firearms and archery equipment authorized for use.

(3) * * *

(xiii) We allow the incidental take of coyote, beaver, raccoon, and opossum when hunting for big game species with firearms and archery equipment authorized for use.

* * * * *

■ 18. Revise § 32.38 to read as follows:

§ 32.38 Maine.

The following refuge units are open for hunting and/or fishing as governed by applicable Federal and State regulations, and are listed in alphabetical order with additional refuge-specific regulations.

(a) *Moosehorn National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, American woodcock, and snipe on designated areas of the refuge subject to the following conditions:

(i) We require every hunter to possess and carry a personally signed refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(ii) We allow hunters to enter the refuge 2 hours before legal shooting hours, and they must exit the refuge by 1 hour past legal shooting hours.

(iii) We only allow portable or temporary blinds and decoys that must be removed from the refuge following each day's hunt (see § 27.93 of this chapter).

(iv) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of ruffed grouse, snowshoe hare, red fox, gray and red squirrel, raccoon, skunk, and woodchuck on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (a)(1)(i), (ii) (except for hunters pursuing raccoon at night), and (iv) of this section apply.

(3) *Big game hunting.* We allow hunting of black bear, bobcat, eastern coyote, moose, and white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (a)(1)(i), (ii) (except for hunters pursuing eastern coyote at night), and (iv) of this section apply.

(ii) The hunter must retrieve all species harvested on the refuge.

(iii) We allow eastern coyote hunting from October 1 to March 31.

(iv) We allow tree stands, blinds, and ladders. You must clearly label any tree stand, blind, or ladder left on the refuge overnight with your hunting license number. You must remove your tree stand(s), blind(s), and/or ladder(s) from the refuge on the last day of the muzzleloader deer season (see § 27.93 of this chapter).

(v) You may hunt black bear, eastern coyote, and white-tailed deer during the State archery and firearms deer seasons on the Baring Division east of State Route 191.

(vi) We prohibit use of firearms to hunt bear and coyote during the archery deer season on the Baring Division east of Route 191. We prohibit the use of firearms, other than a muzzleloader, to hunt coyote during the deer muzzleloader season on the Baring Division east of Route 191.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We only allow fishing from ½ hour before legal sunrise to ½ hour after legal sunset.

(ii) We prohibit trapping fish for use as bait.

(b) *Petit Manan National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, woodcock, rail, and snipe on designated areas of the refuge subject to the following condition: We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of upland game on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs consistent with State regulations.

(ii) You may hunt coyotes from November 1 to March 31.

(iii) Hunters must retrieve all species harvested on the refuge.

(iv) We prohibit night hunting from ½ hour after legal sunset until ½ hour before legal sunrise the following day.

(3) *Big game hunting.* We allow hunting of white-tailed deer and black bear on designated areas of the refuge subject to the following conditions:

(i) Petit Manan Point is open only during the State-prescribed muzzleloader deer season.

(ii) We allow black bear hunting during the firearm season for white-tailed deer.

(iii) We allow hunters to enter the refuge 1 hour prior to legal sunrise and remain on the refuge 1 hour after legal sunset.

(iv) We prohibit the use of dogs when hunting black bear.

(4) [Reserved]

(c) *Rachel Carson National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, coot, woodcock, and snipe on designated areas of the refuge subject to the following conditions:

(i) Prior to entering designated refuge hunting areas, you must obtain a refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) and sign and carry the permit at all times.

(ii) We open designated youth hunting areas to hunters age 15 and younger who possess and carry a refuge hunting permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System). Youth hunters must be accompanied by an adult age 18 or older. The accompanying adult must possess and carry a refuge hunting permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) and may also hunt.

(iii) We allow the use of dogs consistent with State regulations.

(iv) We only allow temporary blinds and stands, which you must remove at the end of each day's hunt (see § 27.93 of this chapter).

(2) *Upland game hunting.* We allow hunting of pheasant, quail, grouse, fox,

and coyote on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(i) and (iii) of this section apply.

(ii) We allow take of pheasant, quail, and grouse by falconry on the refuge during State seasons.

(3) *Big game hunting.* We allow hunting of white-tailed deer and turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions as set forth at paragraphs (c)(1)(i) and (iv) of this section apply.

(ii) We allow hunting with shotgun and archery only. We prohibit rifles and muzzleloading firearms for hunting.

(iii) We allow turkey hunting during the fall season only, as designated by the State.

(iv) We allow only archery on those areas of the Little River division open to hunting.

(v) During the State firearm deer season, we only allow hunting of fox and coyote with archery or shotgun as incidental take with a refuge big game permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(vi) We allow hunting from ½ hour before legal sunrise to ½ hour after legal sunset.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We allow fishing from ½ hour before legal sunrise to ½ hour after legal sunset.

(ii) We prohibit lead tackle.

(iii) We prohibit trapping fish for use as bait.

(d) *Sunkhaze Meadows National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory game birds on designated areas of the refuge subject to the following condition: We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of upland game on designated areas of the refuge subject to the following conditions:

(i) We allow hunters to enter the refuge 1 hour before legal shooting hours, and they must exit the refuge by 1 hour past legal shooting hours, except for hunters pursuing raccoons at night.

(ii) The hunter must retrieve all species harvested on the refuge.

(iii) We allow the use of dogs consistent with State regulations.

(3) *Big game hunting.* We allow hunting of black bear, bobcat, moose, coyote, and white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) We allow hunters to enter the refuge 1 hour before legal shooting hours, and they must exit the refuge by 1 hour after legal shooting hours, except for hunters pursuing coyotes at night.

(ii) We allow tree stands, blinds, and ladders. You must clearly label tree stands, blinds, or ladders left on the refuge overnight with your State hunting license number. You must remove your tree stand(s), blind(s), and/or ladder(s) from the refuge on the last day of the muzzleloader deer season (see § 27.93 of this chapter).

(iii) We allow the use of dogs consistent with State regulations.

(iv) We allow coyote hunting from October 1 to March 31.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: We prohibit trapping fish for use as bait.

(e) *Umbagog National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, snipe, coot, crow, and woodcock on designated areas of the refuge subject to the following condition: We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of fox, raccoon, woodchuck, squirrel, porcupine, skunk, snowshoe hare, ring-necked pheasant, and ruffed grouse on designated areas of the refuge subject to the following conditions:

(i) We prohibit night hunting from ½ hour after legal sunset until ½ hour before legal sunrise the following day.

(ii) We allow the use of dogs consistent with State regulations.

(3) *Big game hunting.* We allow hunting of bear, white-tailed deer, coyote, turkey, and moose on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs consistent with State regulations.

(ii) Hunters must retrieve all species harvested on the refuge.

(iii) We allow temporary blinds and tree stands that are clearly marked with the owner's State hunting license number. You may erect temporary blinds and tree stands no earlier than 14 days prior to the hunting season, and you must remove them within 14 days after the hunting season (see § 27.93 of this chapter).

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge.

■ 19. Revise § 32.39 to read as follows:

§ 32.39 Maryland.

The following refuge units are open for hunting and/or fishing as governed by applicable Federal and State regulations, and are listed in alphabetical order with additional refuge-specific regulations.

(a) *Blackwater National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of goose and duck on designated areas of the refuge subject to the following conditions:

(i) You must obtain, and possess while hunting, a refuge waterfowl hunting permit (signed brochure or printed and signed copy of permit from *Recreation.gov*).

(ii) Up to three additional hunters may accompany you on your reserved unit.

(iii) We allow the use of dogs consistent with State regulations.

(2) [Reserved]

(3) *Big game hunting.* We allow the hunting of white-tailed deer, sika deer, and turkey on designated areas of the refuge subject to the following conditions:

(i) The general hunt regulations for this paragraph (a)(3) are:

(A) You must obtain, and possess while hunting, a turkey or deer hunting permit (printed and signed copy of permit from *Recreation.gov*).

(B) We prohibit organized deer drives unless authorized by the refuge manager. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(C) We prohibit shooting a projectile from a firearm, muzzleloader, bow, or crossbow from, down, or across any road that is traveled by vehicular traffic.

(D) We prohibit the use of rimfire or centerfire rifles and all handguns, including muzzleloading pistols, for hunting.

(ii) We do not allow archery deer hunters to hunt within areas designated for the youth hunt on designated days.

(iii) We allow turkey hunt permit holders (printed and signed copy of permit from *Recreation.gov*) to have an assistant, who must remain within sight and normal voice contact and abide by the rules set forth in the refuge's turkey brochure.

(iv) We allow youth deer and turkey hunters to hunt on designated areas on designated days (youth hunt) if they meet the criteria of a ''youth hunter'' as governed by State law and possess a turkey or deer hunting permit (printed and signed copy of permit from *Recreation.gov*).

(v) For the designated disabled hunt: (A) We require disabled hunters to have their America the Beautiful Access pass (OMB Control 1024–0252) in their

possession while hunting in disabled areas.

(B) Disabled hunters may have an assistant, age 18 or older, who must remain within sight and normal voice contact while hunting. Assistants must possess a printed and signed copy of a permit from *Recreation.gov* and a valid government-issued photo identification.

(4) *Sport fishing.* We allow sport fishing and crabbing on designated areas of the refuge subject to the following conditions:

(i) We allow fishing and crabbing only from April 1 through September 30 from legal sunrise to legal sunset in refuge waters, unless otherwise authorized by the refuge manager.

(ii) We allow fishing and crabbing by boat in the Big Blackwater and the Little Blackwater River.

(b) *Eastern Neck National Wildlife Refuge.* (1)–(2) [Reserved]

(3) *Big game hunting.* We allow hunting of white-tailed deer and turkey on designated areas of the refuge subject to the following conditions:

(i) *General hunt regulations for this paragraph (b)(3).* (A) You must obtain, and possess while hunting, a deer or turkey hunting permit (printed and signed copy of permit from *Recreation.gov*).

(B) We prohibit shooting a projectile from a firearm, muzzleloader, bow, or crossbow from, down, or across any road that is traveled by vehicular traffic.

(C) We prohibit the use of rimfire or centerfire rifles and all handguns, including muzzleloading pistols, for hunting.

(ii) We allow youth deer hunters to hunt on designated areas on designated days (youth hunt) if they meet the criteria of a ''youth hunter'' as governed by State law and possess a printed and signed copy of a permit from *Recreation.gov.*

(iii) For the designated disabled hunt: (A) We require disabled hunters to have their America the Beautiful Access pass (OMB Control 1024–0252) in their possession while hunting in disabled areas.

(B) Disabled hunters may have an assistant who must be age 18 or older and remain within sight and normal voice contact. Assistants must possess a printed and signed copy of a permit from *Recreation.gov* and a valid government-issued photo identification.

(4) *Sport fishing.* We allow sport fishing and crabbing in designated areas of the refuge subject to the following conditions:

(i) We allow fishing and crabbing from designated shoreline areas located at the Ingleside Recreation Area from legal sunrise to legal sunset, April 1 through September 30.

(ii) We allow fishing from designated shoreline areas located at the Chester River end of Boxes Point and Duck Inn Trails from legal sunrise to legal sunset.

(c) *Patuxent Research Refuge*—(1) *Migratory game bird hunting.* We allow hunting of goose, duck, and dove on designated areas of the refuge subject to the following conditions:

(i) We require a National Wildlife Refuge System Hunt Application (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System), and a signed Statement of Hunter Ethics (FWS Form 3–2516).

(ii) We prohibit hunting and scouting on Sundays and Federal holidays. No hunt-related activities may take place unless the Hunting Control Station is open.

(iii) We allow the use of dogs consistent with State regulations.

(iv) We prohibit wading in all impounded waters except for the placement and retrieval of decoys.

(2) *Upland game hunting.* We allow hunting of gray squirrel, eastern cottontail rabbit, and woodchuck on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (c)(1)(i) through (iii) of this section apply.

(3) *Big game hunting.* We allow hunting of turkey and white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(i) and (ii) apply.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We require a National Wildlife Refuge System Fishing/Shrimping/Crabbing/Frogging Application (FWS Form 3–2358).

(ii) We prohibit the use and/or possession of lead sinkers.

■ 20. Amend § 32.40 by revising paragraphs (a), (b), (c), (d), (f), (g), and (h) to read as follows:

§ 32.40 Massachusetts.

* * * * *

(a) *Assabet River National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of waterfowl and woodcock on designated areas of the refuge subject to the following conditions:

(i) We allow hunters to enter the refuge 1½ hours before legal shooting hours, and they must exit the refuge by 1½ hours after legal shooting hours.

(ii) Hunters must obtain and possess a refuge-specific hunting permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) to hunt on the refuge.

(iii) You may begin scouting hunting areas 4 weeks prior to the opening day of your permitted season. We require possession of a valid refuge hunting permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) while scouting.

(iv) We allow the use of dogs consistent with State regulations.

(v) One nonhunting companion may accompany each permitted hunter. We prohibit nonhunting companions from hunting, but they may assist in other means. All companions must carry identification and stay with the hunter.

(vi) Hunters may use temporary tree stands and ground blinds while engaged in hunting during the applicable seasons. Hunters must mark stands and blinds with their permit number. Hunters must remove all stands and blinds within 30 days after the end of the permitted season.

(vii) Migratory waterfowl hunting hours are ½ hour before legal sunrise to legal sunset.

(2) *Upland game hunting.* We allow hunting of ruffed grouse, fox, coyote, gray squirrel, and cottontail rabbit on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (a)(1)(i) through (vi) of this section apply.

(ii) Upland and big game hunting hours are ½ hour before legal sunrise to ½ hour after legal sunset.

(iii) North Unit B, Unit C, and South Unit are archery only.

(iv) We prohibit the use of handguns or rifles for hunting.

(3) *Big game hunting.* We allow hunting of white-tailed deer, turkey, and bear on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (a)(1)(i) through (iii), (v), and (vi), and (2)(ii) through (iv) of this section apply.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We allow catch-and-release fishing only.

(ii) We allow the use of live bait with the exception of any amphibians or reptiles (frogs, salamanders, etc.).

(b) *Great Meadows National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of waterfowl on designated areas of the refuge subject to the following conditions:

(i) We allow hunters to enter the refuge 1½ hours before legal shooting hours, and they must exit the refuge by 1½ hours after legal shooting hours.

(ii) Hunters must obtain and possess a refuge-specific hunting permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) to hunt on the refuge.

(iii) Hunters may begin scouting hunting areas 4 weeks prior to the opening day of your permitted season. We require possession of a valid hunting permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) while scouting.

(iv) One nonhunting companion may accompany each permitted hunter. We prohibit nonhunting companions from hunting, but they may assist in other means. All companions must carry identification and stay with the hunter.

(v) Hunters may use temporary tree stands and ground blinds while engaged in hunting during the applicable seasons. Hunters must mark stands and blinds with their permit number. Hunters must remove all stands and blinds within 30 days after the end of the permitted season.

(vi) We allow the use of dogs consistent with State regulations.

(vii) Migratory waterfowl hunting hours are ½ hour before legal sunrise to legal sunset.

(2) *Upland game hunting.* We allow hunting of coyote on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) through (iii), (iv), and (vi) of this section apply.

(ii) Upland and big game hunting hours are ½ hour before legal sunrise to ½ hour after legal sunset.

(iii) We allow archery hunting only for upland game.

(3) *Big game hunting.* We allow archery hunting of whitetail deer, turkey, and bear on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) through (v) and (b)(2)(ii) of this section apply.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge.

(c) *Mashpee National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the refuge subject to the following conditions:

(i) We allow hunters to access the refuge 1½ hours before legal shooting hours until 1½ hours after legal shooting hours.

(ii) Hunters may begin scouting hunting areas 4 weeks prior to the opening day of your permitted season. We require possession of a valid refuge hunting permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) while scouting.

(iii) We allow the use of dogs consistent with State regulations.

(iv) One nonhunting companion may accompany each permitted hunter. We prohibit nonhunting companions from hunting, but they may assist in other means. All companions must carry identification and stay with the hunter.

(v) Hunters must clearly label tree stands and ground blinds with their State hunting license number.

(vi) Migratory waterfowl hunting hours are ½ hour before legal sunrise to legal sunset.

(2) *Upland game hunting.* We allow hunting of coyote, fox, raccoon, opossum, gray squirrel, quail, pheasant, crow, and ruffed grouse on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(i) through (iv) of this section apply.

(ii) Upland and big game hunting hours are ½ hour before legal sunrise to ½ hour after legal sunset.

(3) *Big game hunting.* We allow hunting of white-tailed deer and wild turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(i), (ii), (iv), and (v), and (c)(2)(ii) of this section apply.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(4) [Reserved]

(d) *Monomoy National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory waterfowl on designated areas of the refuge by boat subject to the following condition: We allow the use of dogs consistent with State regulations.

(2)–(3) [Reserved]

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We allow fishing from legal sunrise to legal sunset on designated portions of the Monomoy Islands unless otherwise posted.

(ii) We allow surf fishing from the Morris Island shore 24 hours a day.

* * * * *

(f) *Oxbow National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of waterfowl, woodcock, and Wilson's snipe on designated areas of the refuge subject to the following conditions:

(i) We allow hunters to enter the refuge 1½ hours before legal shooting hours, and they must exit the refuge by 1½ hours after legal shooting hours.

(ii) Hunters must obtain and possess a refuge-specific hunting permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) to hunt on the refuge.

(iii) Hunters may begin scouting hunting areas 4 weeks prior to the opening day of your permitted season. We require possession of a valid refuge hunting permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) while scouting.

(iv) We allow the use of dogs consistent with State regulations.

(v) Hunters may use temporary tree stands and ground blinds while engaged in hunting during the applicable seasons. Hunters must mark stands and blinds with their permit number. Hunters must remove all stands and blinds within 30 days after the end of the permitted season.

(vi) One nonhunting companion may accompany each permitted hunter. We prohibit nonhunting companions from hunting, but they can assist in other means. All companions must carry identification and stay with the hunter.

(vii) Migratory waterfowl hunting hours are ½ hour before legal sunrise to legal sunset.

(2) *Upland game hunting.* We allow hunting of ruffed grouse, gray squirrel, coyote, fox, and eastern cottontail rabbit on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (f)(1)(i) through (vi) of this section apply.

(ii) Upland and big game hunting hours are ½ hour before legal sunrise to ½ hour after legal sunset.

(iii) Hospital Road North Unit and Still River Depot Area are archery only.

(iv) We prohibit the use of handguns or rifles for hunting.

(3) *Big game hunting.* We allow hunting of white-tailed deer, turkey, and bear on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (f)(1)(i) through (iii), (v), and (vi) and (2)(ii) and (iv) of this section apply.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(4) *Sport fishing.* We allow sport fishing in designated areas of the refuge.

(g) *Parker River National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, brant, coot, crow, merganser, rail, snipe, and woodcock on designated areas of the refuge subject to the following conditions:

(i) Hunters may enter the refuge ½ hour before legal shooting hours and must exit the refuge by ½ hour after legal shooting hours.

(ii) We prohibit the use of centerfire rifles and handguns to hunt any species.

(iii) We prohibit shooting across refuge roads and within or into administratively closed zones.

(iv) We prohibit launching motorized boats for scouting purposes prior to hunting.

(v) We allow the use of dogs consistent with State regulations.

(vi) We allow crow hunting only from September 1 through February 28.

(vii) Migratory waterfowl hunting hours are ½ hour before legal sunrise to legal sunset.

(2) *Upland game hunting.* We allow hunting of ruffed grouse, pheasant, cottontail rabbit, hare, gray squirrel, coyote, fox, raccoon, and opossum on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (g)(1)(i) through (iii), and (v) (with the exception that we prohibit dogs while hunting furbearers) of this section apply.

(ii) Upland and big game hunting hours are ½ hour before legal sunrise to ½ hour after legal sunset.

(3) *Big game hunting.* We allow hunting of white-tailed deer and wild turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (g)(1)(i) through (iii) and (g)(2)(ii) of this section apply.

(ii) We allow hunting of white-tailed deer on Plum Island subject to the following conditions:

(A) We allow archery, primitive firearms, shotgun, and crossbow (by MassWildlife permit only, for certain disabled persons) hunting during a designated 2-day hunt on the first Wednesday and Thursday of the State shotgun deer season.

(B) You must have a lottery-issued hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) to hunt during this 2-day time period.

(iii) We allow hunting of deer and wild turkey in Areas A, B, C, and D subject to the following condition: You may take deer using archery equipment only.

(4) *Sport fishing.* We allow saltwater fishing on designated areas of the refuge subject to the following conditions:

(i) We allow saltwater fishing on the ocean beach from legal sunrise to legal sunset without a refuge permit.

(ii) Stage Island is open to fishing from legal sunrise to legal sunset.

(iii) Nelson Island is open to fishing from legal sunrise to legal sunset.

(iv) We allow walk-on night fishing after legal sunset with a valid refuge permit (FWS Form 3–2358, National Wildlife Refuge System Fishing/Shrimping/Crabbing/Frogging Application; vehicle sticker issued by the refuge office).

(v) We allow anglers to use over-the-sand, surf-fishing vehicles, or off-road vehicles (ORVs) with a valid refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) and permit fee, as determined in an annual lottery.

(h) *Silvio O. Conte National Fish and Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory game birds on designated areas subject to the following conditions:

(i) Hunters may access the refuge 1½ hours before legal sunrise until 1½ hours after legal sunset.

(ii) We prohibit access to Third Island between January 1 and June 30.

(iii) We allow the use of dogs consistent with State regulations.

(iv) Migratory waterfowl hunting hours are ½ hour before legal sunrise to legal sunset.

(2) *Upland game hunting.* We allow hunting of upland game on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (h)(1)(i) through (iii) of this section apply.

(ii) Upland and big game hunting hours are ½ hour before legal sunrise to ½ hour after legal sunset.

(3) *Big game hunting.* We allow hunting of big game on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (h)(1)(i) and (h)(2)(ii) of this section apply.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (h)(1)(i) and (ii) of this section apply.

(ii) We prohibit launching of motorboats from the refuge.

(iii) We prohibit the use of reptiles and amphibians as bait.

■ 21. Amend § 32.42 by revising paragraphs (b)(2) introductory text, (m)(1)(v), and (o) to read as follows:

§ 32.42 Minnesota.

* * * * *

(b) * * *

(2) *Upland game hunting.* We allow hunting of ring-necked pheasant, Hungarian partridge, cottontail and jack rabbit, raccoon, striped skunk, gray and fox squirrel, red and gray fox, and wild turkey on designated areas of the refuge subject to the following conditions:

* * * * *

(m) * * *

(1) * * *

(v) We allow hunting on the Spieker tract in Clay County, as governed by applicable State regulations.

* * * * *

(o) *Rydell National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of goose, duck, coot, woodcock, and mourning dove on designated areas of the refuge subject to the following conditions:

(i) We only allow hunting of goose, duck, and coot during the special State-administered youth waterfowl season.

(ii) We allow the use of dogs while hunting, provided the dog is under the immediate control of the hunter at all times.

(iii) Hunters must dismantle hunting blinds, platforms, and ladders made from natural vegetation at the end of each day.

(iv) We allow nonmotorized boats in areas open to migratory bird hunting during the special State-administered youth waterfowl season.

(v) We prohibit hunting during the Spring Light Goose Conservation Order.

(vi) We allow the use of wheeled, nonmotorized conveyance devices (*e.g.,* bikes, game carts).

(vii) We prohibit entry onto the refuge earlier than 2 hours before legal shooting time, and we require hunters to leave the refuge no later than 2 hours after legal shooting time.

(2) *Upland game hunting.* We allow hunting of ring-necked pheasant, gray

(Hungarian) partridge, ruffed grouse, prairie grouse, rabbit (cottontail and jack), snowshoe hare, squirrel (fox and gray), and wild turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (o)(1)(ii), (iii), (vi), and (vii) of this section apply.

(ii) You may use or possess only approved nontoxic shot shells (see § 32.2(k)) in the field while hunting turkey.

(iii) We prohibit the use of centerfire, rimfire, or muzzleloading rifles, and handguns.

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) We prohibit shooting at a big game animal or a decoy of a big game animal on, from, over, across, or within 30 feet (9 meters) of a roadway open to public vehicle transportation.

(ii) We require a State-issued permit to hunt white-tailed deer in the Special Permit Area of the refuge.

(iii) Archery is the only legal weapon for hunting deer, with the exception of during the special State-administered mentored youth hunt and disabled hunt.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We prohibit the taking of any turtle, frog, leech, minnow, crayfish, and mussel (clam) species by any method on the refuge (see § 27.21 of this chapter).

(ii) We allow fishing from May 1 through November 1.

* * * * *

■ 22. Amend § 32.43 by:

■ a. Revising paragraphs (b)(1) and (2);

■ b. Removing paragraph (b)(4)(i) and (v);

■ c. Redesignating (b)(4)(ii) through (iv) as (b)(4)(i) through (iii);

■ d. Revising paragraphs (c), (e), (f)(2) and (3), (g)(1)(i), (iv), and (x), (g)(2), (g)(3)(i) and (v), (g)(4)(iv), (h)(1)(i) and (v), (h)(2), (h)(3)(iv) and (vi), (h)(4)(i), (i)(1)(i) and (v), (i)(2), (i)(3)(iv), (vi), and (viii), (i)(4)(i), (l), and (m)(1)(i) and (v);

■ e. Adding new paragraph (m)(1)(xi); and

■ f. Revising paragraphs (m)(2)(ii) and (iii), and (m)(3)(i), (iv), (vi), and (vii); and

■ g. Adding new paragraph (m)(3)(viii).

The revisions and addition read as follows:

§ 32.43 Mississippi.

* * * * *

(b) * * *

(1) *Migratory game bird hunting.* We allow hunting of migratory ducks, geese, mergansers, coot, rails, snipe, and woodcock on designated areas of the refuge subject to the following conditions:

(i) All hunters age 16 and older must possess a State-issued North Mississippi NWR hunting permit (code 606, available from the Mississippi Department of Wildlife, Fisheries, and Parks). While hunting on the refuge, all persons age 15 and younger (''youth hunter'') must be in the presence and under the direct supervision of a licensed or exempt hunter age 21 or older. A hunter supervising a youth hunter must hold all required licenses and permits.

(ii) Hunters may enter the refuge at 4 a.m. and must exit the refuge no later than 12 p.m. (noon).

(iii) We allow hunting of migratory game birds, including under the Light Goose Conservation Order, only on Wednesdays, Saturdays, and Sundays.

(iv) Each hunter must obtain a daily Migratory Bird Hunt Report (FWS Form 3–2361). You must display the card in plain view on the dashboard of your vehicle so that the State-issued license number is readable. Prior to leaving the refuge, you must complete the reverse side of the card and deposit it at one of the refuge information stations. Include all game harvested, and if you harvest no game, report ''0.'' We prohibit hunters possessing more than one Migratory Bird Hunt Report at a time.

(v) It is unlawful to hunt from or shoot into the 100-foot (30.5-meter) zone along either side of designated roads and parking lots.

(vi) We allow the use of dogs on the refuge when hunting migratory game birds.

(vii) You must remove decoys, blinds, boats, other personal property, and litter from the hunting area following each morning's hunt (see §§ 27.93 and 27.94 of this chapter).

(viii) We allow no more than 25 shotshells per person in the field.

(ix) We allow the take of beavers, coyotes, nutria, and feral hog during daylight hours only during any open season with weapons and ammunition legal for that season.

(2) *Upland game hunting.* We allow hunting of quail, squirrel, and rabbit on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i), (ii), (v), and (ix) of this section apply.

(ii) All hunters using shotguns for small game must use approved nontoxic shot (see § 32.2(k)).

* * * * *

(c) *Dahomey National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, merganser, coot, rail, snipe, woodcock, and dove on designated areas of the refuge subject to the following conditions:

(i) All hunters age 16 and older must possess a North Mississippi NWR hunting permit (code 606, available from the Mississippi Department of Wildlife, Fisheries, and Parks). While hunting on the refuge, all persons age 15 and younger (''youth hunter'') must be in the presence and under the direct supervision of a licensed or exempt hunter at age 21 or older (''licensed hunter''). A hunter supervising a youth hunter must hold all required licenses and permits.

(ii) Hunters may enter the refuge at 4 a.m. and must exit the refuge no later than 2 hours after legal sunset except during raccoon and frog hunts.

(iii) We allow hunting of waterfowl (ducks, teal, mergansers, coots, and geese), rail and snipe, including under the Light Goose Conservation Order, only on Wednesdays, Saturdays, and Sundays ending at 12 p.m. (noon).

(iv) Each hunter must obtain a daily Migratory Bird Hunt Report (FWS Form 3–2361). You must display the card in plain view on the dashboard of your vehicle so that the State-issued license number is readable. Prior to leaving the refuge, you must complete the card and deposit it at one of the refuge information stations. Include all game harvested, and if you harvest no game, report ''0.'' We prohibit hunters possessing more than one Migratory Bird Hunt Report at a time.

(v) It is unlawful to hunt from or shoot into the 100-foot (30.5-meter) zone along either side of designated roads and parking lots.

(vi) We allow the use of dogs on the refuge when hunting migratory game birds and upland game. We prohibit the use of dogs during big game hunts.

(vii) You must remove decoys, blinds, boats, other personal property, and litter from the hunting area following each morning's hunt (see §§ 27.93 and 27.94 of this chapter).

(viii) We allow no more than 25 shotshells per person in the field.

(ix) We allow the take of coyote, beaver, nutria, and feral hog incidental to other lawful hunting using legal methods of take.

(2) *Upland game hunting.* We allow hunting of quail, squirrel, rabbit, and raccoon on designated areas of the refuge subject to the following conditions:

(i) You must possess a valid general Special Use Permit (FWS Form 3–1383–G) to hunt raccoon on the refuge.

(ii) Each hunter must obtain a daily Upland/Small Game/Furbearer Report (FWS Form 3–2362). You must display the card in plain view on the dashboard of your vehicle so that the State-issued license number is readable. Prior to leaving the refuge, you must complete the card and deposit it at one of the refuge information stations. Include all game harvested, and if you harvest no game, report ''0.'' We prohibit hunters possessing more than one Upland/Small Game/Furbearer Report at a time.

(iii) The conditions set forth at paragraphs (c)(1)(i), (ii), (v) and (ix) of this section apply.

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) Each hunter must obtain a daily Big Game Harvest Report (FWS Form 3–2359). You must display the card in plain view on the dashboard of your vehicle so that the State-issued license number is readable. Prior to leaving the refuge, you must complete the card and deposit it at one of the refuge information stations. Include all game harvested, and if you harvest no game, report ''0.'' We prohibit hunters possessing more than one Big Game Harvest Report at a time.

(ii) The conditions set forth at paragraphs (c)(1)(i), (ii), (v), and (ix) of this section apply.

(iii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(iv) We prohibit hunting or shooting across any open, fallow, or planted field.

(v) We allow valid permit holders to possess and hunt from one portable stand or blind on the refuge. You must clearly label your stand or blind with your State license/sportsmen's identification number. Stands left in the area do not reserve the hunting locations. You may place stands up to 7 days prior to the hunt, and you must remove them within 7 days after the refuge's deer season closes (see § 27.93 of this chapter). We prohibit the placement of ground blinds within mowed trails.

(vi) Hunters using a climbing tree stand must use a fall-arrest system manufactured to Treestand Manufacturer's Association standards.

(vii) We prohibit the use of buckshot on the refuge.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We prohibit the use or possession of alcoholic beverages while fishing.

(ii) We prohibit possession or use of jugs, seines, nets, hand-grab baskets, slat traps/baskets, or any other similar devices.

(iii) We prohibit commercial fishing of any kind.

(iv) We only allow trotlines, yo-yos, limb lines, crawfish traps, or any other similar devices and only for recreational use. You must tag or mark these devices with the angler's State fishing license number written with waterproof ink, legibly inscribed or legibly stamped on the tag. You must attend these devices a minimum of once every 24 hours. When not attended, you must remove these devices from the refuge (see § 27.93 of this chapter).

(v) We allow frogging and crawfishing.

* * * * *

(e) *Hillside National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of goose, duck, merganser, coot, and dove on designated areas of the refuge subject to the following conditions:

(i) Each person age 16 or older hunting or fishing must possess a valid Theodore Roosevelt Complex Annual Public Use Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(ii) All youth hunters age 15 and younger must be in the presence and direct supervision of a Mississippi licensed or exempt hunter, age 21 or older. One adult may supervise no more than one youth hunter.

(iii) Before hunting or fishing, all participants must display their Daily Visitor Information/Harvest Report Card (Big Game Harvest Report, FWS Form 3–2359) in plain view in their vehicle so that the State-issued license number is readable. You must return all cards upon completion of the activity and before leaving the refuge.

(iv) We prohibit all other public use on the refuge during the muzzleloader deer and limited draw turkey hunts.

(v) Valid permit holders may incidentally take opossum, coyote, beaver, bobcat, and nutria in any refuge hunt season with weapons legal for that hunt. Valid permit holders may incidentally take feral hog during deer and turkey hunts only.

(vi) We prohibit hunting or shooting into a 100-foot (30.5-meter) zone along either side of pipelines, power line rights-of-way, designated roads, and trails, and around parking lots. It is considered hunting if you have a loaded weapon, if you have a nocked arrow while bow hunting, or if you are in an elevated tree stand or ground blind with a means to take, within these areas.

(vii) Hunters must remove all decoys, blind material, and harvested waterfowl from the area no later than 1 p.m. each day (see § 27.93 of this chapter).

(viii) We allow the use of dogs for retrieving migratory birds.

(ix) We allow goose, duck, merganser, and coot hunting beginning ½ hour before legal sunrise until 12 p.m. (noon).

(x) We do not open for early teal season.

(xi) We limit waterfowl hunters to 25 shotshells per person in the field.

(2) *Upland game hunting.* We allow hunting of squirrel, rabbit, quail, raccoon, opossum, coyote, beaver, bobcat, and nutria on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (e)(1)(i) through (vi) of this section apply.

(ii) We allow the use of dogs for hunting squirrel, raccoon, and quail, and for the February rabbit hunt.

(iii) Beginning the first day after the deer muzzleloader hunt, we prohibit entry into the Turkey Point area until March 1.

(3) *Big game hunting.* We allow hunting of white-tailed deer, turkey, and feral hog on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (e)(1)(i) through (vi) and (e)(2)(iii) of this section apply.

(ii) We prohibit organized drives. We define a ''drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause game to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the game.

(iii) Hunting or shooting within or adjacent to open fields and tree plantations less than 5 feet (1.5 meters (m)) in height must be from a stand a minimum of 10 feet (3 m) above the ground.

(iv) The refuge brochure provides deer check station locations and requirements. Prior to leaving the refuge, you must check all harvested deer at the nearest self-service check station (Big Game Harvest Report, FWS Form 3–2359) following the posted instructions.

(v) Hunters may possess and hunt from only one stand or blind. Hunters may place a deer stand or blind 48 hours prior to a hunt and must remove it within 48 hours after each designated

hunt (see § 27.93 of this chapter), with the exception of closed areas where special regulations apply.

(vi) During designated muzzleloader hunts, we allow archery equipment and muzzleloaders loaded with a single projectile; we prohibit breech-loading firearms of any type.

(vii) Turkey hunting opportunities will consist of three limited draw hunts within the State season time frame. Limited draw hunts require a Limited Hunt Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) assigned by random computer drawing. At the end of the hunt, you must return the permit with information concerning the hunt to the refuge. Failure to return this permit will disqualify the hunter for any limited hunts the next year.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (e)(1)(i), (iii), (iv), and (e)(2)(iii) of this section apply.

(ii) We prohibit trotlines, limb lines, jugs, seines, and traps.

(iii) We allow frogging during the State bullfrog season.

(iv) We allow fishing in the borrow ponds along the north levee throughout the year except during the muzzleloader deer hunt.

(v) We open all other refuge waters to fishing March 1 through November 15.

(f) * * *

(2) *Upland game hunting.* We allow hunting of rabbit, opossum, coyote, beaver, bobcat, and nutria on designated areas of the refuge subject to the following conditions:

(i) Each person age 16 or older hunting or fishing must possess a valid Theodore Roosevelt Complex Annual Public Use Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System)).

(ii) All youth hunters age 15 and younger must be in the presence and direct supervision of a Mississippi licensed or exempt hunter, age 21 or older. One adult may supervise no more than one youth hunter.

(iii) Before hunting or fishing, all participants must display their Daily Visitor Information/Harvest Report Card (Big Game Harvest Report, FWS Form 3–2359) in plain view in their vehicle so that the required information is readable. You must return all cards upon completion of the activity and before leaving the refuge.

(iv) We prohibit all other public use on the refuge during the muzzleloader deer hunt.

(v) Valid permit holders may incidentally take opossum, coyote, beaver, bobcat, and nutria in any refuge hunt season with weapons legal for that hunt. Valid permit holders may incidentally take feral hog during deer hunts only.

(vi) We allow the use of dogs for hunting during the February rabbit hunt.

(vii) We prohibit hunting or shooting into a 100-foot (30.5-meter (m)) zone along either side of pipelines, power line rights-of-way, designated roads, and trails, and around parking lots. It is considered hunting if you have a loaded weapon, if you have a nocked arrow while bow hunting, or if you are in an elevated tree stand or ground blind with a means to take, within these areas.

(3) *Big game hunting.* We allow hunting of white-tailed deer and feral hog on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (f)(2)(i) through (iii), (v), and (vii) of this section apply.

(ii) We prohibit organized drives. We define a ''drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause game to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the game.

(iii) Hunting or shooting within or adjacent to open fields or tree plantations less than 5 feet (1.5 m) in height must be from a stand a minimum of 10 feet (3 m) above the ground.

(iv) Hunters may possess and hunt from only one stand or blind. Hunters may place a deer stand or blind 48 hours prior to a hunt and must remove it within 48 hours after each designated hunt (see § 27.93 of this chapter), with the exception of closed areas where special regulations apply.

(v) During designated muzzleloader hunts, we allow archery equipment and muzzleloaders loaded with a single projectile; we prohibit breech-loading firearms of any type.

* * * * *

(g) * * *

(1) * * *

(i) Each person age 16 or older who is hunting or fishing must possess a valid Theodore Roosevelt Complex Annual Public Use Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

* * * * *

(iv) Valid permit holders may incidentally take opossum, coyote, beaver, bobcat, and nutria in any refuge hunt season with weapons legal for that hunt. Valid permit holders may incidentally take feral hog during deer hunts only.

* * * * *

(x) We allow hunting during open State seasons. The first 2 days of the season and all weekends, with the exception of youth weekends, are limited draw hunts. These hunts require a Limited Hunt Permit (FWS Form 3–2439, Hunt Application—National Refuge System) assigned by random computer drawing. At the end of the hunt, you must return the permit with information concerning your hunt. If you fail to return this permit, you will not be eligible for any limited hunts the next year.

* * * * *

(2) *Upland game hunting.* We allow hunting of squirrel, rabbit, raccoon, opossum, coyote, beaver, bobcat, and nutria on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (g)(1)(i) through (v) of this section apply.

(ii) We allow the use of dogs for hunting squirrel and raccoon, and for the February rabbit hunt.

(iii) Beginning the day before waterfowl season, we restrict hunting to the waterfowl hunt area.

(3) * * *

(i) The conditions set forth at paragraphs (g)(1)(i) through (v) and (g)(2)(iii) of this section apply.

* * * * *

(v) Hunters may possess and hunt from only one stand or blind. Hunters may place a deer stand or blind 48 hours prior to a hunt and must remove it within 48 hours after each designated hunt (see § 27.93 of this chapter), with the exception of closed areas where special regulations apply.

* * * * *

(4) * * *

(iv) We open refuge waters to fishing throughout the year, except in the waterfowl sanctuary, which is closed one day prior to the beginning of waterfowl season until March 1.

(h) * * *

(1) * * *

(i) Each person age 16 or older who is hunting or fishing must possess a valid Theodore Roosevelt Complex Annual Public Use Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

* * * * *

(v) Valid permit holders may incidentally take opossum, coyote, beaver, bobcat, and nutria in any refuge hunt season with weapons legal for that hunt. Valid permit holders may incidentally take feral hog during deer hunts only.

* * * * *

(2) *Upland game hunting.* We allow hunting of squirrel, rabbit, quail,

raccoon, opossum, coyote, beaver, bobcat, and nutria on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (h)(1)(i) through (vi) of this section apply.

(ii) We allow the use of dogs for hunting squirrel, quail, and raccoon, and for the February rabbit hunt.

(3) * * *

(iv) The refuge brochure provides deer check station locations and requirements. Prior to leaving the refuge, you must check all harvested deer at the nearest self-service check station (Big Game Harvest Report, FWS Form 3–2359) following the posted instructions.

* * * * *

(vi) During designated muzzleloader hunts, we allow archery equipment and muzzleloaders loaded with a single projectile; we prohibit breech-loading firearms of any type.

(4) * * *

(i) The conditions set forth at paragraphs (h)(1)(i), (iii), and (iv) of this section apply.

* * * * *

(i) * * *

(1) * * *

(i) Each person age 16 or older who is hunting or fishing must possess a valid Theodore Roosevelt Complex Annual Public Use Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

* * * * *

(v) Valid permit holders may incidentally take opossum, coyote, beaver, bobcat, and nutria in any refuge hunt season with weapons legal for that hunt. Valid permit holders may incidentally take feral hog during deer and turkey hunts only.

* * * * *

(2) *Upland game hunting.* We allow hunting of squirrel, rabbit, quail, raccoon, opossum, coyote, beaver, bobcat, and nutria on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (i)(1)(i) through (vi) and (x) of this section apply.

(ii) We allow the use of dogs for hunting squirrel, quail, and raccoon, and for the February rabbit hunt.

(3) * * *

(iv) The refuge brochure provides deer check station locations and requirements. Prior to leaving the refuge, you must check all harvested deer at the nearest self-service check station (Big Game Harvest Report, FWS Form 3–2359) following the posted instructions.

* * * * *

(vi) During designated muzzleloader hunts, we allow archery equipment and muzzleloaders loaded with a single projectile; we prohibit breech-loading firearms of any type.

* * * * *

(viii) Limited draw hunts require a Limited Hunt Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) assigned by random computer drawing. At the end of the hunt, you must return the permit with information concerning the hunt to the refuge. Failure to return this permit will disqualify the hunter for any limited hunts the next year.

* * * * *

(4) * * *

(i) The conditions set forth at paragraphs (i)(1)(i), (iii), (iv), and (x) of this section apply.

* * * * *

(l) *Tallahatchie River National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, geese, merganser, coot, rail, snipe, woodcock, and dove on designated areas of the refuge subject to the following conditions:

(i) All hunters age 16 and older must possess a North Mississippi NWR hunting permit (code 606, available from the Mississippi Department of Wildlife, Fisheries, and Parks). While hunting on the refuge, all persons age 15 and younger (''youth hunter'') must be in the presence and under the direct supervision of a licensed or exempt hunter age 21 or older. A hunter supervising a youth hunter must hold all required licenses and permits.

(ii) Hunters may enter the refuge at 4 a.m. and must exit the refuge no later than 2 hours after legal sunset except during raccoon and frog hunts.

(iii) We allow hunting of waterfowl (ducks, teal, mergansers, coot, and geese), rail, and snipe, including under the Light Goose Conservation Order, only on Wednesdays, Saturdays, and Sundays ending at 12 p.m. (noon).

(iv) Each hunter must obtain a daily Migratory Bird Hunt Report (FWS Form 3–2361). You must display the card in plain view on the dashboard of your vehicle so that the State-issued license number is readable. Prior to leaving the refuge, you must complete the card and deposit it at one of the refuge information stations. Include all game harvested, and if you harvest no game, report ''0.'' We prohibit hunters possessing more than one Migratory Bird Hunt Report at a time.

(v) It is unlawful to hunt from or shoot into the 100-foot (30.5-meter) zone along either side of designated roads and parking lots.

(vi) We allow the use of dogs on the refuge when hunting migratory game birds and upland game. We prohibit the use of dogs during big game hunts.

(vii) You must remove decoys, blinds, boats, other personal property, and litter from the hunting area following each morning's hunt (see §§ 27.93 and 27.94 of this chapter).

(viii) We allow no more than 25 shotshells per person in the field.

(ix) We allow the take of beavers, coyotes, nutria, and feral hogs during daylight hours only during any open season with weapons and ammunition legal for that season.

(2) *Upland game hunting.* We allow hunting of quail, squirrel, rabbit, nutria and raccoon on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (l)(1)(i), (ii), (iv) (substitute Big Game Harvest Report [FWS Form 3–2359] for Migratory Bird Hunt Report [FWS Form 3–2361]), (v), and (ix) of this section apply.

(ii) All hunters using shotguns for small game must use approved nontoxic shot (see § 32.2(k)).

(3) *Big game hunting.* We allow hunting of white-tailed deer and feral hog on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (l)(1)(i), (ii), and (iv) (substitute Big Game Harvest Report [FWS Form 3–2359] for Migratory Bird Hunt Report [FWS Form 3–2361]) of this section apply.

(ii) We prohibit dogs while hunting deer. We allow the use of dogs to hunt feral hog during designated hog seasons.

(iii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(iv) We prohibit hunting or shooting across any open, fallow, or planted field.

(v) We allow valid permit holders to possess and hunt from one portable stand or blind on the refuge. You must permanently and legibly write your State hunting license number on all stands on the refuge. Stands left on the area do not reserve the hunting locations. You may place stands up to 7 days prior to the hunt, and you must remove them no more than 7 days after the refuge's deer season closes (see § 27.93 of this chapter). Ground blinds may not be placed within mowed trails.

(vi) Hunters using climbing tree stands must use a fall-arrest system

manufactured to Treestand Manufacturer's Association standards.

(vii) We prohibit the use of buckshot on the refuge.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We prohibit the use or possession of alcoholic beverages while fishing.

(ii) We prohibit possession or use of jugs, seines, nets, hand-grab baskets, slat traps/baskets, or any other similar devices.

(iii) We prohibit commercial fishing of any kind.

(iv) We only allow trotlines, yo-yos, limb lines, crawfish traps, or any other similar devices for recreational use. You must tag or mark these devices with the angler's State fishing license number written in waterproof ink, legibly inscribed or legibly stamped on the tag. You must attend these devices a minimum of once every 24 hours. When not attended, you must remove them from the refuge (see § 27.93 of this chapter).

(v) We prohibit snagging or attempting to snag fish.

(vi) We allow frogging and crawfishing.

(m) * * *

(1) * * *

(i) Each person age 16 or older who is hunting or fishing must possess a valid Theodore Roosevelt Complex Annual Public Use Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

* * * * *

(v) Valid permit holders may incidentally take opossum, coyote, beaver, bobcat, and nutria in any refuge hunt season with weapons legal for that hunt. Valid permit holders may incidentally take feral hog during deer hunts only.

* * * * *

(xi) Limited draw hunts require a Limited Hunt Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) assigned by random computer drawing. At the end of the hunt, you must return the permit with information concerning that hunt to the refuge. Failure to return this permit will disqualify the hunter for any limited hunts the next year.

(2) * * *

(ii) We allow the use of dogs for hunting squirrel and raccoon, and for the February rabbit hunt.

(iii) We allow rabbit hunting on the Brown Tract of Theodore Roosevelt National Wildlife Refuge that is managed by Yazoo National Wildlife Refuge.

(3) * * *

(i) The conditions set forth at paragraphs (m)(1)(i) through (vi) and (xi) of this section apply.

* * * * *

(iv) The refuge brochure provides deer check station locations and requirements. Prior to leaving the refuge, you must check all harvested deer at the nearest self-service check station (Big Game Harvest Report, FWS Form 3–2359) following the posted instructions.

* * * * *

(vi) During designated muzzleloader hunts, we allow archery equipment and muzzleloaders loaded with a single projectile; we prohibit breech-loading firearms of any type.

(vii) Limited draw hunts require a Limited Hunt Permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) assigned by random computer drawing. At the end of the hunt, you must return the permit with information concerning the hunt to the refuge. Failure to return this permit will disqualify the hunter for any limited hunts the next year.

(viii) We allow white-tailed deer hunting on the Brown Tract of Theodore Roosevelt National Wildlife Refuge that is managed by Yazoo National Wildlife Refuge.

* * * * *

■ 23. Amend § 32.45 by:
■ a. Revising paragraph (n)(1)(v);
■ b. Adding paragraph (n)(2);
■ c. Removing paragraph (n)(3)(iv);
■ d. Redesignating paragraphs (n)(3)(v) through (n)(3)(viii) as paragraphs (n)(3)(iv) through (n)(3)(vii);
■ e. Revising paragraph (w)(3) introductory text and (w)(3)(iii); and
■ f. Adding paragraph (w)(3)(iv).

The revisions and additions read as follows:

§ 32.45 Montana.

* * * * *

(n) * * *

(1) * * *

(v) Each hunter must set the appropriate blind selector (metal flip tag) before and after hunting.

* * * * *

(2) *Upland game hunting.* We allow hunting of turkey on designated areas of the refuge.

* * * * *

(w) * * *

(3) *Big game hunting.* We allow archery hunting of bear, elk, white-tailed deer, and mule deer on designated areas of the refuge subject to the following conditions:

* * * * *

(iii) You may install portable stands and blinds no sooner than August 1, and you must remove them by December 15 of each year (see § 27.93 of this chapter).

(iv) We prohibit hunting of black bear during the State spring season.

* * * * *

■ 24. Amend § 32.46 by:
■ a. Revising paragraphs (b) and (c);
■ b. Redesignating paragraphs (d) through (f) as paragraphs (e) through (g);
■ c. Adding a new paragraph (d); and
■ d. Revising newly redesignated paragraphs (e), (f)(2) and (3), and (g).

The revisions and addition read as follows:

§ 32.46 Nebraska.

* * * * *

(b) *Crescent Lake National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of coot, crow, dove, duck, goose, merganser, rail, and snipe on designated areas of the refuge subject to the following conditions:

(i) Hunters may access the refuge from 2 hours before legal sunrise until 2 hours after legal sunset.

(ii) We allow the use of dogs.

(iii) We open the refuge to hunting from September 1 through March 15.

(iv) We prohibit publicly organized hunts unless authorized under a Special Use Permit (FWS Form 3–1383–C).

(2) *Upland game hunting.* We allow hunting of cottontail and jack rabbit, coyote, porcupine, prairie dog, State-defined furbearers, ring-necked pheasant, and prairie grouse on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) through (iv) of this section apply.

(ii) We allow electronic calls for coyote and furbearer hunting.

(iii) Coyotes and all furbearers or their parts, if left in the field, must be left at least 50 yards away from any road, trail, or building. Otherwise, hunters must remove them from the refuge.

(iv) Shooting hours are from ½ hour before legal sunrise until ½ hour after legal sunset.

(3) *Big game hunting.* We allow hunting of white-tailed deer, mule deer, and pronghorn antelope on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (b)(1)(i), (iii), and (iv) of this section apply.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Anglers may enter the refuge 1 hour before legal sunrise and remain until 1 hour after legal sunset.

(ii) We open Blue, Smith, Crane, and Island Lake to fishing year-round. We close all other refuge lakes to fishing.

(iii) We prohibit leaving temporary shelters used for fishing overnight on the refuge.

(c) *Fort Niobrara National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of coot, crow, dark goose, dove, duck, light goose, rail, snipe, teal, and woodcock on designated areas of the refuge subject to the following conditions:

(i) Hunters and anglers may access the refuge from 2 hours before legal sunrise until 2 hours after legal sunset.

(ii) We allow access from designated areas of the refuge.

(iii) You must remove all blinds and decoys at the conclusion of each day's hunt (see § 27.93 of this chapter).

(iv) We allow the use of dogs when hunting August 1 through April 30.

(2) *Upland game hunting.* We allow hunting of badger, bobcat, coyote, fox, long-tailed weasel, mink, opossum, prairie dog, porcupine, rabbit, hare, raccoon, skunk, squirrel, woodchuck, State-defined furbearers, greater prairie chicken, grouse, partridge, pheasant, quail, and turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(i), (ii), and (iv) of this section apply.

(ii) We allow hunting with muzzleloader, archery, shotgun, and falconry.

(iii) You may only possess nontoxic shot when hunting turkey (see § 32.2(k)).

(iv) Shooting hours for coyote, prairie dog, porcupine, woodchuck, and State-defined furbearers are ½ hour before legal sunrise to ½ hour after legal sunset.

(3) *Big game hunting.* We allow hunting of deer, elk, and pronghorn antelope on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(i) and (ii) of this section apply.

(ii) We allow hunting only with muzzleloader and archery equipment.

(iii) We allow portable tree stands and ground blinds to be used from August 16 through January 31.

(iv) We allow muzzleloader deer hunting subject to the following condition: Hunters must possess a refuge hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) and comply with all of its terms and conditions.

(4) *Sport fishing.* We allow fishing on Minnechaduza Creek and on the Niobrara River, downstream from the Cornell Dam, subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(i) and (ii) of this section apply.

(ii) We prohibit the use of limb or set lines.

(iii) We prohibit the take of baitfish, reptiles, and amphibians.

(iv) We prohibit use or possession of alcoholic beverages while fishing on refuge lands and waters.

(d) *John W. and Louise Seier National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of coot, crow, dark goose, dove, duck, light goose, merganser, rail, snipe, teal, and woodcock on designated areas of the refuge subject to the following conditions:

(i) Hunters may access the refuge from 2 hours before legal sunrise until 2 hours after legal sunset.

(ii) You must remove all blinds and decoys at the conclusion of each day's hunt (see § 27.93 of this chapter).

(iii) We allow the use of dogs August 1 through April 31.

(2) *Upland game hunting.* We allow hunting of badger, bobcat, coyote, fox, long-tailed weasel, mink, opossum, prairie dog, porcupine, rabbit, hare, raccoon, skunk, squirrel, woodchuck, State-defined furbearers, greater prairie chicken, grouse, partridge, pheasant, quail, and turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (d)(1)(i) and (iii) of this section apply.

(ii) You may only possess nontoxic shot when hunting turkey (see § 32.2(k)).

(iii) Shooting hours for coyote, prairie dog, porcupine, woodchuck, and State-defined furbearers are ½ hour before legal sunrise to ½ hour after legal sunset.

(3) *Big game hunting.* We allow hunting of deer, elk, and pronghorn antelope on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (d)(1)(i) of this section applies.

(ii) We allow portable tree stands and ground blinds to be used from August 16 through January 31.

(4) [Reserved]

(e) *North Platte National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow youth hunting of pheasant, porcupine, prairie dog, rabbit, State-defined furbearers, squirrel, turkey, and coyote on designated areas of the refuge subject to the following conditions:

(i) We close the Lake Alice Unit to all public entry from November 1 through January 14, and we close the Minatare and Winters Creek Units to all public entry from October 15 through January 14.

(ii) Hunters must be 15 years of age or younger (''youth hunters''). A licensed hunter 19 years of age or older (''adult guide'') must accompany youth hunters. Adult guides must not hunt or carry firearms.

(iii) We close the refuge to public use from legal sunset to legal sunrise. Youth hunters and adult guides may enter the designated hunting area 1 hour prior to legal sunrise.

(iv) We allow the use of dogs for hunting upland game.

(3) *Big game hunting.* We allow archery hunting of mule deer and white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (e)(2)(i) of this section applies.

(ii) We close the refuge to public use from legal sunset to legal sunrise. However, archery deer hunters may enter the designated hunting area 1 hour prior to legal sunrise and remain until 1 hour after legal sunset.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge.

(f) * * *

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district subject to the following condition: The conditions set forth at paragraphs (f)(1)(i) and (ii) of this section apply.

(3) *Big game hunting.* We allow big game hunting on designated areas of the district subject to the following condition: The conditions set forth at paragraphs (f)(1)(i) and (ii) of this section apply.

* * * * *

(g) *Valentine National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of coot, crow, dove, dark goose, duck, light goose, merganser, rail, snipe, and woodcock on designated areas of the refuge subject to the following conditions:

(i) We allow hunter access from 2 hours before legal sunrise to 2 hours after legal sunset.

(ii) We allow the use of dogs.

(iii) We prohibit shooting from a motor vehicle or across any refuge roadway or right-of-way.

(iv) You must remove all blinds and decoys at the conclusion of each day's hunt (see § 27.93 of this chapter).

(2) *Upland game hunting.* We allow hunting of cottontail rabbit, coyote,

partridge, prairie chicken, quail, ring-neck pheasant, State-defined furbearers, sharp-tailed grouse, squirrel, and turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (g)(1)(i) through (iv) of this section apply.

(ii) We allow coyote and State-defined furbearer hunting from September 1 to March 31. Shooting hours are ½ hour before legal sunrise to ½ hour after legal sunset.

(iii) We prohibit the use of dogs to hunt coyotes.

(iv) We prohibit the use of bait to hunt coyotes.

(v) You may only possess nontoxic shot when hunting turkey (see § 32.2(k)).

(3) *Big game hunting.* We allow hunting of elk, white-tailed deer, mule deer, and pronghorn antelope on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (g)(1)(i) and (iii) of this section apply.

(ii) We allow portable tree stands and ground blinds to be used from August 16 through January 31.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Anglers may enter the refuge 1 hour before legal sunrise and remain 1½ hours after legal sunset.

(ii) We prohibit the take of reptiles, amphibians, and minnows (see § 27.21 of this chapter), with the exception that you may take bullfrogs on refuge lakes open to fishing.

■ 25. Amend § 32.47 by:

■ a. Redesignating paragraphs (c) through (f) as paragraphs (d) through (g);

■ b. Adding a new paragraph (c); and

■ c. Revising newly redesignated paragraph (g).

The addition and revision read as follows:

§ 32.47 Nevada.

* * * * *

(c) *Fallon National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of goose, duck, swan, coot, merganser, snipe, and dove on designated areas of the refuge subject to the following conditions:

(i) We allow motorized and nonmotorized boats for hunting.

(ii) We allow the use of dogs when hunting game birds.

(iii) We allow overnight stays while hunting subject to the following conditions:

(A) You may stay overnight only at designated sites within the refuge boundary.

(B) We limit overnight stays to 4 consecutive nights at one location, and to 12 consecutive nights on the refuge.

(2) *Upland game hunting.* We allow hunting of quail, rabbit, turkey, badger, beaver, and coyote on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(ii) and (iii) of this section apply.

(ii) We allow artificial lighting for hunting coyotes.

(3) *Big game hunting.* We allow hunting of mule deer and pronghorn on designated areas of the refuge subject to the following condition: The condition set forth at paragraph (c)(1)(iii) of this section applies.

(4) [Reserved]

* * * * *

(g) *Stillwater National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of goose, duck, swan, coot, merganser, snipe, and dove on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs when hunting game birds.

(ii) We allow overnight stays while hunting subject to the following conditions:

(A) You may stay overnight only at designated sites within the refuge boundary.

(B) We limit overnight stays to 4 consecutive nights at one location, and to 12 consecutive nights on the refuge.

(2) *Upland game hunting.* We allow hunting of quail, rabbit, turkey, badger, beaver, and coyote on designated areas of the refuge subject to the following conditions:

(i) Approved methods of take include shotgun and federally approved non-lead shot, bow and arrow, and falconry.

(ii) We allow the use of dogs when hunting.

(iii) The condition set forth at paragraph (g)(1)(ii) of this section applies.

(3) *Big game hunting.* We allow hunting of mule deer and pronghorn on designated areas of the refuge subject to the following conditions:

(i) Approved methods of take include shotgun, muzzle-loading rifle, and bow and arrow.

(ii) The condition set forth at paragraph (g)(1)(ii) of this section applies.

(4) [Reserved]

■ 26. Amend § 32.48 by revising paragraphs (a)(1)(ii), (b), and (c) to read as follows:

§ 32.48 New Hampshire.

* * * * *

(a) * * *

(1) * * *

(ii) We allow the use of dogs consistent with State regulations.

* * * * *

(b) *Silvio O. Conte National Fish and Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, common snipe, and American woodcock on designated areas of the refuge subject to the following condition: We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of coyote, fox, raccoon, woodchuck, red squirrel, eastern gray squirrel, porcupine, skunk, crow, snowshoe hare, ring-necked pheasant, and ruffed grouse on designated areas of the refuge subject to the following condition: We allow the use of dogs consistent with State regulations.

(3) *Big game hunting.* We allow hunting of white-tailed deer, moose, black bear, and wild turkey on designated areas of the refuge subject to the following condition: We allow tree stands and blinds that are clearly marked with the owner's State hunting license number.

(4) [Reserved]

(c) *Umbagog National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, snipe, coot, crow, and woodcock on designated areas of the refuge subject to the following condition: We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of fox, raccoon, woodchuck, squirrel, porcupine, skunk, snowshoe hare, ring-necked pheasant, and ruffed grouse on designated areas of the refuge subject to the following conditions:

(i) We prohibit night hunting from ½ hour after legal sunset until ½ hour before legal sunrise the following day.

(ii) We allow the use of dogs consistent with State regulations.

(3) *Big game hunting.* We allow hunting of bear, white-tailed deer, coyote, wild turkey, and moose on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs consistent with State regulations.

(ii) Hunters must retrieve all species harvested on the refuge.

(iii) We allow temporary blinds and tree stands that are clearly marked with the owner's State hunting license number. You may erect temporary blinds and tree stands no earlier than 14 days prior to the hunting season, and you must remove them within 14 days after the hunting season (see § 27.93 of this chapter).

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge.

■ 27. Amend § 32.49 by revising paragraphs (a), (b), (c)(3)(iii), (d)(1), and (e) to read as follows:

§ 32.49 New Jersey.

* * * * *

(a) *Cape May National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of waterfowl, coot, moorhen, rail, snipe, and woodcock on designated areas of the refuge subject to the following conditions:

(i) The snipe season on the refuge begins with the start of the State early woodcock south zone season and continues through the end of the State snipe season.

(ii) We allow the use of dogs consistent with State regulations.

(iii) We prohibit falconry.

(2) *Upland game hunting.* We allow hunting of rabbit and squirrel on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (a)(1)(ii) and (iii) of this section apply.

(ii) We allow rabbit and squirrel hunting following the end of the State's 6-day firearm season for white-tailed deer, until the close of the regular rabbit and squirrel season.

(3) *Big game hunting.* We allow hunting of white-tailed deer and turkey on designated areas of the refuge subject to the following condition: Tree stands must be marked with the owner's New Jersey Conservation Identification Number.

(4) *Sport fishing.* We allow saltwater sport fishing on designated areas of the refuge subject to the following conditions:

(i) We allow fishing from 1 hour before legal sunrise to 1 hour after legal sunset.

(ii) We close the Atlantic Ocean beach annually to all access, including fishing, between April 1 and September 30.

(iii) We prohibit fishing for, or possession of, shellfish on refuge lands.

(b) *Edwin B. Forsythe National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of waterfowl, coot, moorhen, and rail on designated areas of the refuge subject to the following conditions:

(i) We require hunters to possess a signed refuge hunt permit (Migratory Bird Hunt Application FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) at all times while scouting and hunting on the refuge.

(ii) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of squirrel on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (b)(1)(i) and (ii) of this section apply.

(3) *Big game hunting.* We allow hunting of white-tailed deer and wild turkey on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (b)(1)(i) of this section applies.

(ii) You must mark deer stands with the hunter's New Jersey Conservation Identification Number. You must remove deer stands from the refuge at the end of the last day of the hunting season (see §§ 27.93 and 27.94 of this chapter).

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: We prohibit the use of lead fishing tackle on the refuge.

(c) * * *

(3) * * *

(iii) Hunters may put up tree stands beginning on the first scouting day, except on the day of the refuge's youth hunt. Hunters must retrieve their stands by 12 p.m. (noon) on the Sunday after the last day of the hunt (see § 27.93 of this chapter). All hunters must put their Conservation Identification Number on their stand, and they may have only one stand in the field at any one time.

* * * * *

(d) * * *

(1) *Migratory game bird hunting.* We allow hunting of goose and duck on designated areas of the refuge subject to the following condition: We allow the use of dogs consistent with State regulations.

* * * * *

(e) *Wallkill River National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory birds on designated areas of the refuge subject to the following conditions:

(i) Hunters must obtain a refuge hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System). We require hunters to possess a signed refuge hunt permit at all times while scouting and hunting on the refuge.

(ii) Hunters may enter the refuge 2 hours before legal shooting time and must leave no later than 2 hours after legal shooting time.

(iii) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of coyote, fox, crow, ruffed grouse, opossum, raccoon, pheasant, chukar, rabbit/hare/jackrabbit, squirrel, and woodchuck on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (e)(1)(i) through (iii) of this section apply.

(ii) We allow hunting from legal sunrise to legal sunset.

(3) *Big game hunting.* We allow hunting of white-tailed deer, bear, and wild turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (e)(1)(i) and (ii) of this section apply.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(4) *Sport fishing.* We allow sport fishing on the refuge subject to the following conditions:

(i) We open Owens Station Crossing for catch-and-release fishing only.

(ii) We allow fishing from ½ hour before legal sunrise to ½ hour after legal sunset.

(iii) We prohibit the taking of amphibians and reptiles (see § 27.21 of this chapter).

(iv) We prohibit trapping fish for use as bait.

■ 28. Amend § 32.50 by:

■ a. Revising paragraphs (a)(1)(i)(A) and (a)(2) introductory text;

■ b. Adding paragraph (a)(2)(iii); and

■ c. Revising paragraph (b).

The revisions and addition read as follows:

§ 32.50 New Mexico.

* * * * *

(a) * * *

(1) * * *

(i) * * *

(A) You may hunt only on Tuesdays, Thursdays, and Saturdays during the period when the State seasons that apply to the Middle Tract area are open.

* * * * *

(2) *Upland game hunting.* We allow hunting of pheasant, quail (scaled, Gambel's, northern bobwhite, and Montezuma), Eurasian collared-dove, desert cottontail, and black-tailed jackrabbit on designated areas of the refuge subject to the following conditions:

* * * * *

(iii) We allow Eurasian collared-dove hunting on the North Tract only during the season that is concurrently open for dove hunting within the State.

* * * * *

(b) *Bosque del Apache National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of mourning dove, white-winged dove, and light goose on designated areas of the refuge subject to the following conditions:

(i) We allow hunting of light goose in the North Special Hunt Area on dates to be determined by refuge staff. Hunters must possess a permit available through a lottery drawing (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(ii) Hunting hours for mourning and white-winged dove are from ½ hour before legal sunrise to legal sunset. Hunting hours for light goose are from ½ hour before legal sunrise to 12:00 p.m. (noon) Mountain Time.

(iii) You must remove all spent shells and all other personal equipment at the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(iv) We allow the use of dogs when hunting.

(v) We prohibit falconry on the refuge.

(vi) We allow the use of horses and pack stock in support of hunting in the East Hunt Unit only.

(2) *Upland game hunting.* We allow hunting of scaled, Gambel's, northern bobwhite, and Montezuma quail; cottontail rabbit; black-tailed jackrabbit; and Eurasian collared-dove on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(iv) through (vi) of this section apply.

(ii) Hunting hours are from ½ hour before legal sunrise to ½ after legal sunset.

(3) *Big game hunting.* We allow hunting of mule deer, javelina, oryx, and bearded Rio Grande turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(vi) and (b)(2)(ii) of this section apply.

(ii) We allow hunting of bearded Rio Grande turkey for youth hunters in the North Special Hunt Area and South Special Hunt Area during the State-established youth hunt and on weekends April through May during the State-established general spring turkey hunt. All hunters must fill out FWS Form 3–2439 (Hunt Application—National Wildlife Refuge System) and pay a fee. The permit is available through a lottery drawing. If selected, you must carry your refuge hunt permit (FWS Form 3–2439) at all times during the hunt.

(iii) We allow incidental take of feral hog by those legally licensed for, and participating in, other big game hunting activities. You may take feral hog only with a method allowed within each refuge hunt unit. We prohibit the use of dogs for this activity.

(4) *Sport fishing.* We allow fishing on designated areas of the refuge subject to the following conditions:

(i) We allow fishing from April 1 through September 30.

(ii) We allow fishing from ½ hour before legal sunrise until ½ hour after legal sunset.

(iii) We prohibit trotlines, bow fishing, seining, dip netting, and traps.

(iv) We allow frogging for bullfrog on the refuge in areas that are open to fishing. We allow the use of hook and line, spears, gigs, and archery equipment to take bullfrog.

* * * * *

■ 29. Amend § 32.51 by:

■ a. Revising paragraphs (c) and (d);

■ b. Adding paragraph (f)(3);

■ c. Revising paragraphs (g)(3)(i) and (ii), (i), (j)(3), and (j)(4)(iv).

The revisions and addition read as follows:

§ 32.51 New York.

* * * * *

(c) *Iroquois National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, rail, coot, gallinule, woodcock, and snipe on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs consistent with State regulations.

(ii) For hunting of duck, goose, and coot:

(A) We allow hunting on Saturday of the New York State Youth Days.

(B) We allow hunting Tuesdays, Thursdays, and Saturdays during the regular waterfowl season, excluding opening day of deer firearms season.

(C) We require proof of successful completion of the New York State waterfowl identification course, the Iroquois nonresident waterfowl identification course, or a suitable nonresident State waterfowl identification course. All hunters must show proof of successful course completion each time they hunt.

(D) We require a refuge hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(E) We allow hunting from legal starting time until 12 p.m. (noon). We require hunters to return a completed Migratory Bird Hunt Report (FWS Form 3–2361) no later than 1 p.m. on the day of the hunt.

(F) Hunters must remain in designated hunting areas, unless actively pursuing downed or crippled birds.

(iii) For hunting of rail, gallinule, snipe, and woodcock, we allow hunting during the State seasons east of Sour Springs Road by all hunters, except we close rail, gallinule, snipe and woodcock hunting during refuge waterfowl hunt days to hunters without a refuge waterfowl permit.

(2) *Upland game hunting.* We allow hunting of ruffed grouse, gray squirrel, cottontail rabbit, pheasant, coyote, fox, raccoon, skunk, and opossum on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (c)(1)(i) of this section applies.

(ii) For small game hunting:

(A) We allow hunting from opening day of the State season until the last day of February.

(B) We prohibit the use of raptors to take small game.

(iii) For furbearer hunting, we prohibit hunting from legal sunset to legal sunrise.

(3) *Big game hunting.* We allow hunting of white-tailed deer and turkey on designated areas of the refuge subject to the following conditions:

(i) We require a refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) for spring turkey hunting.

(ii) The condition set forth at paragraph (c)(1)(i) of this section applies.

(4) *Sport fishing.* We allow sport fishing and frogging on designated areas of the refuge subject to the following conditions:

(i) We allow fishing and frogging from legal sunrise to legal sunset.

(ii) We prohibit collecting fish for use as bait.

(d) *Montezuma National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of waterfowl, Canada goose, snow goose, and gallinule on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs consistent with State regulations.

(ii) For the regular waterfowl season:

(A) We require daily refuge permits (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) and reservations; we issue permits to hunters with a reservation for that hunt day. We require you to complete and return your permit by the end of the hunt day.

(B) We allow hunting only on Tuesdays, Thursdays, and Saturdays during the established refuge season set within the State western zone season. We allow a youth waterfowl hunt during New York State's established youth waterfowl hunt each year.

(C) All hunters with reservations and their hunting companions must check-in at the Route 89 Hunter Check Station area at least 1 hour before legal shooting time or forfeit their reservation.

(D) We allow motorless boats to hunt waterfowl. We limit hunters to one boat per reservation and one motor vehicle in the hunt area per reservation.

(E) We prohibit shooting from within 500 feet (152.4 meters) of the Tschache Pool observation tower.

(F) We require proof of successful completion of the New York State waterfowl identification course, the Montezuma nonresident waterfowl identification course, or a suitable nonresident State waterfowl identification course. All hunters must show proof of successful course completion each time they hunt.

(G) You may hunt gallinule only during the regular waterfowl season.

(iii) For Canada goose and snow goose hunting:

(A) We allow hunting of Canada goose during the New York State September season and of snow goose during portions of the New York State snow goose season and portions of the period covered by the Light Goose Conservation Order.

(B) You must possess a valid daily hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System). We require you to complete and return the daily hunt permit card by the end of the hunt day.

(C) For snow goose hunting, hunters may enter the refuge no earlier than 4 hours before legal sunrise. For Canada goose hunting, hunters may enter the refuge no earlier than 2 hours before legal sunrise.

(2) *Upland game hunting.* We allow hunting of rabbit and squirrel on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (d)(1)(i) of this section applies.

(ii) You must possess a valid daily hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) and are required to complete and return the daily hunt permit card by the end of each hunt day.

(iii) We allow upland game hunters to access the refuge from 2 hours before legal sunrise until 2 hours after legal sunset.

(iv) We require the use of approved nontoxic shot for upland game hunting (see § 32.2(k)).

(3) *Big game hunting.* We allow hunting of white-tailed deer and wild turkey on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (d)(1)(i) of this section applies.

(ii) You must possess a valid daily hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System). We require you to complete and return the daily hunt permit card by the end of the hunt day.

(iii) We allow white-tailed deer and turkey hunters to access the refuge from 2 hours before legal sunrise until 2 hours after the end of legal shooting time.

(iv) We allow youth and special big game hunts during New York State's established youth and special big game hunts each year.

(4) *Sport fishing.* We allow access for fishing from designated areas of the refuge subject to the following condition: We prohibit the use of lead fishing tackle.

* * * * *

(f) * * *

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) We allow archery hunting on specific days between November 1 and January 31.

(ii) Hunters must obtain and possess a refuge-specific permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) for hunting on the refuge.

* * * * *

(g) * * *

(3) * * *

(i) Hunters must purchase and possess a signed refuge hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) at all times while scouting and hunting on the refuge.

(ii) You may hunt deer using archery equipment only.

* * * * *

(i) *Wallkill River National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory birds on designated areas of the refuge subject to the following conditions:

(i) Hunters must obtain and possess a signed refuge hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) at all times while scouting and hunting on the refuge.

(ii) Hunters may enter the refuge 2 hours before legal shooting time and leave no later than 2 hours after legal shooting time.

(iii) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of rabbit/hare, gray/black/fox squirrel, pheasant, bobwhite quail, ruffed grouse, crow, red/gray fox, coyote, bobcat, raccoon, skunk, mink, weasel, and opossum on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (i)(1)(i) through (iii) of this section apply.

(ii) We allow hunting from legal sunrise to legal sunset.

(3) *Big game hunting.* We allow hunting of white-tailed deer, bear, and wild turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (i)(1)(i) and (ii), and (i)(2)(ii) of this section apply.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We open Owens Station Crossing for catch-and-release fishing only.

(ii) We allow fishing from ½ hour before legal sunrise to ½ hour after legal sunset.

(iii) We prohibit the taking of amphibians and reptiles.

(iv) We prohibit minnow/bait trapping.

(j) * * *

(3) *Big game hunting.* We allow hunting of white-tailed deer and turkey within designated areas of the refuge subject to the following conditions:

(i) We allow archery and shotgun hunting of white-tailed deer during specific days between November 1 and January 31.

(ii) We require a permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) for hunting on the refuge.

(iii) Hunters assigned to Unit 5 must hunt from portable tree stands and must direct aim away from a public road and/or dwelling.

(4) * * *

(iv) We prohibit the taking of baitfish and frogs.

■ 30. Amend § 32.52 by revising paragraph (f)(1)(vi), and adding paragraph (f)(1)(ix), to read as follows:

§ 32.52 North Carolina.

* * * * *

(f) * * *

(1) * * *

(vi) Shooting hours are from ½ hour before legal sunrise until 12 p.m. (noon).

* * * * *

(ix) Hunting by youth hunters (age 16 and younger) is subject to the following conditions:

(A) Validly licensed adults, age 21 or older, holding applicable permits must accompany and supervise, remaining in sight and voice contact at all times, any youth hunters. Each adult may supervise no more than two youth hunters.

(B) Youth hunters must possess and carry evidence of successful completion of a State-approved hunter education course.

(C) We allow hunting on Tuesdays, Wednesdays, Fridays, and Saturdays during the late and youth waterfowl State seasons.

* * * * *

■ 31. Revise § 32.53 to read as follows:

§ 32.53 North Dakota.

The following refuge units are open for hunting and/or fishing as governed by applicable Federal and State regulations, and are listed in alphabetical order with additional refuge-specific regulations.

(a) *Appert Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(b) *Ardoch National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(c) *Arrowwood National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of pheasant, sharp-tailed grouse, partridge, cottontail rabbit, and fox on designated areas of the refuge subject to the following conditions:

(i) We allow hunting of upland game birds on the day following the close of the State firearm deer season through the end of the regular upland bird season.

(ii) We allow hunting of cottontail rabbit and fox on the day following the close of the State firearm deer season through March 31.

(3) *Big game hunting.* We allow deer hunting on designated areas of the refuge subject to the following conditions:

(i) We prohibit entering the refuge before legal shooting hours on the opening day of firearms deer season. We require all hunters to be off the refuge 1½ hours after legal sunset.

(ii) We allow deer hunting on the refuge during the State youth deer season.

(iii) After harvesting a deer, firearm deer hunters must wear blaze orange on the refuge.

(iv) We allow access by foot travel only. You may use a vehicle on designated refuge roads and trails to retrieve deer during the following times only: 9:30 to 10 a.m.; 1:30 to 2 p.m.; and ½ hour after legal sunset for 1 hour.

(v) We allow temporary tree stands, blinds, and game cameras for daily use; you must remove them by the end of each day's hunt (see § 27.93 of this chapter).

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We allow boats at idle speed only on Arrowwood Lake and Jim Lake from May 1 to September 30 of each year.

(ii) We allow ice fishing and dark house spearfishing. We allow snowmobiles, all-terrain vehicles (ATVs), utility terrain vehicles (UTVs), motor vehicles, and fish houses on the ice as conditions allow.

(iii) You may use and leave fish houses on the ice overnight until March 15.

(d) *Arrowwood Wetland Management District*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction at the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district.

(3) *Big game hunting.* We allow big game hunting on designated areas of the district.

(4) *Sport fishing.* We allow sport fishing on designated areas of the district subject to the following condition: You must remove boats, motor vehicles, fishing equipment, and other personal property (excluding ice houses) by legal sunset (see §§ 27.93 and 27.94 of this chapter).

(e) *Audubon National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of ring-necked pheasant, gray partridge, and sharp-tailed grouse on designated areas of the refuge subject to the following conditions:

(i) We open to upland game hunting annually on the day following the close of the regular deer gun season, and we close as governed by the State season.

(ii) We allow game retrieval without a firearm up to 100 yards (90 meters) inside the refuge boundary fence and closed areas of the refuge. Retrieval time may not exceed 10 minutes. You may use dogs to assist in retrieval.

(3) *Big game hunting.* We allow hunting of white-tailed and mule deer on designated areas of the refuge subject to the following conditions:

(i) We close the refuge to hunting during the State's special youth deer hunting season.

(ii) Hunters may use designated refuge roads to retrieve downed deer.

(iii) We allow only portable tree stands. You must remove all tree stands at the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(4) *Sport fishing.* We allow ice fishing on designated areas of the refuge.

(f) *Audubon Wetland Management District*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district.

(3) *Big game hunting.* We allow big game hunting on designated areas of the district.

(4) *Sport fishing.* We allow sport fishing on designated areas of the district subject to the following condition: You must remove boats, motor vehicles, fishing equipment, and other personal property (excluding ice houses) by the end of each day's fishing activity (see §§ 27.93 and 27.94 of this chapter).

(g) *Bone Hill National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(h) *Brumba National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(i) *Buffalo Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: Access is controlled by the individual landowner.

(j) *Camp Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: Access is controlled by the individual landowner.

(k) *Canefield Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(l) *Chase Lake National Wildlife Refuge.* (1)–(2) [Reserved]

(3) *Big game hunting.* We allow deer hunting on designated areas of the refuge.

(4) [Reserved]

(m) *Chase Lake Wetland Management District*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the district subject to the following conditions: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district.

(3) *Big game hunting.* We allow big game hunting on designated areas of the district.

(4) *Sport fishing.* We allow sport fishing on designated areas of the district subject to the following condition: You must remove boats, motor vehicles, fishing equipment, and other personal property (excluding ice houses) by the end of each day's fishing activity (see §§ 27.93 and 27.94 of this chapter).

(n) *Cottonwood Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: Access is controlled by the individual landowner.

(o) *Crosby Wetland Management District*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district.

(3) *Big game hunting.* We allow big game hunting on designated areas of the district.

(4) *Sport fishing.* We allow sport fishing on designated areas of the district subject to the following condition: You must remove boats, motor vehicles, fishing equipment, and other personal property (excluding ice houses) by the end of each day's fishing activity (see §§ 27.93 and 27.94 of this chapter).

(p) *Dakota Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(q) *Des Lacs National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of fox, sharp-tailed grouse, Hungarian partridge, turkey, and ring-necked pheasant on designated areas of the refuge subject to the following conditions:

(i) We open for upland game bird hunting on the day following the close of the regular deer gun season through the end of the State season.

(ii) We allow the use of hunting dogs for retrieval of upland game.

(iii) We allow fox hunting from the day following the regular firearm deer season until March 31.

(iv) We prohibit accessing refuge lands from refuge waters.

(3) *Big game hunting.* We allow deer and moose hunting on designated areas of the refuge subject to the following conditions:

(i) We only allow the use of portable tree stands and ground blinds. We prohibit leaving stands and blinds overnight on the refuge (see § 27.93 of this chapter).

(ii) We prohibit entry to the refuge before 12 p.m. (noon) on the first day of the respective bow, gun, or muzzleloader deer hunting seasons.

(iii) The condition set forth at paragraph (q)(2)(iv) of this section applies.

(4) [Reserved]

(r) *Devils Lake Wetland Management District*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(3) *Big game hunting.* We allow big game hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(4) *Sport fishing.* We allow sport fishing on designated areas of the district subject to the following condition: You must remove boats, motor vehicles, fishing equipment, and other personal property (excluding ice houses) by the end of each day's fishing activity (see §§ 27.93 and 27.94 of this chapter).

(s) *Half Way Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(t) *Hiddenwood Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: Access is controlled by the individual landowner.

(u) *Hobart Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(v) *Hutchinson Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(w) *J. Clark Salyer National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of goose, duck, and coot on designated areas of the refuge subject to the following condition: We allow the use of dogs for hunting and retrieving game birds.

(2) *Upland game hunting.* We allow hunting of ruffed and sharp-tailed grouse, Hungarian partridge, turkey, ring-necked pheasant, and fox on designated areas of the refuge subject to the following conditions:

(i) We open the refuge to hunting for sharp-tailed grouse, Hungarian partridge, and ring-necked pheasant north of the Willow-Upham road on the day following the close of the regular firearm deer season.

(ii) We open the refuge to fox hunting on the day following the close of the regular firearm deer season. Fox hunting on the refuge closes March 31.

(iii) Hunters may possess only approved nontoxic shot (see § 32.2(k)) for all upland game hunting, including turkey.

(3) *Big game hunting.* We allow hunting of deer and moose on designated areas of the refuge subject to the following conditions:

(i) You must possess and carry a refuge permit to hunt antlered deer on the refuge outside the nine public hunting areas during the regular firearms season.

(ii) We prohibit entry to the refuge before 12 p.m. (noon) on the first day of the respective bow, gun, or muzzleloader deer hunting seasons. You may access refuge roads open to the public before 12 p.m. (noon).

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We allow boat fishing from May 1 through September 30.

(ii) We allow ice fishing and dark house spearfishing. We allow snowmobiles, all-terrain vehicles (ATVs), utility terrain vehicles (UTVs), motor vehicles, and fish houses on the ice as conditions allow.

(x) *J. Clark Salyer Wetland Management District*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district.

(3) *Big game hunting.* We allow big game hunting on designated areas of the district.

(4) *Sport fishing.* We allow sport fishing on designated areas of the district subject to the following condition: You must remove boats, motor vehicles, fishing equipment, and other personal property (excluding ice houses) by the end of each day's fishing activity (see §§ 27.93 and 27.94 of this chapter).

(y) *Johnson Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(z) *Kulm Wetland Management District*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district.

(3) *Big game hunting.* We allow big game hunting on designated areas of the district.

(4) *Sport fishing.* We allow sport fishing on designated areas of the district subject to the following condition: You must remove boats, motor vehicles, fishing equipment, and other personal property (excluding ice houses) by the end of each day's fishing activity (see §§ 27.93 and 27.94 of this chapter).

(aa) *Lake Alice National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the refuge subject to the following conditions:

(i) We allow motorized boats only during the migratory game bird hunting season; however, motors must not exceed 10 horsepower.

(ii) You must remove all boats, decoys, portable blinds, other personal property, and any materials brought onto the refuge for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow hunting of ring-necked pheasants, sharp-tailed grouse, gray partridge, cottontail rabbit, jackrabbit, snowshoe hare, and fox on designated areas of the refuge.

(3) *Big game hunting.* We allow deer and fox hunting on designated areas of the refuge subject to the following conditions:

(i) We prohibit trapping.

(ii) We allow portable tree stands. Hunters must remove tree stands from the refuge by the end of each day's hunt (see § 27.93 of this chapter).

(4) *Sport fishing.* We allow ice fishing on designated areas of the refuge subject to the following conditions:

(i) We allow vehicles and fish houses on the ice as conditions allow.

(ii) We allow public access for ice fishing from 5 a.m. to 10 p.m.

(iii) You must remove ice fishing shelters and personal property from the refuge by 10 p.m. each day (see §§ 27.93 and 27.94 of this chapter).

(bb) *Lake George National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(cc) *Lake Ilo National Wildlife Refuge.* (1)–(3) [Reserved]

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We open the lake to fishing from 5 a.m. to 10 p.m. year round.

(ii) We open the refuge to ice fishing from October 1 through March 31.

(dd) *Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: Access is controlled by the individual landowner.

(ee) *Lake Nettie National Wildlife Refuge.* (1)–(2) [Reserved]

(3) *Big game hunting.* We allow hunting of white-tailed and mule deer on designated areas of the refuge subject to the following conditions:

(i) We allow only portable tree stands.

(ii) Hunters must remove tree stands from the refuge at the end of each day's hunt (see § 27.93 of this chapter).

(4) [Reserved]

(ff) *Lake Otis National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(gg) *Lake Patricia National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(hh) *Lake Zahl National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of sharp-tailed grouse, Hungarian partridge, and ring-necked pheasant on designated areas of the refuge subject to the following conditions:

(i) We open to upland game bird hunting on the day following the close of the regular deer gun season through the end of the State season.

(ii) We allow the use of hunting dogs to retrieve upland game.

(3) *Big game hunting.* We allow deer hunting on designated areas of the refuge subject to the following conditions:

(i) You may only use portable tree stands and ground blinds. We prohibit leaving stands and blinds overnight (see § 27.93 of this chapter).

(ii) We prohibit entry to the refuge before 12 p.m. (noon) on the first day of the respective archery, gun, or muzzleloader deer hunting season.

(4) [Reserved]

(ii) *Lambs Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(jj) *Little Goose Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(kk) *Long Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of ring-necked pheasant, sharp-tailed grouse, and grey partridge on designated areas of the refuge subject to the following condition: We open to upland game bird hunting annually on the day following the close of the firearm deer season through the close of the State season.

(3) *Big game hunting.* We allow hunting of deer on designated areas of the refuge.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: We only allow fishing from legal sunrise to legal sunset.

(ll) *Long Lake Wetland Management District*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district.

(3) *Big game hunting.* We allow big game hunting on designated areas of the district.

(4) *Sport fishing.* We allow sport fishing on designated areas of the district subject to the following condition: You must remove boats, motor vehicles, fishing equipment, and other personal property (excluding ice houses) by the end of each day's fishing activity (see §§ 27.93 and 27.94 of this chapter).

(mm) *Lords Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(nn) *Lost Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(oo) *Lostwood National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of sharp-tailed grouse, Hungarian partridge, and ring-necked pheasant on designated areas of the refuge subject to the following condition: We allow the use of dogs to retrieve upland game.

(3) *Big game hunting.* We allow deer and moose hunting on designated areas of the refuge subject to the following condition: We prohibit entry to the refuge before 12 p.m. (noon) on the first day of the respective archery, gun, or muzzleloader deer hunting season.

(4) [Reserved]

(pp) *Lostwood Wetland Management District*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district.

(3) *Big game hunting.* We allow big game hunting on designated areas of the district.

(4) *Sport fishing.* We allow sport fishing on designated areas of the district subject to the following condition: You must remove boats, motor vehicles, fishing equipment, and other personal property (excluding ice houses) by the end of each day's fishing activity (see §§ 27.93 and 27.94 of this chapter).

(qq) *Maple River National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(rr) *Pleasant Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(ss) *Pretty Rock National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species

subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(tt) *Rabb Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(uu) *Rock Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(vv) *Rose Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: Access is controlled by the individual landowner.

(ww) *School Section National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: Access is controlled by the individual landowner.

(xx) *Sheyenne Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: Access is controlled by the individual landowner.

(yy) *Sibley Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(zz) *Silver Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(aaa) *Slade National Wildlife Refuge.* (1)–(2) [Reserved]

(3) *Big game hunting.* We allow hunting of deer on designated areas of the refuge.

(4) [Reserved]

(bbb) *Snyder Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(ccc) *Springwater National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(ddd) *Stewart Lake National Wildlife Refuge.* (1)–(3) [Reserved]

(4) *Sport fishing.* We allow ice or shore fishing on designated areas of the refuge.

(eee) *Stoney Slough National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(fff) *Storm Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(ggg) *Sunburst Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(hhh) *Tewaukon National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow ring-necked pheasant hunting on designated areas of the refuge subject to the following condition: We open for upland game hunting on the first Monday following the close of the State deer gun season through the close of the State pheasant season.

(3) *Big game hunting.* We allow deer hunting on designated areas of the refuge subject to the following conditions:

(i) We allow deer bow hunting on designated areas of the refuge as governed by State regulations.

(ii) The deer bow hunting season closes September 30, reopens the Friday following the close of the State gun deer season, and continues through the end of the State archery deer season.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge.

(iii) *Tewaukon Wetland Management District*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the district subject to the following condition: You must remove boats, decoys, portable blinds, other personal property, and any materials brought onto the area for blind construction by the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the district.

(3) *Big game hunting.* We allow big game hunting on designated areas of the district.

(4) *Sport fishing.* We allow sport fishing on designated areas of the district subject to the following condition: You must remove boats, motor vehicles, fishing equipment, and other personal property (excluding ice houses) by the end of each day (see §§ 27.93 and 27.94 of this chapter).

(jjj) *Tomahawk National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(kkk) *Upper Souris National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of wild turkey, sharp-tailed grouse, Hungarian partridge, and pheasant on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs for hunting and retrieving of upland game birds with the exception of wild turkey.

(ii) We allow hunters on the refuge from 5 a.m. until 10 p.m.

(3) *Big game hunting.* We allow deer and moose hunting on designated areas of the refuge subject to the following conditions:

(i) We only allow the use of portable tree stands and ground blinds. You must remove stands and blinds from the refuge at the end of each day's hunt (see § 27.93 of this chapter).

(ii) The condition set forth at paragraph (kkk)(2)(ii) of this section applies.

(iii) We prohibit entry to the refuge before 12 p.m. (noon) on the first day of the respective bow, gun, or muzzleloader deer hunting seasons.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We allow the use of fishing boats, canoes, kayaks, and float tubes in designated boat fishing areas from Lake Darling Dam north to State Highway 28 (Greene) crossing for fishing from May 1 through September 30.

(ii) We allow fishing from nonmotorized vessels only on the Beaver Lodge Canoe Trail from May 1 through September 30.

(iii) We allow boating and fishing from vessels on the Souris River from Mouse River Park to the north boundary of the refuge from May 1 through September 30.

(iv) We allow snowmobiles, all-terrain vehicles (ATVs), utility terrain vehicles (UTVs), motor vehicles, and fish houses on the ice as conditions allow from Lake Darling Dam north to Carter Dam (Dam 41) for ice fishing.

(v) We allow you to place fish houses overnight on the ice of Lake Darling as governed by State regulations.

(vi) We allow anglers to place portable fish houses on the Souris River north of Carter Dam (Dam 41) and south of Lake Darling Dam for ice fishing, but anglers must remove the fish houses from the refuge at the end of each day's fishing activity (see § 27.93 of this chapter).

(vii) We allow anglers on the refuge from 5 a.m. until 10 p.m.

(lll) *Wild Rice National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(mmm) *Willow Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(nnn) *Wintering River National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

(ooo) *Wood Lake National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(3) *Big game hunting.* We allow hunting of all State-defined species subject to the following condition: Access is controlled by the individual landowner.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) Access is controlled by the individual landowner.

(ii) We prohibit boats during the regular North Dakota waterfowl season.

■ 32. Amend § 32.54 by:

■ a. Revising paragraph (b)(1) introductory text;

■ b. Adding paragraphs (b)(2)(iii) and (iv); and

■ c. Revising paragraph (b)(3)(ii)(C).

The revisions and additions read as follows:

§ 32.54 Ohio.

* * * * *

(b) * * *

(1) *Migratory game bird hunting.* We allow hunting of duck, goose, rail, gallinule, coot, dove, woodcock, crow, and snipe on designated areas of the refuge subject to the following conditions:

* * * * *

(2) * * *

(iii) We prohibit hunting or shooting within 150 feet (45.7 meters) of any structure, building, or parking lot.

(iv) For hunting, you may use or possess only approved nontoxic shot shells (see § 32.2(k)) while in the field.

(3) * * *

(ii) * * *

(C) The condition set forth at paragraph (b)(2)(iv) applies while turkey hunting.

* * * * *

■ 33. Amend § 32.55 by revising paragraphs (g)(4)(ii) and (vii) through (x) to read as follows:

§ 32.55 Oklahoma.

* * * * *

(g) * * *

(4) * * *

(ii) Anglers may use boats from March 1 through September 30 in designated waters unless otherwise specified on the fishing tearsheet.

* * * * *

(vii) Anglers may fish after legal sunset from a boat (during boating season) in the Cumberland Pool, except in the sanctuary zones. Anglers may fish after legal sunset at the headquarters boat ramp area, Goose Pen Pond, Sandy Creek Bridge, Murray 23, and Nida Point.

(viii) We allow bowfishing in Pennington Creek and the Washita River during daylight hours.

(ix) We prohibit the take of fish by use of hands (noodling).

(x) We prohibit the take of frog, turtle, or mussel (see § 27.21 of this chapter).

* * * * *

■ 34. Amend § 32.56 by:

■ a. Revising paragraphs (f) and (n)(1) introductory text;

■ b. Redesignating paragraph (t) as paragraph (u); and

■ c. Adding new paragraph (t).

The revisions and addition read as follows:

§ 32.56 Oregon.

* * * * *

(f) *Hart Mountain National Antelope Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, and coot on designated areas of the refuge subject to the following conditions:

(i) We allow only portable blinds and temporary blinds constructed of synthetic or nonliving natural materials.

(ii) We prohibit digging of pit blinds for waterfowl hunting.

(2) *Upland game hunting.* We allow hunting of chukar and California quail on designated areas of the refuge.

(3) *Big game hunting.* We allow hunting of deer, antelope, and bighorn sheep on designated areas of the refuge subject to the following conditions:

(i) We allow only portable blinds and temporary blinds constructed of synthetic or nonliving natural materials.

(ii) We allow ground blinds, but we prohibit construction of them earlier than 1 week prior to the opening day of the legal season for which you have a valid permit.

(iii) You must remove blinds within 24 hours of harvesting an animal or at the end of the permittee's legal season (see § 27.93 of this chapter).

(iv) We limit hunters to one blind each, and you must tag blinds with the owner's State license or permit number.

(4) *Sport fishing.* We allow fishing on designated areas of the refuge.

* * * * *

(n) * * *

(1) *Migratory game bird hunting.* We allow hunting of duck, goose, and coot on designated areas of the refuge subject to the following conditions:

* * * * *

(t) *Wapato Lake National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, and coot on designated areas of the refuge subject to the following conditions:

(i) We allow hunting on Tuesdays, Thursdays, and Saturdays during the State waterfowl season.

(ii) The hunt area is open for access 2 hours before and after legal shooting hours.

(iii) All hunters must hunt from designated blinds except to retrieve downed birds. We prohibit hunting from levees.

(iv) We allow a maximum occupancy of four persons per blind.

(v) Disabled hunters must possess an Oregon Disabilities Hunting and Fishing Permit issued by the Oregon Department of Fish and Wildlife to qualify for preference in using the ADA Accessibility Guidelines blind or Federal Access pass.

(vi) You must remove decoys, other personal property, and trash (including empty shotgun hulls) from the refuge at the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(vii) We allow the use of dogs for retrieving waterfowl.

(viii) Hunters must submit a Migratory Bird Hunt Report (FWS Form 3–2361) at the end of each day's hunt.

(2)–(4) [Reserved]

* * * * *

■ 35. Amend § 32.57 by:

■ a. Revising paragraph (a);

■ b. Adding paragraphs (b)(1)(iv) and (b)(2)(iii); and

■ c. Revising paragraphs (b)(4)(iv), (c)(3), and (c)(4)(iv).

The revisions and additions read as follows:

§ 32.57 Pennsylvania.

* * * * *

(a) *Cherry Valley National Wildlife Refuge*—(1) *Migratory game bird*

hunting. We allow hunting of migratory game birds on designated areas of the refuge subject to the following conditions:

(i) Hunters must obtain and possess a signed refuge hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) at all times while scouting and hunting on the refuge.

(ii) Hunters may enter the refuge 2 hours before legal shooting time and must leave no later than 2 hours after legal shooting time.

(iii) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of squirrel, grouse, rabbit, pheasant, quail, woodchuck, crow, fox, raccoon, opossum, skunk, weasel, coyote, and bobcat on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (a)(1)(i), (ii), and (iii) of this section apply.

(ii) We allow hunting from legal sunrise to legal sunset.

(3) *Big game hunting.* We allow hunting of white-tailed deer, bear, and wild turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (a)(1)(i) and (ii) of this section apply.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(4) *Sport fishing.* We allow sport fishing on the refuge subject to the following conditions:

(i) The Cherry Creek section located on the former Cherry Valley Golf Course is open for catch-and-release fishing. Anglers at this location must:

(A) Obtain a day-use fishing permit (signed brochure). A maximum of three anglers per day may share the same permit; and

(B) Use only artificial lures and barbless hooks to fish.

(ii) We allow fishing from ½ hour before legal sunrise to ½ hour after legal sunset.

(iii) We allow only nonmotorized or electric-motor boats in designated areas.

(iv) We prohibit the use of eel chutes, eelpots, and fyke nets.

(v) We prohibit trapping fish for use as bait.

(vi) We prohibit the take, collection, capture, killing, and possession of any reptile or amphibian on the refuge.

(b) * * *

(1) * * *

(iv) We allow the use of dogs consistent with State regulations.

(2) * * *

(iii) The condition set forth at paragraph (b)(1)(iv) of this section applies.

* * * * *

(4) * * *

(iv) We prohibit the taking or possession of shellfish on the refuge.

(c) * * *

(3) *Big game hunting.* We allow archery-only hunting of white-tailed deer on designated areas of the refuge subject to the following condition: Hunters must possess a refuge hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(4) * * *

(iv) We prohibit the take, collection, or capture of any reptile or amphibian on the refuge.

* * * * *

■ 36. Revise § 32.58 to read as follows:

§ 32.58 Rhode Island.

The following refuge units are open for hunting and/or fishing as governed by applicable Federal and State regulations, and are listed in alphabetical order with additional refuge-specific regulations.

(a) *Block Island National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, merganser, and coot on designated areas of the refuge subject to the following conditions:

(i) We require hunters to possess and carry a signed refuge hunting brochure valid for the current season.

(ii) We only allow portable or temporary blinds, and decoys must be removed from the refuge following each day's hunt (see § 27.93 of this chapter).

(iii) We allow the use of dogs consistent with State regulations. Dogs must be under direct control of the hunter at all times.

(2) [Reserved]

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) We require hunters to possess and carry a signed refuge hunting brochure valid for the current season.

(ii) We only allow portable or temporary stands and blinds that must be removed from the refuge on the last day of the deer hunt (see § 27.93 of this chapter). Stands and blinds must be marked with the hunter's State hunting license number.

(4) *Sport fishing.* We allow saltwater fishing from refuge shorelines.

(b) *John H. Chafee National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, merganser, and coot on designated areas of the refuge subject to the following conditions:

(i) We require hunters to possess and carry a signed refuge migratory game bird hunting brochure valid for the current season.

(ii) We only allow portable or temporary blinds and decoys that must be removed from the refuge following each day's hunt (see § 27.93 of this chapter).

(iii) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of coyote and fox on designated areas of the refuge subject to the following condition: We only allow the incidental take of coyote and fox during the refuge deer hunting season with a signed refuge hunting brochure valid for the current season.

(3) *Big game hunting.* We allow hunting of white-tailed deer and wild turkey on designated areas of the refuge subject to the following conditions:

(i) We require every hunter to possess and carry a personally signed refuge hunting brochure valid for the current season.

(ii) We only allow portable or temporary stands and blinds that must be removed from the refuge on the last day of the deer hunt (see § 27.93 of this chapter). We prohibit permanent tree stands. Stands and blinds must be marked with the hunter's State hunting license number.

(4) *Sport fishing.* We allow saltwater fishing in designated areas of the refuge.

(c) *Ninigret National Wildlife Refuge.*

(1) [Reserved]

(2) *Upland game hunting.* We allow hunting of coyote and fox on designated areas of the refuge subject to the following condition: We only allow the incidental take of coyote and fox during the refuge deer hunting season. We require hunters to possess and carry a signed refuge hunting brochure valid for the current season.

(3) *Big game hunting.* We allow hunting of white-tailed deer and turkey on designated areas of the refuge subject to the following conditions:

(i) We require hunters to possess and carry a signed refuge hunting brochure valid for the current season.

(ii) We only allow portable or temporary stands and blinds that must be removed from the refuge on the last day of the deer hunt (see § 27.93 of this chapter). We prohibit permanent tree stands. Stands and blinds must be marked with the hunter's State hunting license number.

(4) *Sport fishing.* We allow saltwater fishing from refuge shorelines.

(d) *Sachuest Point National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of fox and coyote on designated areas of the refuge subject to the following condition: We only allow the incidental take of fox and coyote during limited, periodic hunts with a signed hunt application (see paragraph (d)(3)(i) of this section).

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) We require every hunter to possess and carry a personally signed hunt application (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(ii) We only allow hunting of big game during limited, periodic hunts.

(iii) We only allow portable tree stands and blinds. You must clearly label any tree stand or blind left on the refuge overnight with your refuge permit number. You must remove your tree stand(s) and/or blind(s) from the refuge on the last day of the refuge-authorized deer hunt (see § 27.93 of this chapter).

(4) *Sport fishing.* We allow saltwater fishing on designated areas of the refuge subject to the following conditions:

(i) Anglers may only saltwater fish at Sachuest Beach shoreline from September 16 through March 31.

(ii) Anglers may night-fish after legal sunset with a refuge permit (FWS Form 3–2358, National Wildlife Refuge System Fishing/Shrimping/Crabbing/Frogging Application).

(e) *Trustom Pond National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, merganser, coot, and mourning dove on designated areas of the refuge subject to the following condition: We allow the use of dogs consistent with State regulations.

(2)–(3) [Reserved]

(4) *Sport fishing.* We allow saltwater fishing on designated areas of the refuge subject to the following condition: Anglers may saltwater fish from September 16 through March 31.

■ 37. Amend § 32.59 by revising paragraph (b)(3) introductory text to read as follows:

§ 32.59 South Carolina.

* * * * *

(b) * * *

(3) *Big game hunting.* We allow hunting of white-tailed deer, turkey, coyote, and feral hog on designated areas of the refuge subject to the following conditions:

* * * * *

■ 38. Amend § 32.60 by revising paragraph (b) to read as follows:

§ 32.60 South Dakota.

* * * * *

(b) *LaCreek National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow the hunting of goose, duck, coot, common snipe, sandhill crane, crow, and mourning dove on designated areas of the refuge subject to the following conditions:

(i) Hunters may enter the refuge 2 hours before legal sunrise and remain no longer than 2 hours after legal sunset. We allow access from refuge parking areas, adjacent public lands, and adjacent private lands enrolled in public access programs.

(ii) We allow the use of motorized boats for hunting and game retrieval on the Little White River Recreation Area. We allow the use of manual powered boats for hunting and game retrieval on all waters within open hunt areas and the use of boats with electric motors on Pool #10.

(iii) We allow the use of dogs.

(iv) We prohibit shooting from or over refuge roads and parking areas.

(v) We prohibit hunting light geese during the spring conservation order.

(vi) For crow hunting, we prohibit hunting with rifles and hunting during the spring season.

(2) *Upland game hunting.* We allow the hunting of bobcat, coyote, fox, cottontail rabbit, mountain lion, prairie chicken, ring-necked pheasant, and sharp-tailed grouse on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i), (ii), and (iv) of this section apply.

(ii) We allow access for bobcat, coyote, fox, and mountain lion hunting January 1 through February 15, and hunting hours are from ½ hour before legal sunrise to ½ hour after legal sunset.

(iii) We prohibit the use of dogs when hunting bobcat, coyote, fox, and mountain lion. We allow the use of dogs while hunting other upland game.

(iv) Coyotes and all furbearers or their parts, if left in the field, must be left at least 50 yards away from any road, trail, or building. Otherwise, hunters must remove them from the refuge.

(3) *Big game hunting.* We allow hunting of white-tailed and mule deer on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) through (iv) of this section apply.

(ii) Hunters may leave portable tree stands and free-standing elevated platforms on the refuge from August 25 through February 15. Hunters must remove all other personal property by the end of each day's hunt (see § 27.93 of this chapter).

(iii) We close the refuge to archery hunting during refuge firearm seasons.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We prohibit the use or possession of live minnows or bait fish in Pools 3, 4, 7, and 10 and the Cedar Creek Trout Ponds.

(ii) We open designated fishing areas from ½ hour before legal sunrise to ½ hour after legal sunset, except the Little White River Recreation Area.

* * * * *

■ 39. Amend § 32.61 by:

■ a. Revising paragraphs (g)(1) introductory text, (g)(1)(v) and (vi), (g)(2), and (g)(3)(i);

■ b. Removing paragraph (g)(3)(ii);

■ c. Redesignating paragraphs (g)(3)(iii) and (iv) as paragraphs (g)(3)(ii) and (iii), respectively; and

■ d. Revising paragraph (g)(4)(i).

The revisions read as follows:

§ 32.61 Tennessee.

* * * * *

(g) *Tennessee National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of Canada goose, dove, and crow on designated areas of the refuge subject to the following conditions:

* * * * *

(v) Youth hunters age 16 and younger must be accompanied by an adult 21 years old or older who has a refuge hunting permit on his or her person. The adult must remain in a position to take immediate control of the hunting device.

(vi) We allow the use of dogs for migratory bird, squirrel, raccoon, and opossum hunting.

* * * * *

(2) *Upland game hunting.* We allow hunting of squirrel, coyote, beaver, raccoon, and opossum on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (g)(1)(i) through (vi) and (viii) of this section apply.

(ii) We allow hunting for raccoon and opossum from legal sunset to legal sunrise.

(3) * * *

(i) The conditions set forth at paragraphs (g)(1)(i) through (v) and (viii) of this section apply.

* * * * *

(4) * * *

(i) We allow fishing in Swamp Creek, Sulphur Well Bay, and Bennetts Creek from March 16 through November 14. We open the remainder of the refuge portion of Kentucky Lake to fishing year-round. We allow bank fishing year-round along Refuge Lane from the New Johnsonville Pump Station.

* * * * *

■ 40. Amend § 32.62 by revising paragraphs (f), (i), and (j) to read as follows:

§ 32.62 Texas.

* * * * *

(f) *Buffalo Lake National Wildlife Refuge*—(1) *Migratory bird hunting.* We allow hunting of mourning dove, white-winged dove, and Eurasian collared-dove on designated areas of the refuge subject to the following conditions:

(i) We require hunters to obtain a Special Use Permit (FWS Form 3–1383–G).

(ii) Hunters age 17 and younger (''youth hunters'') must be under the direct supervision of an adult age 18 or older (''adult supervisor'').

(iii) We limit hunting to no more than 6 days with a maximum of 12 hunters, during the concurrent pheasant/quail season as governed by the State of Texas hunting season.

(iv) Hunting hours will be from 30 minutes before legal sunrise until noon.

(v) All hunters must check in and out at refuge headquarters.

(vi) Bag limits will be determined annually for each species, but will never exceed the limits set by Texas Parks and Wildlife Department (TPWD).

(2) *Upland game hunting.* We allow hunting of ring-necked pheasant, northern bobwhite, and scaled quail on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (f)(1)(ii), (iii), and (v) of this section apply.

(ii) Hunting hours will be from 9 a.m. to 4:30 p.m.

(iii) We allow only shotguns for pheasant and quail hunting.

(3) *Big game hunting.* We allow hunting of white-tailed deer, mule deer, and feral hog on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (f)(1)(ii) of this section applies.

(ii) After legal sunset, hunters may be in designated camping areas only. We prohibit hunters in all other areas of the refuge after legal sunset.

(iii) During the youth hunt, each adult supervisor may supervise only one youth hunter. A youth hunter may have up to two adult supervisors.

(4) [Reserved]

* * * * *

(i) *Laguna Atascosa National Wildlife Refuge.* (1)–(2) [Reserved]

(3) *Big game hunting.* We allow hunting of white-tailed deer, feral hog, nilgai antelope, other exotic ungulates, and American alligator on designated areas of the refuge subject to the following conditions:

(i) We allow the incidental take of nilgai antelope, feral hog, and other rarely observed exotic ungulates (such as fallow deer, axis deer, sika deer, Barbary sheep, and black buck) during all refuge hunts, with the exception of American alligator hunts.

(ii) We require hunters to attend refuge hunter orientation before hunting on the refuge. We require each hunter to obtain and carry with them a signed and dated hunt information tearsheet (name only) in addition to the State hunt permit.

(iii) Bag limits for species hunted on the refuge are provided in the refuge hunt tearsheet annually.

(iv) Each hunter age 17 and younger must be under the direct supervision of an adult age 18 or older.

(v) We allow a scouting period prior to the commencement of each refuge hunt period. A permitted hunter and a limit of two non-permitted individuals may enter the hunt units during the scouting period, which begins after hunter orientation and ends at legal sunset. Each hunter must clearly display a Vehicle Validation Tag face up on the vehicle dashboard when scouting and hunting.

(vi) We allow hunters to enter the refuge 1½ hours before legal sunrise during their permitted hunt periods. Hunters must leave the hunt units no later than 1 hour after State legal shooting hours.

(vii) Hunters may access hunt units only by foot or bicycle.

(viii) We allow hunting from portable stands or by stalking and still hunting. There is a limit of one blind or stand per permitted hunter. Hunters must attach hunter identification (permit number or State license number) to the blind or stand. Hunters must remove all blinds and stands at the end of the permitted hunt period (see § 27.93 of this chapter).

(ix) During American alligator hunts, we allow hunters to leave hooks set over only one night period at a time; set lines must be checked daily. Hunters must field dress all harvested big game in the field and check the game at the hunt check station before removal from the refuge. Hunters may use a nonmotorized cart to assist with the transportation of harvested game animals.

(x) Hunters must field dress all harvested big game in the field and check the game at the hunt check station before removal from the refuge. Hunters may use a nonmotorized cart to assist with the transportation of harvested game animals.

(xi) We prohibit the killing or wounding of a game animal and then intentionally or knowingly failing to make a reasonable effort to retrieve and include it in the hunter's bag limit.

(4) *Sport fishing.* We allow fishing and crabbing on designated areas of the refuge subject to the following conditions:

(i) We allow fishing and crabbing year-round only from Adolph Thomae Jr. County Park, on San Martin Lake of the Bahia Grande Unit, and on the South Padre Island Unit.

(ii) We allow only pole and line, rod and reel, hand line, dip net, or cast net for fishing. We prohibit the use of crab traps or pots for crabbing. Anglers must attend all fishing lines, crabbing equipment, and other fishing devices at all times.

(iii) In the Bahia Grande Unit, inside the refuge boundary on San Martin Lake, we allow only bank and wade fishing within a designated area, which may only be accessed on foot. In other waters of the Bahia Grande Unit, we do not allow boats or fishing inside the refuge boundary.

(j) *Lower Rio Grande Valley National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of mourning, white-winged, and white-tipped dove on designated areas of the refuge subject to the following conditions:

(i) We require hunters to obtain a hunt permit (signed brochure) and to possess and carry that permit at all times during your designated hunt period. Hunters must also display the vehicle placard (part of the hunt permit) while participating in the designated hunt period.

(ii) Hunters age 17 and younger must be under the direct supervision of an adult age 18 or older.

(iii) You may access the refuge during your permitted hunt period from 1 hour before legal hunt time to 1 hour after legal hunt time. You must only hunt during legal hunt hours.

(iv) We restrict hunt participants to those listed on the refuge hunt permit (hunter, non-hunting chaperone, and non-hunting assistant).

(v) We allow hunters to use bicycles on designated routes of travel.

(vi) We allow the use of dogs to retrieve doves during the hunt.

(2) *Upland game hunting.* We allow hunting of wild turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (j)(1)(i) through (v) of this section apply.

(ii) We allow turkey hunting during the spring season only.

(iii) You may only harvest one bearded turkey per hunter.

(iv) We prohibit the killing, wounding, taking, or possession of game animals and then intentionally or knowingly failing to make a reasonable effort to retrieve or keep the edible portions of the animal and include it in your bag limit.

(3) *Big game hunting.* We allow hunting of white-tailed deer, feral hog, nilgai antelope, javelina, and other exotic ungulates (as defined by the State of Texas to include fallow deer, axis deer, sika deer, Barbary sheep, and black buck) on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (j)(1)(i) through (v) and (2)(iv) of this section apply.

(ii) We allow only free-standing blinds or tripods. Hunters may set them up during the scouting days preceding each permitted hunt day and must take them down by the end of each hunt day (see § 27.93 of this chapter). Hunters must mark and tag all stands with their hunting license number during the period of use.

(iii) Hunters must field-dress all harvested big game in the field.

(iv) Hunters may use nonmotorized dollies or carts off of improved roads or trails to haul carcasses to a parking area.

(v) We prohibit the use of big game decoys.

(4) [Reserved]

* * * * *

■ 41. Amend § 32.63 by:

■ a. Removing paragraph (a)(1)(iii);

■ b. Redesignating paragraphs (a)(1)(iv) through (vi) as paragraphs (a)(1)(iii) through (v); and

■ c. Revising paragraph (b).

The revision reads as follows:

§ 32.63 Utah.

* * * * *

(b) *Fish Springs National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of coot, duck, goose, mourning dove, and snipe on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs when hunting.

(ii) You may construct temporary blinds. You must remove all blinds constructed out of materials other than vegetation at the end of each day's hunt (see § 27.93 of this chapter).

(iii) We allow the use of small boats (15 feet or less) when hunting. We prohibit gasoline motors and air boats.

(iv) You may enter the refuge 2 hours prior to legal sunrise and must exit the refuge by 1½ hours after legal sunset.

(v) You must remove decoys, boats, vehicles, and other personal property from the refuge at the end of each day's hunt (see § 27.93 of this chapter).

(vi) We have a special blind area for use by disabled hunters. We prohibit trespass for any reason by any individual not registered to use that area.

(2) *Upland game hunting.* We allow hunting of chukar, desert rabbit, and mountain rabbit on designated areas of the refuge subject to the following conditions:

(i) We close to hunting on January 31.

(ii) We allow the use of dogs when hunting.

(3) *Big game hunting.* We allow hunting of mule deer and pronghorn antelope on designated areas of the refuge subject to the following condition: We only allow archery equipment when hunting big game.

(4) [Reserved]

* * * * *

■ 42. Amend § 32.64 by adding paragraphs (a)(1)(vii) and (a)(2)(v), and revising paragraphs (a)(4)(i)(A) and (b), to read as follows:

§ 32.64 Vermont.

* * * * *

(a) * * *

(1) * * *

(vii) In all hunting areas, we allow the use of dogs consistent with State regulations.

* * * * *

(2) * * *

(v) The condition set forth at paragraph (a)(1)(vii) of this section applies.

* * * * *

(4) * * *

(i) * * *

(A) We close the following areas: Goose Bay, Saxes Creek and Pothole, Metcalfe Island Pothole, Long Marsh Channel, and Clark Marsh.

* * * * *

(b) *Silvio O. Conte National Fish and Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of duck, goose, crow, and American woodcock on designated areas of the refuge subject to the following conditions:

(i) We allow disabled hunters to hunt from a vehicle that is at least 10 feet from the traveled portion of the refuge road if the hunter possesses a State-issued disabled hunting license and a Special Use Permit (FWS Form 3–1383–G) issued by the refuge manager.

(ii) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of coyote, fox, raccoon, bobcat, woodchuck, red squirrel, eastern gray squirrel, porcupine, skunk, snowshoe hare, eastern cottontail, and ruffed grouse on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) and (ii) of this section apply.

(ii) Shooting from, over, or within 10 feet of the traveled portion of any gravel road is prohibited.

(iii) We require hunters hunting at night to possess a Special Use Permit (FWS Form 3–1383–G) issued by the refuge manager.

(3) *Big game hunting.* We allow hunting of white-tailed deer, moose, black bear, and wild turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) and (b)(2)(ii) of this section apply.

(ii) You may use portable tree stands and/or blinds. You must clearly label your tree stands and/or blinds with your hunting license number.

(iii) You may retrieve moose at the Nulhegan Basin Division with the use of a commercial moose hauler, if the hauler possesses a Special Use Permit (FWS Form 3–1383–C) issued by the refuge manager.

(4) [Reserved]

■ 43. Amend § 32.65 by:

■ a. Revising paragraph (a)(3)(iii);

■ b. Adding paragraph (a)(3)(v);

■ c. Revising paragraph (b)(1)(i);

■ d. Adding paragraphs (b)(1)(iv);

■ e. Revising paragraph (b)(3)(i);

■ f. Adding paragraph (b)(3)(v);

■ g. Revising paragraph (c)(3)(i);

■ h. Adding paragraph (c)(3)(vi);

■ i. Revising paragraphs (d), (e)(3), and (e)(4)(ii);

■ j. Adding paragraph (f)(3)(v);

■ k. Revising paragraphs (h) and (i);

■ l. Adding paragraph (j)(3)(v);

■ m. Revising paragraphs (k)(3), (k)(4)(iv), and (l)(3)(i); and

■ n. Adding paragraph (l)(3)(v).

The revisions and additions read as follows:

§ 32.65 Virginia.

* * * * *

(a) * * *

(3) * * *

(iii) We prohibit retrieval of wounded game from a ''No Hunting Area'' or ''Safety Zone'' without the consent of the refuge employee on duty at the check station.

* * * * *

(v) We prohibit the use of pursuit dogs while hunting white-tailed deer.

* * * * *

(b) * * *

(1) * * *

(i) You must obtain and possess a signed refuge hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) while hunting on the refuge.

* * * * *

(iv) We allow the use of dogs consistent with State regulations.

* * * * *

(3) * * *

(i) We allow holders of a signed refuge hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) to access areas of the refuge typically closed to the nonhunting public. All occupants of a vehicle or hunt party must possess a refuge hunt permit and be actively engaged in hunting. We allow an exception for those persons aiding a disabled person who possesses a valid State-issued Commonwealth of Virginia Disabled Resident Lifetime License or Commonwealth of Virginia Resident Disabled Veteran's Lifetime License.

* * * * *

(v) We prohibit the use of pursuit dogs while hunting white-tailed deer and sika.

* * * * *

(c) * * *

(3) * * *

(i) We allow holders of a signed refuge hunt permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) to access areas of the refuge typically closed to the nonhunting public. All occupants of a vehicle or hunt party must possess a refuge hunt permit and be actively engaged in hunting. We allow an exception for those persons aiding a disabled person who possesses a valid State-issued Commonwealth of Virginia Disabled Resident Lifetime License or Commonwealth of Virginia Resident Disabled Veteran's Lifetime License.

* * * * *

(vi) We prohibit the use of pursuit dogs while hunting white-tailed deer.

* * * * *

(d) *Elizabeth Hartwell Mason Neck National Wildlife Refuge.* (1)–(2) [Reserved]

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) You must possess and carry a signed refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(ii) We only allow shotguns with slugs during the firearm season.

(iii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(iv) We prohibit the use of pursuit dogs while hunting deer.

(v) Hunters must certify and qualify weapons and ammunition at a refuge-approved range and view the refuge orientation session online prior to issuance of a refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(4) [Reserved]

(e) * * *

(3) *Big game hunting.* We allow hunting of white-tailed deer and bear on designated areas of the refuge subject to the following conditions:

(i) You must possess and carry a signed refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(ii) We prohibit the use of pursuit dogs while hunting white-tailed deer and bear.

(4) * * *

(ii) We prohibit bank fishing on the refuge, with the exception noted in paragraph (e)(4)(i) of this section.

* * * * *

(f) * * *

(3) * * *

(v) We prohibit the use of pursuit dogs while hunting white-tailed deer.

* * * * *

(h) *Occoquan Bay National Wildlife Refuge.* (1)–(2) [Reserved]

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) You must possess and carry a signed refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) and be selected in the refuge lottery to hunt.

(ii) We only allow shotguns with slugs during the firearm season.

(iii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(iv) We prohibit the use of pursuit dogs while hunting deer.

(v) Hunters must certify and qualify weapons and ammunition at a refuge-approved range and view the refuge orientation session online prior to issuance of a refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(4) [Reserved]

(i) *Plum Tree Island National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory waterfowl, gallinule, and coot on designated areas of the refuge subject to the following conditions:

(i) We require migratory game bird hunters to obtain and carry a permit through a lottery administered by the Virginia Department of Game and Inland Fisheries.

(ii) You must hunt from a blind, as assigned by the hunting permit.

(iii) We allow the use of dogs consistent with State regulations.

(2)–(4) [Reserved]

(j) * * *

(3) * * *

(v) We prohibit the use of pursuit dogs while hunting white-tailed deer.

* * * * *

(k) * * *

(3) *Big game hunting.* We allow hunting of white-tailed deer on designated areas of the refuge subject to the following conditions:

(i) We require big game hunters to obtain a permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System).

(ii) We prohibit the use of pursuit dogs while hunting white-tailed deer.

(4) * * *

(iv) We prohibit the use of lead fishing tackle in freshwater ponds, including Wilna Pond and Laurel Grove Pond.

* * * * *

(l) * * *

(3) * * *

(i) You must obtain and carry a signed refuge big game hunt brochure while hunting.

* * * * *

(v) We prohibit the use of pursuit dogs while hunting white-tailed deer.

* * * * *

■ 44. Amend § 32.66 by revising paragraph (l)(1) and (n) to read as follows:

§ 32.66 Washington.

* * * * *

(l) * * *

(1) *Migratory game bird hunting.* We allow hunting of duck, goose, and coot on designated areas of the refuge subject to the following conditions:

(i) We allow hunting during the State youth season in September.

(ii) We allow hunting from the beginning of the regular waterfowl seasons through November 30 by youths (younger than age 16) on Saturday and Sunday only. An adult, age 18 or older, must accompany and supervise youth hunters. We allow the supervising adult(s) to hunt.

(iii) We allow the use of dogs when hunting.

(iv) Hunters may access the refuge no earlier than 2 hours before legal hunting hours and must leave no later than 1 hour after legal hunting hours.

(v) Hunters may hunt only from within 50 yards of posted hunting sites.

(vi) Hunting parties are restricted to a maximum of two youths and two accompanying adults per hunting site.

(vii) We allow the use of nonmotorized boats for hunting.

(viii) We only allow the use of portable blinds and temporary blinds constructed of manmade materials.

(ix) Hunters must remove all blinds, decoys, and other personal equipment from the refuge at the end of each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(x) We allow migratory game bird hunting with shotguns only.

* * * * *

(n) *Willapa National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of goose, duck, coot, and snipe on designated areas of the refuge subject to the following conditions:

(i) In the designated goose hunt area in the Riekkola Unit, hunters may take ducks, coots, and snipe only incidental to hunting geese.

(ii) We open the refuge for hunting access from 1½ hours before legal sunrise until 1½ hours after legal sunset.

(iii) We allow the use of dogs when hunting.

(iv) You must remove all personal property, including decoys and boats, by 1 hour after legal sunset (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow hunting of forest grouse (sooty and ruffed) on designated areas of the refuge subject to the following conditions:

(i) We allow archery hunting only.

(ii) The condition set forth at paragraph (n)(1)(ii) of this section applies.

(3) *Big game hunting.* We allow hunting of deer, elk, and bear on designated areas of the refuge subject to the following conditions:

(i) At Long Island, we allow only archery hunting; we prohibit hunting firearms.

(ii) We prohibit bear hunting on any portion of the refuge except Long Island.

(iii) We prohibit the use of centerfire or rimfire rifles within the Lewis, Porter Point, and Riekkola Units.

(iv) The condition set forth at paragraph (n)(1)(ii) of this section applies.

(v) You may leave your tree stand(s) in place for 3 days. You must label your tree stand(s) with your hunting license number and the date you set up the stand. You may set up stands 1½ hours before legal sunrise. You must remove your tree stand(s) and all other personal property from the refuge by 1½ hours after legal sunset on the third day (see § 27.93 of this chapter).

(vi) At Leadbetter Point, we allow hunting of elk only during the State early muzzleloader season, and by special permit in consultation with the State.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge.

■ 45. Revise § 32.67 to read as follows:

§ 32.67 West Virginia.

The following refuge units are open for hunting and/or fishing as governed by applicable Federal and State regulations, and are listed in alphabetical order with additional refuge-specific regulations.

(a) *Canaan Valley National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of goose, duck, rail, coot, gallinule, mourning dove, snipe, and woodcock on designated areas of the refuge subject to the following conditions:

(i) We require each hunter to possess and carry a signed refuge hunting brochure (signed brochure).

(ii) Hunters may enter the refuge 1 hour before legal sunrise and must exit the refuge, including parking areas, no later than 1 hour after legal sunset.

(iii) We prohibit overnight parking except by Special Use Permit (FWS Form 3–1383–G) on Forest Road 80.

(iv) We allow the use of dogs consistent with State regulations.

(v) We prohibit dog training except during legal hunting seasons.

(2) *Upland game hunting.* We allow the hunting of ruffed grouse, squirrel, cottontail rabbit, snowshoe hare, red fox, gray fox, bobcat, woodchuck, coyote, opossum, striped skunk, and raccoon on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (a)(1)(i), (iv) and (v) of this section apply.

(ii) You may hunt coyote, raccoon, opossum, skunk, and fox at night, but you must obtain a Special Use Permit (FWS Form 3–1383–G) at the refuge headquarters before hunting.

(iii) We only allow hunting in the No Rifle Zones with the following equipment: Archery (including crossbow), shotgun, or muzzleloader.

(iv) We prohibit the hunting of upland game species from March 1 through August 31.

(3) *Big game hunting.* We allow the hunting of white-tailed deer, black bear, and turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (a)(1)(i) and (iv) and (a)(2)(iii) of this section apply.

(ii) We allow the use of dogs for hunting black bear during the gun season.

(iii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: We prohibit the use of lead fishing tackle on designated areas of the refuge.

(b) *Ohio River Islands National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory game birds on designated areas of the refuge subject to the following conditions:

(i) We require each hunter to possess and carry a signed refuge hunting brochure (signed brochure).

(ii) Hunters may enter the refuge 1 hour before legal sunrise and must exit the refuge, including parking areas, no later than 1 hour after legal sunset.

(iii) We allow the use of dogs consistent with State regulations.

(2) *Upland game hunting.* We allow hunting of upland game on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (b)(1)(i), (ii), and (iii) of this section apply.

(3) *Big game hunting.* We allow hunting of big game on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) and (ii) of this section apply.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the

organized or planned hunt and known to be waiting for the deer.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) We allow fishing from 1 hour before legal sunrise until 1 hour after legal sunset. This restriction does not apply to off-shore fishing.

(ii) We prohibit trotlines (setlines) and turtle lines.

■ 46. Amend § 32.68 by revising paragraphs (c) and (d) to read as follows:

§ 32.68 Wisconsin.

* * * * *

(c) *Hackmatack National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of migratory game birds on designated areas of the refuge subject to the following condition: You must remove all boats, decoys, blinds, blind materials, stands, platforms, and other hunting equipment (see §§ 27.93 and 27.94 of this chapter) brought onto the refuge at the end of each day's hunt.

(2) *Upland game hunting.* We allow upland game and turkey hunting on designated areas of the refuge subject to the following conditions:

(i) For hunting, you may use or possess only approved nontoxic shot shells while in the field, including shot shells used for hunting wild turkey (see § 32.2(k)).

(ii) You must remove all boats, decoys, blinds, blind materials, stands, platforms, and other hunting equipment (see §§ 27.93 and 27.94 of this chapter) brought onto the refuge at the end of each day's hunt.

(3) *Big game hunting.* We allow big game hunting on designated areas of the refuge subject to the following conditions:

(i) You must remove all boats, decoys, blinds, blind materials, stands, platforms, and other hunting equipment (see §§ 27.93 and 27.94 of this chapter) brought onto the refuge at the end of each day's hunt.

(ii) We prohibit organized deer drives. We define a ''deer drive'' as an organized or planned effort to pursue, drive, chase, or otherwise frighten or cause deer to move in the direction of any person(s) who is part of the organized or planned hunt and known to be waiting for the deer.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following condition: We prohibit the taking of turtle and frog (see § 27.21 of this chapter).

(d) *Horicon National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of goose, duck, coot, common moorhen, and American woodcock on designated areas of the refuge subject to the following condition: We allow only participants in the Learn to Hunt and other special programs to hunt goose, duck, coot, and common moorhen.

(2) *Upland game hunting.* We allow hunting of wild turkey, ring-necked pheasant, gray partridge, ruffed grouse, squirrel, cottontail rabbit, snowshoe hare, raccoon, opossum, striped skunk, red fox, gray fox, coyote, and bobcat on designated areas of the refuge subject to the following conditions:

(i) For hunting, you may use or possess only approved nontoxic shot shells while in the field, including shot shells used for hunting wild turkey (see § 32.2(k)).

(ii) We prohibit night hunting from ½ hour after legal sunset until ½ hour before legal sunrise the following day.

(iii) We allow the use of dogs while hunting upland game (except raccoon, opossum, striped skunk, red fox, gray fox, coyote, and bobcat), provided the dog is under the immediate control of the hunter at all times.

(iv) Coyote, red fox, gray fox, and bobcat hunting begins on the first day of the traditional 9-day gun deer season.

(v) Coyote hunting ends on the last day of the season for fox.

(vi) You may only hunt striped skunk and opossum during the season for raccoon.

(vii) You may only hunt snowshoe hare during the season for cottontail rabbit.

(viii) Hunters may enter the refuge no earlier than 1 hour before legal shooting hours and must exit the refuge no later than 1 hour after legal shooting hours.

(3) *Big game hunting.* We allow hunting of white-tailed deer and black bear in designated areas of the refuge subject to the following conditions:

(i) Hunters must remove all stands and personal property from the refuge following each day's hunt (see §§ 27.93 and 27.94 of this chapter). We prohibit hunting from any stand left up overnight.

(ii) We prohibit hunting bear with dogs.

(iii) Hunters must possess a refuge permit (FWS Form 3–2439, Hunt Application—National Wildlife Refuge System) to hunt in Area E (surrounding the office/visitor center).

(iv) Hunters may enter the refuge no earlier than 1 hour before legal shooting hours and must exit the refuge no later than 1 hour after legal shooting hours.

(v) Any ground blind used during any gun deer season must display at least 144 square inches (929 square centimeters) of solid-blaze-orange or fluorescent pink material visible from all directions.

(4) *Sport fishing.* We allow fishing on designated areas of the refuge subject to the following conditions:

(i) We only allow bank fishing or fishing through the ice.

(ii) We prohibit the use of fishing weights or lures containing lead.

* * * * *

■ 47. Amend § 32.69 by:

■ a. Redesignating paragraphs (a) through (e) as paragraphs (b) through (f);

■ b. Adding a new paragraph (a); and

■ c. Revising newly redesignated paragraphs (b), (c), (e)(1), and (f).

The addition and revisions read as follows:

§ 32.69 Wyoming.

* * * * *

(a) *Bamforth National Wildlife Refuge.* (1) [Reserved]

(2) *Upland game hunting.* We allow hunting of chukar, grey partridge, pheasant, rabbit, sharp-tailed grouse, and turkey on designated areas of the refuge.

(3) *Big game hunting.* We allow hunting of pronghorn antelope, mule deer, and white-tailed deer on designated areas of the refuge.

(4) [Reserved]

(b) *Cokeville Meadows National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of dove, duck, dark goose, coot, merganser, light goose, snipe, Virginia rail, Sora rail, sandhill crane, and mourning dove on designated areas of the refuge subject to the following conditions:

(i) We allow the use of dogs when hunting.

(ii) Hunters may only access the refuge 1 hour before legal sunrise until 1 hour after legal sunset.

(2) *Upland game hunting.* We allow hunting of blue grouse, ruffed grouse, chukar partridge, gray partridge, cottontail rabbit, snowshoe hare, squirrel (red, gray, and fox), red fox, raccoon, and striped skunk on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (b)(1)(ii) of this section applies.

(ii) We allow the use of dogs to find and retrieve legally harvested upland game birds, cottontail rabbits, and squirrels. You may not use dogs to chase red fox, raccoon, striped skunk, or any other species not specifically allowed in this paragraph (b)(2)(ii).

(iii) Licensed migratory bird, big game, or upland/small game hunters may harvest red fox, raccoon, and striped skunk on the refuge from

September 1 until the end of the last open big game, upland bird, or small game season. You must possess, and remove from the refuge, all red fox, raccoon, and striped skunk that you harvest on the refuge.

(3) *Big game hunting.* We allow hunting of elk, mule deer, white-tailed deer, pronghorn, and moose subject to the following condition: The condition set forth at paragraph (b)(1)(ii) of this section applies.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge.

(c) *Hutton Lake National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow youth hunting of goose, duck, coot, and merganser on designated areas of the refuge during the Wyoming Zone C2 ''special youth waterfowl hunting days'' subject to the following conditions:

(i) We allow the use of dogs when hunting.

(ii) We prohibit the cleaning of game on the refuge.

(2) *Upland game hunting.* We allow hunting of chuker, grey partridge, pheasant, rabbit, sharp-tailed grouse, and turkey on designated areas of the refuge subject to the following conditions:

(i) The conditions set forth at paragraphs (c)(1)(i) and (ii) of this section apply.

(ii) We allow hunting November 1 through March 1.

(3) *Big game hunting.* We allow hunting of pronghorn antelope and mule deer on designated areas of the refuge subject to the following condition: We allow hunting November 1 through March 1.

(4) [Reserved]

* * * * *

(e) * * *

(1) *Migratory game bird hunting.* We allow hunting of dove, goose, duck, and coot on designated areas of the refuge.

* * * * *

(f) *Seedskadee National Wildlife Refuge*—(1) *Migratory game bird hunting.* We allow hunting of dark goose, duck, coot, merganser, dove, snipe, and rail on designated areas of the refuge subject to the following conditions:

(i) We open the refuge to the general public from ½ hour before legal sunrise to ½ hour after legal sunset. Waterfowl hunters may enter the refuge 1 hour before legal shooting hours to set up decoys and blinds.

(ii) We allow the use of dogs when hunting.

(iii) You must only use portable blinds or blinds constructed from dead and downed wood.

(iv) You must remove portable blinds, tree stands, decoys, and other personal equipment from the refuge after each day's hunt (see §§ 27.93 and 27.94 of this chapter).

(2) *Upland game hunting.* We allow hunting of sage grouse, cottontail rabbit, jackrabbit, raccoon, fox, and skunk on designated areas of the refuge subject to the following condition: The conditions set forth at paragraphs (f)(1)(i) and (ii) of this section apply.

(3) *Big game hunting.* We allow hunting of pronghorn, mule deer, white-tailed deer, elk, and moose on designated areas of the refuge subject to the following condition: The condition set forth at paragraph (f)(1)(i) section applies.

(4) *Sport fishing.* We allow sport fishing on designated areas of the refuge subject to the following conditions:

(i) The condition set forth at paragraph (f)(1)(i) of this section applies.

(ii) We prohibit taking of mollusk, crustacean, reptile, and amphibian from the refuge (see § 27.21 of this chapter).

PART 36—ALASKA NATIONAL WILDLIFE REFUGES

■ 48. The authority citation for part 36 continues to read as follows:

Authority: 16 U.S.C. 460(k) *et seq.,* 668dd–668ee, 3101 *et seq.,* Pub. L. 115–20, 131 Stat. 86.

■ 49. Amend § 36.39 by adding paragraph (d) to read as follows:

§ 36.39 Public use.

* * * * *

(d) *Arctic National Wildlife Refuge.* We prohibit all domestic sheep, goats, and camelids on the refuge.

* * * * *

Subchapter E—Management of Fisheries Conservation Areas

PART 71—HUNTING AND SPORT FISHING ON NATIONAL FISH HATCHERIES

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

Authority: Sec. 4, Pub. L. 73–121, 48 Stat. 402, as amended; sec. 4, Pub. L. 87–714, 76 Stat. 654; 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd, 1534.

■ 51. Revise § 71.11 to read as follows:

§ 71.11 National fish hatcheries open for hunting.

The following hatcheries are open for hunting as governed by applicable Federal and State regulations, and are listed in alphabetical order with additional hatchery-specific regulations.

(a) *Iron River National Fish Hatchery*—(1) *Migratory game bird hunting.* We allow duck, goose, coot, rail, snipe, woodcock, dove, and crow hunting on designated areas of the hatchery.

(2) *Upland game hunting.* We allow pheasant, bobwhite quail, ruffed and sharp-tailed grouse, Hungarian partridge, rabbit/hare, squirrel, coyote, fox, bobcat, raccoon, opossum, skunk, weasel, and woodchuck hunting on designated areas of the hatchery.

(3) *Big game hunting.* We allow white-tailed deer, turkey, and bear hunting on designated areas of the hatchery subject to the following conditions:

(i) You must label tree stands and ground blinds with the owner's State hunting license number. The label must be readable from the ground.

(ii) You may place tree stands and ground blinds on the hatchery only from September 1 to December 31 annually.

(b) *Jordan River National Fish Hatchery*—(1) *Migratory game bird hunting.* We allow the hunting of woodcock, dove, duck, goose, rail, snipe, coot, and crow on designated areas of the hatchery subject to the following conditions:

(i) We allow entry into the hatchery 1 hour before legal sunrise and require hunters to leave the hatchery no later than 1 hour after legal sunset.

(ii) We prohibit shooting on or over any hatchery road within 50 feet (15 meters) from the centerline.

(iii) We allow the use of dogs while hunting, provided the dog is under the immediate control of the hunter at all times.

(2) *Upland game hunting.* We allow hunting of rabbit/hare, squirrel, coyote, fox, bobcat, raccoon, opossum, skunk, weasel, and woodchuck on designated areas of the hatchery subject to the following condition: The conditions set forth at paragraphs (b)(1)(i) through (iii) of this section apply.

(3) *Big game hunting.* We allow hunting of bear, white-tailed deer, and turkey on designated areas of the hatchery and subject to the following conditions:

(i) The conditions set forth at paragraphs (b)(1)(i) through (iii) of this section apply.

(ii) We allow the use of portable stands and blinds for hunting, and hunters must remove them at the end of each day.

(iii) You must label tree stands with the owner's Department of Natural Resources sportcard number. The label, printed in legible English that can be easily read from the ground, must be affixed to the stand.

(c) *Leadville National Fish Hatchery*—(1) *Migratory game bird hunting.* We

allow migratory game bird hunting on designated areas of the hatchery.

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the hatchery.

(3) *Big game hunting.* We allow big game hunting on designated areas of the hatchery subject to the following conditions:

(i) You must label tree stands and ground blinds with the owner's State hunting license number. The label must be readable from the ground.

(ii) You may place tree stands and ground blinds on the refuge only from September 1 to December 31 annually.

(4) *Sport fishing.* See § 71.12(k) for hatchery-specific fishing regulations for this hatchery.

(d) *Leavenworth National Fish Hatchery*—(1) *Migratory game bird hunting.* We allow migratory game bird hunting on designated areas of the hatchery subject to the following condition: We allow the use of dogs for hunting in accordance with State of Washington hunting regulations.

(2) *Upland game hunting.* We allow upland game hunting on designated areas of the hatchery subject to the following condition: We allow the use of dogs for hunting in accordance with State of Washington hunting regulations.

(3) *Big game hunting.* We allow big game hunting on designated areas of the hatchery subject to the following condition: We allow the use of dogs for hunting in accordance with State of Washington hunting regulations.

(4) *Sport fishing.* See § 71.12(l) for hatchery-specific fishing regulations for this hatchery.

(e) *Little White Salmon National Fish Hatchery*—(1) *Migratory bird hunting.* We allow hunting of crow on designated areas of the hatchery subject to the following conditions:

(i) We only allow portable blinds and temporary blinds constructed of nonliving natural materials. Hunters must remove all equipment at the end of each day's hunt.

(ii) We allow the use of dogs when hunting.

(2) *Upland game hunting.* We allow hunting of bobcat, grouse, partridge, and porcupine on designated areas of the hatchery subject to the following condition: The conditions set forth at paragraphs (e)(1)(i) and (ii) of this section apply.

(3) *Big game hunting.* We allow hunting of bear, elk, black-tailed deer, mule deer, and wild turkey on designated areas of the hatchery subject to the following condition: The conditions set forth at paragraphs (e)(1)(i) and (ii) of this section apply.

(4) *Sport fishing.* See § 71.12(m) for hatchery-specific fishing regulations for this hatchery.

(f) *Southwest Native Aquatic Resources and Recovery Center*—(1) *Migratory game bird hunting.* We allow the hunting of sandhill crane, light and dark goose, duck, merganser, coot, mourning and white-winged dove, and band-tailed pigeon on designated areas of the center.

(2) *Upland game hunting.* We allow the hunting of Eurasian collared-dove; dusky (blue) grouse; pheasant; scaled quail; and Abert's, red, gray, and fox squirrel on designated areas of the center.

(3) [Reserved]

(g) *Spring Creek National Fish Hatchery*—(1) *Migratory bird hunting.* We allow hunting of crow on designated areas of the hatchery subject to the following conditions:

(i) We only allow portable blinds and temporary blinds constructed of nonliving natural materials. Hunters must remove all equipment at the end of each day's hunt.

(ii) We allow the use of dogs when hunting.

(2) *Upland game hunting.* We allow hunting of bobcat, grouse, partridge, and porcupine on designated areas of the hatchery subject to the following condition: The conditions set forth at paragraphs (g)(1)(i) and (ii) of this section apply.

(3) *Big game hunting.* We allow hunting of bear, elk, black-tailed deer, mule deer, and wild turkey on designated areas of the hatchery subject to the following condition: The conditions set forth at paragraphs (g)(1)(i) and (ii) of this section apply.

(4) *Sport fishing.* See § 71.12(o) for hatchery-specific fishing regulations for this hatchery.

■ 52. Amend § 71.12 by:

■ a. Redesignating paragraphs (g) through (m) as paragraphs (k) through (q), respectively; paragraphs (b) through (f) as paragraphs (e) through (i), respectively; and paragraph (a) as paragraph (c); and

■ b. Adding new paragraphs (a), (b), (d), (j), and (r).

The additions read as follows:

§ 71.12 National fish hatcheries open for sport fishing.

* * * * *

(a) *Abernathy Fish Technology Center.* We allow sport fishing on designated areas of the center.

(b) *Berkshire National Fish Hatchery.* We allow sport fishing on designated areas of the hatchery subject to the following conditions:

(1) Anglers must abide by posted signage.

(2) Anglers must remain at least 50 feet away from raceways and fish culture areas to maintain biosecurity of stocked fish populations.

(3) On the Konkapot River, we prohibit angling equipment, including, but not limited to, live bait, boots, and rods, near the areas described in paragraph (b)(2).

(4) We limit access to Outreach Pond to youth (ages 13 and younger), supervised by an adult at all times.

(5) We allow fishing on Outreach Pond during open hatchery hours only.

(6) We prohibit the use of baitfish, shiners, and minnows in the Outreach Pond.

(7) We prohibit all fishing methods of take besides rods on Outreach Pond.

(8) We allow a daily creel limit of three (3) fish per individual at Outreach Pond. There is no creel limit during fishing derbies.

(9) We prohibit fishing during the winter in Outreach Pond.

(10) We prohibit the use of all lead, including tackle containing lead, when fishing in Outreach Pond.

* * * * *

(d) *Dwight D. Eisenhower National Fish Hatchery.* We allow sport fishing on designated areas of the hatchery subject to the following conditions:

(1) Anglers must abide by posted signage.

(2) Anglers must remain at least 50 feet away from the water intake from Furnace Brook, raceways, and fish culture areas for safety and to maintain biosecurity of stocked fish populations.

(3) We prohibit angling equipment, including, but not limited to, live bait, boots, and rods, near the areas described in paragraph (d)(2).

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(j) *Lamar National Fish Hatchery.* We allow sport fishing on designated areas of the hatchery subject to the following condition: We only allow sport fishing from legal sunrise to legal sunset.

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(r) *Willard National Fish Hatchery.* We allow sport fishing on designated areas of the hatchery.

George Wallace,

Assistant Secretary for Fish and Wildlife and Parks.

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Part V

Department of Education

Notice of the Rescission of Outdated Guidance Documents; Notice

DEPARTMENT OF EDUCATION

Notice of the Rescission of Outdated Guidance Documents

AGENCY: Office of the Secretary, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary announces the guidance documents the Department of Education (Department) is rescinding because they are outdated, after conducting a review of its guidance under Executive Order (E.O.) 13891.

FOR FURTHER INFORMATION CONTACT: Lynn Mahaffie, Department of Education, 400 Maryland Avenue SW, Room 6E–231, Washington, DC 20202. Telephone: (202) 453–7862. Email: *Lynn.Mahaffie@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On October 9, 2019, the President issued E.O. 13891 titled ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' 84 FR 55235. Section 3(b) of the E.O. requires the Department to ''review its guidance documents and, consistent with applicable law, rescind those guidance documents that it determines should no longer be in effect.'' This notice notifies the public, including the Department's stakeholders, of the guidance documents the Department rescinds as outdated (*e.g.,* superseded by subsequent statutory amendments or enactments), in accordance with section 3(b) of E.O. 13891. The guidance documents identified as being rescinded in this notice do not include any guidance documents the Department has, is considering, or is planning to rescind through exercising the Department's policy-making discretion (*i.e.,* rescissions based on a change in Department policy or statutory interpretation).

Additionally, section 3(a) of E.O. 13891 requires the Department to develop a guidance portal that contains or links to all of its guidance documents in effect. On February 26, 2020, the Department published a notice in the **Federal Register** announcing that its guidance portal was operational, in compliance with section 3(a) of the E.O. 85 FR 11056.

Section 4 of E.O. 13891 requires the Department to finalize regulations to set forth processes and procedures for issuing guidance documents. The Department's Spring 2020 Unified Agenda provides that the timetable for these interim final regulations is August 2020. See *www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=1801-AA22.*

The below table lists the guidance documents the Department rescinds, the office within the Department that issued the guidance, the date the guidance was issued, and a link to the guidance (which the Department will continue to make publicly available for historical purposes).

Documents rescinded by the Office of Postsecondary Education are listed in the Appendix to this notice. Those may be located at *https://ifap.ed.gov/,* by entering the title of the document into the Search function.

Title	Date issued	Link
Office of Elementary and Secondary Education (OESE)		
State Grants for Innovative Programs—Title V, Part A, Non-Regulatory Guidance.	8/28/02	*http://www.ed.gov/programs/innovative/titlevguidance2002.doc.*
Title I Services to Eligible Private School Children, Non-Regulatory Guidance.	10/17/03 ..	*https://www2.ed.gov/programs/titleiparta/psguidance.doc.*
Examples of Calculating Amounts Available for Transfer (Appendix C).	8/1/04	Although Appendix C is referenced in the final guidance, Appendix C has been rescinded and is omitted from the final guidance: *https://www2.ed.gov/programs/transferability/finalsummary04.doc.*
Alternate Achievement Standards for Students with the Most Significant Cognitive Disabilities Non-Regulatory Guidance.	8/1/05	*https://www2.ed.gov/policy/elsec/guid/altguidance.doc.*
Improving Data Quality for Title I Standards, Assessments, and Accountability Reporting Guidelines For States, LEAs, and Schools.	4/1/06	*https://www2.ed.gov/policy/elsec/guid/standardsassessment/nclbdataguidance.pdf.*
Adjusting Local Educational Agency Allocations to Reflect Revised Fiscal Year 2006 (School Year 2006–2007) Title I, Part A Allocations.	11/1/06	*https://www2.ed.gov/programs/titleiparta/fy2006allocationsguidance.doc.*
Letters to Chief State School Officers Regarding States' Good-Faith Efforts in Meeting the Highly Qualified Teachers Goal.	7/23/07	*https://www2.ed.gov/policy/elsec/guid/secletter/070723.html.*
Public School Choice Non-Regulatory Guidance	1/14/09	*https://www2.ed.gov/policy/elsec/guid/schoolchoiceguid.pdf.*
Funds Under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA) Made Available Under the American Recovery and Reinvestment Act of 2009.	3/1/10	*http://www2.ed.gov/policy/gen/leg/recovery/guidance/title-i-rev-201003.doc.*
Investing in Innovation Fund (i3) Frequently Asked Questions Addendum.	3/30/10	*http://www2.ed.gov/programs/innovation/faqsaddendum-20100330.pdf.*
i3 FAQs Addendum 2	4/8/10	*http://www2.ed.gov/programs/innovation/faqsaddendum2-20100408.pdf.*
i3 FAQs Addendum 3	4/21/10	*http://www2.ed.gov/programs/innovation/faqsaddendum3-20100421.pdf.*
i3 FAQs Addendum 4	4/30/10	*http://www2.ed.gov/programs/innovation/faqsaddendum4-20100430.pdf.*
i3 Guidance and FAQs	6/18/10	*http://www2.ed.gov/programs/innovation/faqs.pdf.*
Teacher Incentive Fund—FAQs For the 2010 Competition and Grant Award.	6/28/10	*http://www2.ed.gov/programs/teacherincentive/faq.html.*
Guidance on School Improvement Grants (SIG) under Section 1003(g) of the ESEA.	6/29/10	*https://www2.ed.gov/programs/sif/sigguidance05242010.pdf.*
Teacher Incentive Fund—FAQs—Addendum	7/1/10	*http://www2.ed.gov/programs/teacherincentive/faq.html.*
Recipient Reporting Requirements Guidance	12/3/10	*https://www2.ed.gov/policy/gen/leg/recovery/section-1512.html*

Title	Date issued	Link
Dear Colleague Letter Regarding if a Student Using American Sign Language Is an English learner.	1/27/11	*http://www.nysldstac.org/wp-content/uploads/2013/08/Letter-to-Title-III-Directors-regarding-clarification-to-determine-if-an-ASL-user-is-LEP.pdf.*
Enhanced Assessment Grants (EAG)—FAQs for Competition in FY 2011.	5/13/11	*https://www2.ed.gov/programs/eag/eagfaqs5-2011.doc.*
Letter to Chief State School Officers and State Child Welfare Directors on the Fostering Connections Act.	8/25/11	*https://www.ed.gov/sites/default/files/Joint%20Fostering%20Connections%20Letter.pdf*
Race to the Top—Early Learning Challenge FAQs (including subsequent updates).	5/12/12	*https://www2.ed.gov/programs/racetothetop-earlylearningchallenge/faq.html.*
EAG—FAQs for Competition in FY 2012	5/17/12	*https://www2.ed.gov/programs/eag/eagfaqs4-2012.doc.*
Teacher Incentive Fund—FAQs for the FY 2012 Competition (Cohort 4).	6/8/12	*http://www2.ed.gov/programs/teacherincentive/faq.html.*
ESEA Flexibility FAQs	8/3/12	*https://www2.ed.gov/policy/eseaflex/esea-flexibility-faqs.doc.*
Serving Preschool Children Through Title I Non-Regulatory Guidance.	10/1/12	*https://www2.ed.gov/policy/elsec/guid/preschoolguidance2012.pdf.*
State and Local Report Cards Under Title I, Part A, Non-Regulatory Guidance.	2/8/13	*https://www2.ed.gov/programs/titleiparta/state_local_report_card_guidance_2-08-2013.pdf.*
i3 FAQs Scale-up and Validation Competitions	6/3/13	*http://www2.ed.gov/programs/innovation/faq.html.*
EAG FAQs for Competition in FY 2013	6/14/13	*https://www2.ed.gov/programs/eag/eagfaq2013.doc.*
i3 FAQs Development Competition	7/18/13	*http://www2.ed.gov/programs/innovation/faq.html.*
Flexibility in Schoolwide Programs	9/13/13	*https://www2.ed.gov/programs/titleiparta/flexswp091313.pdf.*
Turnaround School Leaders (TSL) Program FAQs	2014	*https://www2.ed.gov/programs/turnaroundschlldr/faq.html.*
Addendum #3 to the SIG Guidance	1/27/14	*https://www2.ed.gov/programs/sif/sigfaq-finalversion.doc.*
FY 2015 Ready to Learn Grant Competition FAQs	4/1/15	*https://www2.ed.gov/programs/rtltv/faq.html.*
Letter from the Office of Safe and Healthy Students Director to the Education for Homeless Children and Youths State Coordinators and Title I State Directors.	8/15/15	*https://www2.ed.gov/programs/homeless/homelesscoord0815.pdf.*
Peer Review of State Assessment Systems Non-Regulatory Guidance for States.	9/25/15	*https://www2.ed.gov/policy/elsec/guid/assessguid15.pdf.*
Dear Colleague Letter regarding ESSA Transition and Implementation.	12/18/15 ..	*https://www2.ed.gov/policy/elsec/leg/essa/transition-dcl.pdf.*
Preschool Pay for Success Feasibility Grant FAQs	2016	*https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/innovation-early-learning/preschool-pay-success-feasibility-grant/faq/.*
Promoting Student Resilience Program FAQs	2016	*https://oese.ed.gov/offices/disaster-recovery-unit/promoting-student-resilience-program/frequently-asked-questions-promoting-student-resilience-program/.*
Dear Colleague Letter Inviting States to Request a Limited Waiver of the Speaking and Listening Requirements under ESSA.	3/2/16	*https://www2.ed.gov/admins/lead/account/saa/cssoassessmentltr32016.pdf.*
High School Equivalency Program (HEP)-College Assistance Migrant Program (CAMP) Performance Reporting and Evaluation FAQs.	10/1/16	This guidance was distributed to grantees through a listserv. The guidance does not appear on the Department's website.
Dear Colleague Letter Regarding ESSA Transition for Accountability Systems.	11/29/16 ..	*https://www2.ed.gov/policy/elsec/leg/essa/essadcl-accountability-plus-112916.pdf.*
Opportunities and Responsibilities for State and Local Report Cards Under the ESEA, As Amended by the Every Student Succeeds Act (ESSA).	1/6/17	*https://www2.ed.gov/policy/elsec/leg/essa/essastatereportcard.pdf.*
ESSA Consolidated State Plan Guidance	1/6/17	*https://www2.ed.gov/policy/elsec/leg/essa/essastateplanguidance.pdf.*
REAP Program Changes 2017/2018 FAQs	2/14/17	*https://www2.ed.gov/programs/reaprlisp/reaphangesin2017and2018webinar-questions.pdf.*
HEP and CAMP Eligibility FAQs Webinar	3/24/17	*https://www2.ed.gov/programs/hep/hep-camp/eligibility-faqs-webinarqandadocument.docx.*
Office of Career, Technical, and Adult Education (OCTAE)		
Responsibilities and Opportunities Created by Title I of the WIA	5/24/99	*https://www2.ed.gov/policy/sectech/guid/cte/title19911.html#:~:text=The%20foundation%20of%20the%20comprehensive,information%20resources%20they%20need%20to.*
Services That Prepare Individuals for Nontraditional Training and Employment and Related Issues.	5/27/99	*https://www2.ed.gov/about/offices/list/ovae/pi/cte/vocnontrad13.html.*
Second Jointly Issued Guidance Regarding the Non-Duplication Provision in the WIA.	6/30/99	*https://www2.ed.gov/policy/adulted/guid/jointmemo2.html.*
Accountability Systems Development for Perkins	10/15/99 ..	The guidance does not appear on the Department's website.
Permissible State Uses of Tech-Prep	5/19/00	The guidance does not appear on the Department's website.
The Role of Tech-Prep Education in Preparing America's Future	6/18/02	*https://www2.ed.gov/policy/sectech/guid/cte/61802memo.html.*
Update to Questions and Answers Regarding the Implementation of Perkins—Version 1.0.	1/9/07	The guidance does not appear on the Department's website.
Transmittal of the Perkins State Plan Guide (Program Memo and Guide for Submission of State Plans).	3/12/07	*https://www2.ed.gov/policy/sectech/guid/cte/perkinsiv/stateplanmemo.pdf.*
Student Definitions and Measurement Approaches for the Core Indicators of Performance under Perkins.	3/13/07	*https://www2.ed.gov/policy/sectech/guid/cte/perkinsiv/studentdef.doc.*

Title	Date issued	Link
Update to Questions and Answers Regarding the Implementation of Perkins—Version 2.0.	6/6/07	*https://www2.ed.gov/policy/sectech/guid/cte/perkinsiv/qaver2.doc.*
Questions and Answers Regarding the Implementation of Perkins—Version 3.0.	5/28/09	*https://www2.ed.gov/about/offices/list/ovae/pi/cte/perkins-iv-version3.pdf.*
Workforce Innovation and Opportunity Act (WIOA): FAQs, Round 1.	10/1/14	*http://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/wioa-faqs.pdf.*
Use of Carryover Funds Awarded Under the AEFLA, Title II of the Workforce Investment Act (WIA).	10/24/14 ..	*https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/program-memo-tydings-amendment.pdf.*
Guide for the Development of a State Plan Under the Adult Education and Family Literacy Act (AEFLA).	12/1/14	*http://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/state-guidance.pdf.*
Questions and Answers Regarding the Implementation of Perkins—Version 4.0.	4/24/15	The guidance does not appear on the Department's website.
WIOA: FAQs, Round 2	5/1/15	*http://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/wioa-aefla-faqs-round-2.pdf.*
Program Memorandum on Competition and Award of AEFLA Funds under WIOA.	12/1/15	*https://www2.ed.gov/about/offices/list/ovae/program-memo-15-6-state-competitions.pdf.*
WIOA: FAQs—Program Year 2016 Local Infrastructure Agreements.	1/1/16	*https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/wioa-faq-set2-1-27-2016.pdf.*
Program Memorandum Regarding Program Income	2/1/16	*https://s3.amazonaws.com/PCRN/docs/MemoRegardingProgramIncomeUnderPerkinsIV-2-5-16.pdf.*
Program Memorandum on WIOA Requirements for Unified and Combined State Plans.	3/1/16	*https://www2.ed.gov/about/offices/list/ovae/wioa-16-1.pdf.*
Establishing Expected Levels of Performance and Negotiating Adjusted Levels of Performance for Program Years.	4/1/16	*https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/wioa-16-2.pdf.*
Dear Colleague Letter on Gender Equity in Career and Technical Education.	6/15/16	*https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201606-title-ix-gender-equity-cte.pdf.*
Question and Answers Regarding the Implementation of the Carl D. Perkins Career and Technical Education Act of 2006 (Perkins)—Version 5.0.	8/5/16	*https://s3.amazonaws.com/PCRN/uploads/SkillsOnPurpose/PerkinsIV_Nonregulatory_Guidance_Q%26As_Version_5.pdf.*
Program Memorandum on Clarifications Regarding Competition and Award AEFLA Funds.	10/1/16	*https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-17-1.pdf.*
Use of Funds Reserved for Activities under Section 243 of the AEFLA.	3/1/17	*https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/octae-program-memo-17-5.pdf.*
Office of Planning, Evaluation and Policy Development (OPEPD)		
Getting America's Students Ready for the 21st Century: Meeting the Technology Literacy Challenge.	6/96	*https://eric.ed.gov/?id=ED398899.*
eLearning: Putting a World-Class Education at the Fingertips of All Children.	12/20	*https://eric.ed.gov/?id=ED444604.*
Toward A New Golden Age In American Education	2004	*https://files.eric.ed.gov/fulltext/ED484046.pdf.*
Joint Letter with ED and HHS Announcing Passage of the Uninterrupted Scholars Act.	4/24/13	*https://studentprivacy.ed.gov/resources/joint-ferpa-letter-ed-hhs-regarding-uninterrupted-scholars-act.*
Cover Letter to the Department's Annual Notices to Superintendents and Chief State School Officers (CSSOs).	12/15/16 ..	*https://studentprivacy.ed.gov/resources/rescinded-august-2020-cover-letter-department%E2%80%99s-annual-notices-seas-and-leas.*
Office for Civil Rights (OCR)		
Guidance on Schools' Obligation to Include Elementary and Secondary Students with Disabilities in Statewide Assessment Systems.	9/29/97	*https://www2.ed.gov/about/offices/list/ocr/docs/asses902.html.*
Dear Colleague Letter on Title IX Grievance Procedures, Elementary and Secondary Education.	4/26/04	*https://www2.ed.gov/about/offices/list/ocr/responsibilities_ix.html.*
Title IX Grievance Procedures, Postsecondary Education	8/4/04	*https://www2.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html.*
Guidance on Equitable Access to, Participation in, and Administration of Public School Choice under ESEA (as amended by the No Child Left Behind Act).	1/8/09	*https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20090108.pdf.*
Guidance on Obligation of Schools to Designate a Title IX Coordinator.	4/24/15	Dear Colleague Letter: *https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.* Spanish Version: *https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators-sp.pdf.* Letter to Title IX Coordinators: *https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-letter-201504.pdf.* Title IX Resource Guide: *https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf.*
Office of Finance and Operations (OFO)		
Basic EEO and Prevention of Sexual Harassment Training for New Employees.	9/11/96	*https://www2.ed.gov/about/offices/list/om/onboard/docs/eeo.ppt.*

Title	Date issued	Link
Treasury Offset Program FAQs For U.S. Department of Education Grantees and Payees	7/1/10	*https://www2.ed.gov/policy/fund/guid/gposbul/gposbul.html.*
Key Financial Management Requirements for Discretionary Grants Awarded by the Department of Education.	12/1/14	*https://www2.ed.gov/policy/fund/guid/gposbul/gposbul.html.*
FAQs to Assist U.S. Department of Education Grantees To Appropriately Use Federal Funds for Conferences and Meetings.	12/1/14	*https://www2.ed.gov/policy/fund/guid/uniform-guidance/cost-principles.html.*
Excessive Cash Drawdown Memorandum	12/1/14	*https://www2.ed.gov/policy/fund/guid/gposbul/drawdown.html.*
Noteworthy Additions or Changes for Select Items of Cost	6/17/15	*https://www2.ed.gov/policy/fund/guid/uniform-guidance/selectitemsofcost.pdf.*
Implementing the Uniform Guidance	6/17/15	*https://www2.ed.gov/policy/fund/guid/uniform-guidance/overview-resources.html.*
The Uniform Guidance Audit Requirements——2 CFR Part 200 Subpart F -PowerPoint.	6/25/15	*https://www2.ed.gov/policy/fund/guid/uniform-guidance/index.html.*
Indirect Cost Concerns Under the Uniform Guidance	9/2/15	*https://www2.ed.gov/policy/fund/guid/uniform-guidance/indirect-costs.html.*
The Role of Internal Control, Documenting Internal Control, and Determining Allowability & Use of Funds.	9/23/15	*https://www2.ed.gov/policy/fund/guid/uniform-guidance/internal-controls.html.*
Procurement Policies Under the Uniform Guidance	3/11/16	*https://www2.ed.gov/policy/fund/guid/uniform-guidance/procurement.html.*
Recipients of ED Grants and Cooperative Agreements FAQs on Cash Management.	7/1/16	*https://www2.ed.gov/policy/fund/guid/gposbul/cash-management-faqs.pdf.*
Questions and Answers Regarding 2 CFR Part 200	12/1/16	*https://www2.ed.gov/policy/fund/guid/uniform-guidance/edfaqs1216.pdf.*
Manager's Quick Check Assessment of Internal Control	9/23/15	*https://www2.ed.gov/policy/fund/guid/uniform-guidance/internal-controls.html.*

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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.

Betsy DeVos,

Secretary of Education.

Appendix

OFFICE OF POSTSECONDARY EDUCATION (OPE)

Title	Date issued
Announcement of student financial assistance videoconferences to be held in April and May 1995	3/1/1995
Expanded information available to the financial aid community on our World Wide Web pages	2/1/1998
Provides information concerning the Assignment of defaulted Federal Perkins Loans & NDSLs to ED for collection	9/1/1998
Standards that will be used to review 85/15 and 90/10 eligibility calculations for proprietary schools that include institutional scholarships and loans as revenue	10/1/1999
Mandatory timely completion of Loan Verification Certificates (LVC)	2/17/2004
Approval of Loan Discharge Applications	9/16/2005
Agreements Between Public Institutions of Higher Education and Vocational Rehabilitation Agencies	11/22/2006
Commitment to use the Financial Aid Shopping Sheet	8/30/2012
Contact information for the FSA Student Loan Ombudsman	4/17/2013
Implementation of Financial Aid Shopping Sheet	1/30/2013
The Office of Postsecondary Education issues this guidance to provide States with information about maintenance of effort requirements and waiver requests under the College Access Challenge Grant program	1/1/2013
2014–04–18—(GEN–14–09): OMB-Approval of the Financial Disclosure for Reasonable and Affordable Rehabilitation Payments Form	4/18/2014
Perkins Loan Program—Excess Liquid Capital	9/29/2015
Campus Policing	9/8/2016
Clarifies the Department's expectation regarding the accreditation effective date used by accrediting agencies	6/6/2017
Schools may choose to have 1995–96 Renewal Applications mailed to them instead of to their students	8/1/1994
This letter announces a workshop, ''Electronics: The Wave of the Future,'' to be held on November 14–17 in Anaheim, California	9/1/1994
Changes to the 1995–96 processing system, FAFSA, SAR, and Renewal FAFSA	9/1/1994
Additional Information Pertaining to 1995–96 Renewal Applications requested through the Department's Electronic Data Exchange (EDE). (Follow-up to 1995–96 Action Letter # 1)	9/1/1994
Telecommunications services provided under the General Electronic Support system and enrollment procedures for 1995–96	10/1/1994

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
Title IV Institution Code List of Participating Institutions for 95–96 Award Year	12/1/1994
This letter provides information on Tentative 1995–96 Funding Levels for the Campus-Based Programs	1/1/1995
This letter provides information regarding changes in the 1996–97 FISAP for the Federal Perkins Loan, FSEOG, and FWS Programs	1/1/1995
This letter provides procedures for submitting a request for a waiver of the 1994–95 FWS Community Service expenditure requirement	1/1/1995
This letter provides information regarding your institution's final authorization letter for funding under the campus-based programs for the 1995–96 award year	3/1/1995
This letter establishes the deadlines for schools to begin submitting data to the NSLDS and for schools who have not already done so to submit the NSLDS Data Provider Setup Form and, if applicable, Servicer Delegation Letter	4/1/1995
This letter establishes the deadlines for schools to begin submitting data to the National Student Loan Data System	4/1/1995
FERPA Changes	5/1/1995
Close-out of 1993–94 awards for the FWS, Federal Perkins Loan, and/or FSEOG programs	6/1/1995
Transmittal letter for Amendments to the 1994–95 National Direct Student Loan and Federal Perkins Loan Programs Directory of Designated Low-Income Schools for Teacher Cancellation Benefits	6/1/1995
Safeguard Activity Report for the Federal Perkins Loan Program	6/1/1995
Transmittal letter for the 1996–97 Electronic FISAP diskette package	7/1/1995
Release of Campus-Based Funds and MANDATORY FWS Community Service Reporting Requirements	6/1/1995
This letter provides information concerning the ASSIGNMENT of Federal Perkins Loans and National Direct (or Defense) Student Loans (NDSLs) in default to ED for collection	6/1/1995
This letter provides information concerning the ASSIGNMENT of Federal Perkins Loans and National Direct (or Defense) Student Loans (NDSLs) in default to the U.S. Department of Education (ED) for collection	6/1/1995
The Federal Perkins Loan Program Expanded Lending Option (ELO) and an agreement to participate in the ELO	7/1/1995
Revised Perkins Loan Program Assignment Form, ED553	7/1/1995
This letter accompanies the 1993–94 Federal Perkins Loan Service Cancellations Payment Letter	8/1/1995
This letter accompanies the 1993–94 Federal Perkins Loan Service Cancellations Payment Letter	8/1/1995
Use of State scholarships and grants as the non-Federal share of Federal Supplemental Educational Opportunity Grant awards	8/1/1995
This letter is a reminder of the 1996–97 Electronic FISAP Mailing in July	8/1/1995
Correction pages for the Federal Perkins Loan Program Assignment Submission Procedures in CB–95–13	9/1/1995
This letter provides procedures for submitting a request for a waiver of the 1995–96 FWS community service expenditure requirement	9/1/1995
Cover letter for Directory of Designated Low-Income Schools for Teacher Cancellation Benefits for the Federal Perkins Loan and National Direct Student Loan Programs	10/1/1995
This letter accompanies the second 1993–94 Federal Perkins Loan Service Cancellations Payment Letter	11/1/1995
Cover letter for 1996–97 FISAP Edit/Verification Process	11/1/1995
This letter provides information to postsecondary institutions and to guaranty agencies and lenders in the Federal Family Education Loan Program (FFELP) to assist students and institutions in areas designated as natural disaster areas due to the October floods in Texas. The guidance offered in this letter is similar to that provided after the floods in the Southeast earlier this year	1/1/1995
Guidance for helping Title IV participants affected by the recent May 1995 floods in Illinois, Louisiana, Mississippi and Missouri	7/1/1995
Guidance for helping Title IV participants affected by Hurricane Marilyn in the Commonwealth of Puerto Rico and the U.S. Virgin Islands and Hurricane Opal in Florida, Alabama, Georgia and North Carolina	11/1/1995
This letter describes the telecommunications services provided to state and non-state guarantee agencies under the General Electronic Support (GES) system and invites new users to become enrolled in these services. Enrollment will be carried forward each year unless the agency calls to cancel the service	1/1/1995
This letter transmits the U.S. Department of Education's Audit Guide, Compliance Audits (Attestation Engagements) of the Federal Family Education Loan Program to Participating Lenders	3/1/1995
Interim Reporting Instructions For The Guaranty Agency Quarterly/Annual Report (ED Form 1130)	3/1/1995
Limitations on lending by schools and prohibition on inducements to schools by lenders must be observed	3/1/1995
This letter provides guidance relating to the filing of the Lender's Interest and Special Allowance Request and Report (ED Form 799)	6/1/1995
Last Submission Date for Default Reinsurance Requests for FY 1995	8/1/1995
Extension for completion of lender compliance audits	9/1/1995
Suspension of Default Reinsurance Claim Payments Due to Non-Receipt of September 1995 Quarterly Report	10/1/1995
Guaranty agency retention of payoff amounts of defaulted loans consolidated under the Federal Consolidation Loan Program	11/1/1995
This letter provides information to postsecondary institutions and to guaranty agencies and lenders in the Federal Family Education Loan Program (FFELP) to assist students and institutions in areas designated as natural disaster areas due to the October floods in Texas. The guidance offered in this letter is similar to that provided after the floods in the Southeast earlier this year	1/1/1995
1995–96 Institution Applicant Data Service for Federal Title IV Student Aid Programs	1/1/1995
1995–96 State Agency Applicant Data Service for Federal Title IV Student Aid Programs	1/1/1995
Simplification of our Federal student aid regulations and administrative processes	1/1/1995
Announcement of Student Financial Assistance videoconferences to be held in early 1995	1/1/1995
Conference support for electronic initiatives	1/1/1995
Distribution of the 1995 Winter Training Calendar	1/1/1995
Cumulative List of Student Financial Assistance Programs Mailings for the Period January 1, 1994 through December 31, 1994	1/1/1995
Transmitting A Guide to 1995–96 SARs and ISIRs	2/1/1995
Distribution of the 1995–96 Spanish booklet on ED's student aid programs: "Ayuda Federal Para Estudiantes"	2/1/1995
To inform postsecondary educational institutions how to report ownership or control by, contracts with, or gifts from, foreign sources	2/1/1995
To inform postsecondary educational institutions how and when to report information regarding third party servicers	2/1/1995
Cover letter for Chapter 2 of 1994–95 Federal Student Financial Aid Handbook	3/1/1995

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
Errata to the 1995–96 Institution Applicant Data Service for Federal Title IV Student Aid Programs (GEN–95–2)	3/1/1995
This letter provides information regarding the NSLDS to schools participating in Title IV aid programs	3/1/1995
Cover letter for Chapter 3 of 1994–95 Federal Student Financial Aid Handbook	3/1/1995
1995–96 Verification Changes; Updated Verification Worksheets; Signature Requirement Chart	4/1/1995
Clarification of the methods by which a student may apply for Federal student aid	4/1/1995
Clarification concerning institutional refunds to students	4/1/1995
Announcement of Change in Topic of May Student Financial Assistance Videoconference	5/1/1995
Requests review and correction of names and addresses used in the student aid mailing list	5/1/1995
Announcement of June 29 Student Financial Assistance Videoconference	5/1/1995
Implementation of the 85 percent rule to determine eligibility for Title IV student assistance programs	5/1/1995
FY 1993 Cohort Default Rate	6/1/1995
1996–97 Application for Participation in the William D. Ford Federal Direct Loan Program sent to Chief Fiscal Officers at eligible non-participating institutions	5/1/1995
1996–97 Application for Participation in the William D. Ford Federal Direct Loan Program sent only to eligible non-participating school's Financial Aid Officers	5/1/1995
Invitation to schools to submit proposals to become experimental sites for the purpose of testing alternative methods of administering Title IV student aid programs	6/1/1995
Announcement of July 12 Student Financial Assistance Videoconference	6/1/1995
This letter announces a nationwide series of Fiscal Officer Training Workshops in 1995	6/1/1995
Cover letter for 1995–96 Federal Student Financial Aid Handbook	6/1/1995
Distribution of The Verification Guide, 1995–96	6/1/1995
Announcement of October 19 NSLDS SSCR Process Videoconference	7/1/1995
Guidance for helping Title IV participants affected by the recent May 1995 floods in Illinois, Louisiana, Mississippi and Missouri	7/1/1995
Cumulative List of Student Financial Assistance Programs Mailings for the Period January 1, 1995 through June 30, 1995	8/1/1995
This letter advises institutions of the recent court decision regarding the regulations dealing with the relationship between clock hours and credit hours, and of the steps that affected institutions must take to come into compliance with these regulations	8/1/1995
Announcement of September 14 Student Financial Assistance Videoconference	8/1/1995
This Action Letter introduces the 1995–96 FAFSA EXPRESS, a financial aid software package that allows applicants to complete and submit an electronic Free Application for Federal Student Aid using a personal computer equipped with a modem	8/1/1995
How to access Host Site listings for October 19 Videoconference: "SSCR: The New Wave Process."	9/1/1995
Announcement of November 9 Student Financial Assistance Videoconference	9/1/1995
This letter gives information and schedules for the 1996–97 Renewal FAFSA, which institutions may request through the Department's Electronic Data Exchange (EDE), beginning Oct. 9–Nov. 10, 1995	10/1/1995
Distribution of the 1995 Fall Training Calendar	10/1/1995
Availability of The Blue Book	10/1/1995
This letter announces two workshops, "EDE: Your Gateway to the Future," to be held on November 28–30 in San Francisco, California and December 11–13 in Orlando, Florida	10/1/1995
Guidance for helping Title IV participants affected by Hurricane Marilyn in the Commonwealth of Puerto Rico and the U.S. Virgin Islands and Hurricane Opal in Florida, Alabama, Georgia and North Carolina	11/1/1995
The Title IV School Code List of Participating Institutions for the 1996–97 Award Year	10/1/1995
This Action Letter introduces a Windows version of EDExpress, the software designed to help institutions manage student aid data	10/1/1995
This letter announces the Title IV Update Training to be conducted in the spring of 1996	11/1/1995
This letter describes the Title IV Wide Area Network (WAN) services, the receipt of Institutional Student Information Records (ISIRs) through the Electronic Data Exchange (EDE) or the Applicant Data Service (but NOT both), and applicable enrollment procedures	11/1/1995
This Action Letter describes changes to the 1996–97 application processing system, the FAFSA, the Renewal FAFSA, the SAR, and the ISIR	12/1/1995
This letter provides information to postsecondary institutions and to guaranty agencies and lenders in the Federal Family Education Loan Program (FFELP) to assist students and institutions in areas designated as natural disaster areas due to the October floods in Texas. The guidance offered in this letter is similar to that provided after the floods in the Southeast earlier this year	1/1/1995
U.S. Department of Education's Audit Guide	3/1/1995
This letter provides information regarding the NSLDS to lenders participating in the FFEL Program	3/1/1995
This letter provides guidance relating to the filing of the Lender's Interest and Special Allowance Request and Report (ED Form 799)	6/1/1995
This letter provides guidance relating to the filing of the Lender's Interest and Special Allowance Request and Report (ED Form 799)	6/1/1995
Guidance for helping Title IV participants affected by the recent May 1995 floods in Illinois, Louisiana, Mississippi and Missouri	9/7/1995
Extension for completion of lender compliance audits	9/1/1995
This letter contains information about the publication of the FY 1993 cohort default rates for originating lenders, holders, and guaranty agencies participating in the FFEL Program, as mandated by the Higher Education Act of 1992	11/1/1995
Guidance for helping Title IV participants affected by Hurricane Marilyn in the Commonwealth of Puerto Rico and the U.S. Virgin Islands and Hurricane Opal in Florida, Alabama, Georgia and North Carolina	1/11/1995
This letter contains the 1995–96 Federal Pell Grant Program payment and disbursement schedules	1/1/1995
This letter provides information concerning your initial 1995–96 Federal Pell Grant Statement of Account and Institutional Payment Summary	5/1/1995
Informational Package on Ford FDLP, sent to Chief Fiscal Officers	6/1/1995
Informational Package on Ford FDLP, sent to FAAs	6/1/1995
Procedures for 1994–95 Federal Pell Grant account adjustments after the September 30, 1995 submission deadline	10/1/1995
This letter provides additional information on the Federal Pell Grant Eligibility Flag to institutions participating in the 1995–96 Institution Applicant Data Service. It amends 1995–96 Action Letter #7 (GEN–95–2)	10/1/1995

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
Limitations on lending by schools and prohibition on inducements to schools by lenders must be observed	3/1/1995
Guidance for helping Title IV participants affected by Hurricane Marilyn in the Commonwealth of Puerto Rico and the U.S. Virgin Islands and Hurricane Opal in Florida, Alabama, Georgia and North Carolina	1/11/1995
This letter describes the telecommunications services provided to state and non-state guarantee agencies under the General Electronic Support (GES) system and invites new users to become enrolled in these services. Enrollment will be carried forward each year unless the agency calls to cancel the service	1/1/1995
This letter conveys the application that each participating state must submit to receive fiscal year 1995 funds for the SSIG Program.	3/1/1995
Fiscal Year 1994 (1994–95 award year) State Student Incentive Grant (SSIG) Program Performance Report (ED Form 1288–1)	8/1/1995
This letter describes the telecommunications services provided to State and Non-state Guaranty Agencies under the Title IV Wide Area Network (WAN) system, the receipt of Institutional Student Information Records (ISIRs) through EDE or the Applicant Data Service (but not both), and applicable enrollment procedures	11/1/1995
Direct Loan List of Publications	7/1/1995
Describes a mailing list change to the Application Ordering System (AOS) for 1996–97 FAFSAs and Student Guides	8/1/1995
Developing and implementing a comprehensive prevention policy for campus violence against women	9/6/1996
Announcement of October 17 Student Financial Assistance Videoconference	1/9/1996
Distribution of the 1996 Fall Training Calendar	1/9/1996
This letter announces the 1997–98 Title IV Training to be conducted in early 1997, lists the sites and dates for the workshops, and explains registration procedures	1/12/1996
Announcement of ''Direct Loan Update '96'' videoconference	5/1/1996
This letter announces and describes a training series on EDExpress, and lists the sites and dates for the workshops	8/1/1996
Announcing a new way to order the 1997–98 version of the Free Application for Federal Student Aid and the Student Guide. . . 1–800–284–2788	9/1/1996
This letter provides information on Tentative 1996–97 Funding Levels for the Campus-Based Programs	1/1/1996
The Federal Perkins Loan Program-Expanded Lending Option (ELO) and an agreement to participate in the ELO	6/1/1996
Release of Campus-Based Funds and Request for Supplemental Federal Work-Study (FWS) Funds	6/1/1996
Close-out of 1994–95 awards for the Federal Work- Study (FWS), Federal Perkins Loan, and/or Federal Supplemental Educational Opportunity Grant (FSEOG) programs	6/1/1996
Transmittal letter for the 1997–98 Electronic FISAP diskette package	7/1/1996
This letter accompanies the 1994–95 Federal Perkins Loan Service Cancellations Payment Letter	7/1/1996
Safeguard Activity Report for the Federal Perkins Loan Program	7/1/1996
Use of State scholarships and grants as the non-Federal share of Federal Supplemental Educational Opportunity Grant awards	8/1/1996
This letter provides procedures for submitting a request for a waiver of the 1996–97 FWS community service expenditure requirement	9/1/1996
This letter is a reminder of the 1997–98 Electronic FISAP Mailing in July	9/1/1996
This letter provides information regarding supplemental funding under the campus-based programs for the 1996–97 award year	9/1/1996
Submission of Campus-Based Reallocation Form (E40–4P)	1/1/1996
Release of 1995–96 Unexpended awards for the Federal Work-Study (FWS), Federal Perkins Loan, and/or Federal Supplemental Educational Opportunity Grant (FSEOG) Programs	9/1/1996
Cover letter for 1997–98 FISAP Edit/Verification Process	11/1/1996
The impact of the new Federal minimum wage on the Federal Work-Study Program	11/1/1996
This letter contains important information regarding 1996–97 Campus-Based Program funding	2/1/1996
Changes in the 1997–98 FISAP for the Federal Perkins Loan, Federal Supplemental Educational Opportunity Grant (FSEOG), and Federal Work-Study (FWS) Programs	2/1/1996
In late July, institutions will automatically receive an Electronic FISAP Software package with 3 1/2″ high density diskettes	5/1/1996
Information regarding your institution's final authorization letter for funding under the campus-based programs for the 1996–97 award year	5/1/1996
Transmittal letter for Amendments to the 1995–96 Federal Perkins Loan and National Direct Student Loan Programs Directory of Designated Low-Income Schools for Teacher Cancellation Benefits	5/1/1996
This letter provides information about redesigned Federal Perkins Loan and National Direct Student Loan (NDSL) promissory notes	5/1/1996
This letter provides information on a preliminary estimate of your institution's 1997–98 Federal Work-Study funding. WE ARE SENDING YOU THIS LETTER ALONG WITH THE FISAP EDIT/VERIFICATION MATERIALS FOR 1997–98	11/1/1996
Guidance for helping Title IV participants affected by flooding in Idaho, Maryland, New York, Ohio, Oregon, Pennsylvania, Vermont, Virginia, Washington, and West Virginia	1/4/1996
This letter contains information about the Guaranty Agency Quarterly/Annual Report (ED Form 1130)	3/1/1996
Last Submission Date for Default Reinsurance Requests for FY 1996	8/1/1996
This letter describes the implementation of the Student Status Confirmation Report function of the National Student Loan Data System	9/1/1996
Guidance for helping Title IV participants affected by Hurricane Fran in Maryland, North Carolina, Pennsylvania, Virginia, and West Virginia and Hurricane Hortense in Puerto Rico	1/9/1996
This letter provides an initial draft of the 1997–98 Institutional Student Information Record (ISIR) layout and description	10/1/1996
Suspension of Default Reinsurance Claim Payments Due to Non-Receipt of September 1996 Quarterly Report	10/1/1996
Extension of lender audit requirement deadline	11/1/1996
Distribution of the 1996 Winter Training Calendar	1/2/1996
1996–97 release of our FAFSA Express software	2/1/1996
This letter describes the 1996–97 Title IV Update Training and the Direct Loan Training for new schools to be conducted in spring 1996, and lists the sites and dates for the workshops	1/1/1996
This letter references an Advance Notice of Proposed Rulemaking that was recently published in the **Federal Register** regarding a new draft proposal for improved oversight in the Federal student aid programs	1/1/1996
Student Status Confirmation Report (SSCR) User's Guide	2/1/1996
Transmitting A Guide to 1996–97 SARs and ISIRs	3/1/1996

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
Incorporation of the Student Status Confirmation Report (SSCR) into the NSLDS to centralize and fully automate the enrollment verification process	3/1/1996
This letter describes the Title IV Wide Area Network (WAN) services, the receipt of Institutional Student Information Records (ISIRs) through the Electronic Data Exchange (EDE) or the Applicant Data Service (but not both), the National Student Loan Data System (NSLDS), and applicable enrollment procedures. This letter is a replacement of Action Letter #4 (GEN–95–53) dated November 1995 for enrollment to the Title IV WAN	3/1/1996
Errata and replacement pages for the 1995–96 FSFA Handbook	3/1/1996
Guidance for helping Title IV participants affected by flooding in Idaho, Maryland, New York, Ohio, Oregon, Pennsylvania, Vermont, Virginia, Washington, and West Virginia	1/4/1996
This letter provides an overview of the regulatory provisions, and guidance to institutions on how to receive technical assistance in administering the campus security regulations, and the Department's enforcement policy regarding them	5/1/1996
SFAP Customer Support Branch Inquiry Service. Your direct help line for questions and information on administering the Title IV Student Financial Assistance Programs at your institution. Call 1–800–4ED–SFAP (1–800–433–7327)	7/1/1996
This letter announces the availability of the National Student Loan Data System (NSLDS) to meet the regulatory requirements for obtaining financial aid transcript (FAT) information for purposes of determining student eligibility for Federal Title IV student assistance	7/1/1996
This letter announces two U.S. Department of Education conferences entitled, ''Electronics: Riding the Road to Success,'' to be held on November 12–14 in Lake Tahoe, Nevada and December 8–10 in Atlanta, Georgia	1/9/1996
This letter gives information and schedules for institutions that wish to have their students receive the 1997–98 Renewal Free Application for Federal Student Aid (Renewal FAFSA)	9/1/1996
This letter describes the implementation of the Student Status Confirmation Report function of the National Student Loan Data System	9/1/1996
Guidance for helping Title IV participants affected by Hurricane Fran in Maryland, North Carolina, Pennsylvania, Virginia, and West Virginia and Hurricane Hortense in Puerto Rico	1/9/1996
This letter provides an initial draft of the 1997–98 Institutional Student Information Record (ISIR) layout and description	10/1/1996
This letter describes Title IV Wide Area Network (TIV WAN or Title IV WAN) services, enhancements for the 1997–98 award year, enrollment procedures, access to the National Student Loan Data System (NSLDS), and receiving Institutional Student Information Records (ISIRs) through the Electronic Data Exchange (EDE) OR the Institution Applicant Data Service (but not through both)	11/1/1996
Department of Education to Hold Regional Meetings in December for Reauthorization of the Higher Education Act	11/1/1996
Changes and enhancements to the 1997–98 application processing system	11/1/1996
Guidance for helping Title IV participants affected by flooding in Idaho, Maryland, New York, Ohio, Oregon, Pennsylvania, Vermont, Virginia, Washington, and West Virginia	1/4/1996
Extension of lender audit requirement deadline	6/1/1996
This letter describes the implementation of the Student Status Confirmation Report function of the National Student Loan Data System	9/1/1996
Guidance for helping Title IV participants affected by Hurricane Fran in Maryland, North Carolina, Pennsylvania, Virginia, and West Virginia and Hurricane Hortense in Puerto Rico	1/9/1996
This letter contains information about the publication of the Fiscal Year (FY) 1994 cohort default rates for originating lenders, holders, and guaranty agencies participating in the Federal Family Education Loan (FFEL) Program, as mandated by the Higher Education Act of 1965, as amended	12/1/1996
Extension of lender audit requirement deadline	11/1/1996
This letter contains the 1996–97 Federal Pell Grant Program payment and disbursement schedules	2/1/1996
This letter contains the REVISED 1996–97 Federal Pell Grant Program payment and disbursement schedules	5/1/1996
This letter provides information regarding the provision in the Department's Fiscal Year 1996 Appropriation Act that precludes a student from receiving a Federal Pell Grant for the 1996–97 award year, if the student's school is ineligible to participate in the Federal Family Education Loan Program or the William D. Ford Federal Direct Loan Program as a result of cohort default rates	8/1/1996
1996–10–01—(P–96–04) Procedures for 1995–96 Federal Pell Grant account adjustments after the SEPTEMBER 30, 1996 submission deadline	10/1/1996
1996–97 release of our FAFSA Express software	2/1/1996
This letter conveys the application that each participating State must submit to receive fiscal year 1996 funds for the State Student Incentive Grant (SSIG) Program	5/1/1996
Fiscal Year 1995 (1995–96 award year) State Student Incentive Grant (SSIG) Program Performance Report (ED Form 1288–1)	8/1/1996
Announcement of February 13 Student Financial Assistance Videoconference	1/1/1997
This letter describes a training series on the 1997–98 EDExpress for Windows application processing software, and lists the sites and dates for the workshops	2/1/1997
Advertising the U.S. Department of Education's New FAFSA Express Software and Poster	3/1/1997
To provide general information concerning the forthcoming changes in Title IV program numbers used by participating institutions of postsecondary education. Publication Reference: Section 487b, Higher Education Act of 1965, as amended in 1992, P.L. 102–325 [20 U.S.C. 1094b]	3/1/1997
Distribution of the 1997 Spring Training Calendar	3/1/1997
This letter will only be posted electronically. It will not be mailed to institutions	4/1/1997
Title IV Single Identifier Initiative U.S. Department of Education Washington, D.C. 20202–5132—To Financial Aid Administrator	6/1/1997
Distribution of the 1997 Fall Training Calendar	8/1/1997
Distribution of the FAFSA on the Web poster and instructions for ordering FAFSA on the Web brochures	8/2/1997
This letter describes a nationwide series of Fiscal Officer Training Workshops and lists the sites, dates, and registration procedures	9/1/1997
Announcement of October 16 Student Financial Assistance Videoconference	9/1/1997
Invitation to order bulk quantities of the following 1998–99 student aid application materials: The Free Application for Federal Student Aid (FAFSA)	9/1/1997
Electronic Aid Office Training	9/1/1997

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
This letter announces a series of Electronic Aid Office workshops to be held February through September l998; lists the contents, sites and dates of the workshops; and explains registration procedures	12/1/1997
Changes in the 1998–99 FISAP for the Federal Perkins Loan, FSEOG, and FWS Programs	2/1/1997
Information regarding your institution's final authorization letter for funding under the campus-based programs for the 1997–98 award year	3/1/1997
This letter provides procedures for submitting a request for a waiver of the 1997–98 FWS community service expenditure requirement	5/1/1997
This letter provides information on the Application for Additional Allocation of Federal Work-Study Funds for Fiscal Year 1997	5/1/1997
Information regarding the Job Location and Development Program under the Federal Work-Study programs	5/1/1997
Safeguard Activity Report for the Federal Perkins Loan Program	6/1/1997
Release of Campus-Based Funds and Request for Supplemental FWS Funds	6/1/1997
The Federal Perkins Loan Program-Expanded Lending Option (ELO) and an agreement to participate in the ELO	6/1/1997
Transmittal letter for the 1998–99 Electronic FISAP diskette package	6/1/1997
Close-out of 1995–96 awards for the FWS, Federal Perkins Loan, and/or FSEOG programs	7/1/1997
This letter accompanies the supplemental awards issued in response to the Application for Additional Allocation of FWS Funds for Fiscal Year 1997	7/1/1997
Information regarding the FWS Program and its community service aspects, including reading tutors of children	7/1/1997
This letter accompanies the 1995–96 Federal Perkins Loan Service Cancellations Payment Letter	8/1/1997
Use of State scholarships and grants as the non-Federal share of FSEOG awards	8/1/1997
This letter provides information regarding supplemental funding under the Campus-Based Programs for the 1997–98 award year	9/1/1997
Cover letter for 1998–99 FISAP Edit/Verification Process	11/1/1997
Guidance for guaranty agencies concerning the recent floods in California, Idaho, and Nevada. This guidance is different than the Department's previous guidance for helping borrowers who live in natural disaster areas	1/1/1997
Updated listings of declared disaster areas for recent floods in California, Idaho, Nevada, and Washington	1/1/1997
Declared disaster areas for recent flooding in Oregon	1/1/1997
Additional disaster areas for recent weather-related problems in Washington	2/1/1997
Declared disaster areas for recent storm damage in Arkansas	3/1/1997
Declared disaster areas for recent flooding in Ohio and Kentucky	3/1/1997
Declared disaster areas for recent tornadoes in Arkansas, and flooding in Indiana, Kentucky, Ohio, Tennessee, and West Virginia	3/1/1997
Declared disaster areas for recent tornadoes in Arkansas, and flooding in Illinois, Indiana, Kentucky, Ohio, Tennessee, and West Virginia	3/1/1997
Declared disaster areas for recent tornadoes in Arkansas, and flooding in Illinois, Indiana, Kentucky, Ohio, Tennessee, and West Virginia	3/1/1997
Declared disaster areas for recent tornadoes in Tennessee	4/1/1997
Declared disaster areas for recent floods in North Dakota and South Dakota	4/1/1997
Declared disaster areas for recent floods in Minnesota	4/1/1997
Declared disaster area for recent flooding in Arkansas	4/1/1997
Additional disaster areas declared for recent floods in Minnesota	4/1/1997
Liberalized forbearance policy for parts of North Dakota that have been severely impacted by recent flooding	4/1/1997
Update on forbearance policy for Minnesota flooding	5/1/1997
Disaster areas declared for storm damage and flooding in Michigan, Texas, and Wisconsin	7/1/1997
Disaster areas declared for storm damage and flooding in Vermont	7/1/1997
Disaster areas declared for storm damage and flooding in Alabama and Colorado	8/1/1997
Disaster areas declared for storm damage and flooding in Minnesota	8/1/1997
Storm damage and flooding in Illinois	9/1/1997
Storm damage and flooding in New Jersey	9/1/1997
Typhoon Keith in the Northern Mariana Islands	12/1/1997
Typhoon Paka in Guam	12/1/1997
This letter describes the telecommunications services provided to State and Non-state Guaranty Agencies under the Title IV WAN services, the receipt of ISIRs through the EDE or the Institution Applicant Data Service (but NOT both), and applicable enrollment procedures	3/1/1997
Guidance for institutions of higher education, guaranty agencies, and lenders concerning the recent flooding in North Dakota, South Dakota, and Minnesota	5/1/1997
This letter provides guidance concerning closed school loan discharges for borrowers who attended certain correspondence schools	7/1/1997
Last Submission Date for Default Reinsurance Requests for FY 1997	7/1/1997
Suspension of Default Reinsurance Claim Payments Due to Non-Receipt of September 1997 Quarterly/Annual Report	10/1/1997
Revised Federal Default Consolidation Loan Payoff Report and Instructions	10/1/1997
Extension of Guaranty Agency Claims and Collections Report (ED Form 1189)	11/1/1997
This letter Transmits a Guide to 1997–1998 SARs and ISIRs	2/1/1997
Enclosed is a calendar setting forth some of the significant products, activities, and services that you can expect from us in 1997, and some of the milestones we expect to achieve	4/1/1997
Guidance for institutions of higher education, guaranty agencies, and lenders concerning the recent flooding in North Dakota, South Dakota, and Minnesota	5/1/1997
Information concerning the restructuring of the Institutional Participation and Oversight Service	6/1/1997
How to report changes to the information you provided on your Application for Approval to Participate in Federal Student Financial Aid Programs	8/1/1997
This letter announces three U.S. Department of Education conferences entitled, ''A Second Decade of Partnership Through Electronics'' to be held in St. Paul, MN November 4–6; Seattle, WA November 17–19; and Boston, MA December 16–18	8/1/1997

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
This letter announces a conference for Third Party Servicers sponsored by the U.S. Department of Education on October 9–10, 1997, in Washington, DC. NOTE TO SCHOOLS: If you are using a Third Party Servicer, please forward this letter to them	8/1/1997
UPDATE ON THE SSCR PROCESS OF THE NSLDS: Describes a series of letters that will be sent to institutions in connection with the SSCR process	8/1/1997
This letter provides information and schedules for institutions that wish to have their students receive the 1998–99 Renewal Free Application for Federal Student Aid (Renewal FAFSA)	9/1/1997
This letter provides guidance regarding the Notice published in the FEDERAL REGISTER on September 19, 1997, that informs institutions of the deadline dates for institutions to use designated electronic processes to meet administrative capability requirements for participation in the Title IV Federal Student Financial Assistance Programs	10/1/1997
Compliance with a new Federal requirement relating to electronic participation between the ED and postsecondary educational institutions	11/1/1997
Changes and enhancements to the 1998–99 application processing system	11/1/1997
Guidance for institutions of higher education, guaranty agencies, and lenders concerning the recent flooding in North Dakota, South Dakota, and Minnesota	5/1/1997
National Student Loan Data System Reporting Requirements	5/1/1997
This letter provides guidance concerning closed school loan discharges for borrowers who attended certain correspondence schools	7/1/1997
This letter provides guidance relating to the filing of the Lender's Application for Payment of Insurance Claim (ED Form 1207)	9/1/1997
This letter accompanies the supplemental awards issued in response to the Application for Additional Allocation of FWS Funds for Fiscal Year 1997. REFERENCE: This letter supplements Chapter 7 of the FSA Handbook	10/21/1997
This letter announces changes to the Electronic Data Exchange service by which institutions exchange 1996–97 Pell payment data with the Department of Education, and the associated customer support function	4/1/1997
This letter provides information to institutions on procedures for requesting Federal Pell Grant Authorization Adjustments. It supersedes information contained in the initial instruction, GEN 94–14 dated April 1994	6/1/1997
Procedures for 1996–97 Federal Pell Grant account adjustments after the September 30, 1997 submission deadline	10/1/1997
This letter contains the 1997–98 Federal Pell Grant Program payment and disbursement schedules	1/1/1997
To identify postsecondary institutions which may not have received notice of the requirement to submit an application for recertification in the Federal student financial aid programs	3/1/1997
Guidance for institutions of higher education, guaranty agencies, and lenders concerning the recent flooding in North Dakota, South Dakota, and Minnesota	5/1/1997
This letter conveys the application that each participating State must submit to receive fiscal year 1997 funds for the SSIG Program	2/1/1997
Fiscal Year 1996 (1996–97 award year) State Student Incentive Grant (SSIG) Program Performance Report (ED Form 1288–1)	8/1/1997
This letter provides information on Tentative1997–98 Funding Levels for the Campus-Based Programs	1/1/1997
Transmittal letter for the 1997–98 Electronic FISAP diskette package	10/22/1997
This letter describes two training series on the 1998–99 EDExpress for Windows software: One on application processing and the other on packaging. Workshop schedules and registration forms are included	3/1/1998
Distribution of the 1998 Spring Training Calendar	3/1/1998
Distribution of the 1998 Summer Training Calendar	6/1/1998
This letter describes a nationwide series of National Student Loan Data System (NSLDS) workshops and lists the sites, dates, and registration procedures	6/1/1998
We are pleased to announce the availability of a Student Financial Assistance Programs ''fax broadcast'' service for postsecondary schools	6/1/1998
The Student Financial Assistance electronic Bulletin Board Service (BBS), which has served the financial aid community since spring 1995, will be retired as of July 1, 1998	6/1/1998
Announces the new 1999–2000 Recipient Financial Management System (RFMS) for reporting and requesting funds under the Federal Pell Grant Program	7/1/1998
Announcement of October 15 Student Financial Assistance Videoconference	8/1/1998
Announces the development of a Master Promissory Note process for use in the Direct Loan and the FFEL Programs	9/1/1998
This letter announces two federal student aid training events for High School Counselors to be presented in Fall 1998, lists the locations and dates for the events, and provides registration procedures	9/1/1998
Low-Income School and Teacher Shortage Area Lists for Loan Cancellation/Deferment now available on the Web	10/1/1998
How to order bulk quantities of the 1999–2000 FAFSA and Student Guide	10/1/1998
Teleconference—Department is sponsoring to address the Y2K issue	11/1/1998
Automated application status checks now available on the toll-free line at the Federal Student Aid Information Center	11/1/1998
The Hope Scholarship and Lifetime Learning Tax Credits	12/1/1998
This letter provides information on Tentative 1998–99 Funding Levels for the Campus-Based Programs	1/1/1998
Changes in the 1999–2000 FISAP for the Federal Perkins Loan, Federal Supplemental Educational Opportunity Grant (FSEOG), and Federal Work-Study (FWS) Programs	1/1/1998
Information regarding your institution's final authorization letter for funding under the campus-based programs for the 1998–99 award year	3/1/1998
This letter provides information on the Application for Additional Allocation of Federal Work-Study Funds for Fiscal Year 1998	3/1/1998
This letter provides procedures for submitting a request for a waiver of the1998–99 FWS community service expenditure requirement	5/1/1998
Information regarding the waiver of the institutional-share requirement under the Federal Work-Study Program for students employed as tutors in family literacy programs	5/1/1998
Release of Campus-Based Funds and Request for Supplemental Federal Work-Study (FWS) Funds	6/1/1998
Safeguard Activity Report for the Federal Perkins Loan Program	6/1/1998
Instruction concerning the Assignment of defaulted Federal Perkins Loans and National Direct (or Defense) Student Loans ED for collection that expires June 30, 1998	6/1/1998
This letter accompanies the 1996–97 Federal Perkins Loan Service Cancellations Payment Letter	7/1/1998
Provides updated fund liquidation procedures for an institution that ends its participation in the Federal Perkins Loan Program	7/1/1998

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
This letter provides information regarding supplemental funding under the Campus-Based Programs for the 1998–1999 award year	8/1/1998
Provides information concerning the Assignment of defaulted Federal Perkins Loans and NDSLs to ED for collection	9/1/1998
Use of State scholarships and grants as the non-Federal share of Federal Supplemental Educational Opportunity Grant awards	9/1/1998
Cover letter for the 1999–2000 FISAP Edit/Verification Process	11/1/1998
High winds, tornadoes, and flooding in Florida	1/1/1998
Severe winter and ice storms, high winds, and flooding in New York	1/1/1998
Flooding in Tennessee	1/1/1998
Flooding in North Carolina	1/1/1998
Ice storm in Maine	1/1/1998
Ice storm in New Hampshire	1/1/1998
Flooding in Tennessee	2/1/1998
Flooding in California	2/1/1998
Tornadoes and flooding in Florida	2/1/1998
Flooding in California	2/28/1998
Hurricane Georges in Puerto Rico	9/28/1998
Hurricane Georges in Florida	10/1/1998
Hurricane Georges in the U.S. Virgin Islands	10/1/1998
Hurricane Georges in Alabama	10/1/1998
Hurricane Georges in Mississippi	10/1/1998
Hurricane Georges in Louisiana	10/1/1998
Hurricane Georges in Mississippi	10/1/1998
Hurricane Georges in Mississippi	10/1/1998
Hurricane Georges in Alabama	10/1/1998
Flooding in Missouri	10/1/1998
Ice storm in Maine	2/28/1998
Tornadoes and flooding in Kansas	10/1/1998
Hurricane Georges in Mississippi	10/1/1998
Hurricane Georges in Alabama	10/1/1998
Landslide in Washington	10/1/1998
Flooding and storm damage in Missouri	10/1/1998
Flooding and storm damage in Texas	10/1/1998
Flooding and storm damage in Texas	10/1/1998
Flooding and storm damage in Kansas	11/1/1998
Flooding in Missouri	11/1/1998
Tropical Storm Mitch in Florida	11/10/1998
Ice storm in Vermont	2/28/1998
Flooding and storm damage in Kansas	11/10/1998
Flooding and storm damage in Kansas	11/18/1998
Flooding and storm damage in Texas	11/19/1998
Tropical Storm Mitch in Florida	11/19/1998
Severe weather in Texas	12/1/1998
Tornadoes and flooding in Kansas	12/1/1998
Hurricane Georges in Mississippi	12/9/1998
Tornadoes in Florida	2/25/1998
Tornadoes in Florida	2/27/1998
Flooding in California	3/1/1998
Tornadoes in Florida	3/1/1998
Flooding in New Jersey	3/1/1998
Flooding in California	3/10/1998
Flooding in Alabama	3/11/1998
Flooding in Georgia	3/12/1998
Flooding in Georgia	3/17/1998
Tornadoes and flooding in Florida	3/17/1998
Flooding in Alabama	3/19/1998
Flooding in Georgia	3/191998
Flooding in North Carolina	3/20/1998
Tornadoes in Georgia	3/20/1998
Tornadoes in North Carolina	3/24/1998
Flooding in Georgia	3/31/1998
Tornadoes in Minnesota	4/2/1998
Flooding in Georgia	4/6/1998
Flooding in Georgia	4/9/1998
Tornadoes in Georgia	4/13/1998
Tornadoes in Alabama	4/13/1998
Tornadoes in Georgia	4/14/1998
Flooding in Georgia	4/14/1998
Tornadoes in Tennessee	4/22/1998
Tornadoes in Tennessee	4/27/1998
Tornadoes in Arkansas	4/28/1998
Tornadoes in Tennessee	4/29/1998
Tornadoes in Alabama	5/1/1998

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
Tornadoes in Tennessee	5/1/1998
Tornadoes in Kentucky	5/1/1998
Tornadoes in Tennessee	5/1/1998
Flooding in Georgia	5/1/1998
Flooding in Georgia	5/1/1998
Tornadoes in Tennessee	5/1/1998
Tornadoes in Kentucky	5/1/1998
Tornadoes in Tennessee	5/1/1998
Flooding in Georgia	5/18/1998
Tornadoes in Tennessee	5/27/1998
Tornadoes in South Dakota	6/1/1998
Tornadoes in South Dakota	6/4/1998
Tornadoes in Pennsylvania	6/9/1998
Flooding in Oregon	6/16/1998
Flooding in Massachusetts	6/25/1998
Flooding in Vermont	7/1/1998
Severe weather in Ohio	7/1/1998
Severe weather in Iowa	7/1/1998
Severe weather in West Virginia	7/1/1998
Severe weather in New York	7/1/1998
Severe weather in Iowa	7/1/1998
Fires in Florida	7/1/1998
Fires in Florida	7/1/1998
Severe weather in New York	7/1/1998
Flooding in North Dakota	7/1/1998
Flooding in North Dakota	8/3/1998
Severe weather in Iowa	8/3/1998
Flooding in Vermont	8/3/1998
Severe weather in Iowa	8/3/1998
Tornadoes in Pennsylvania	8/5/1998
Flooding in Massachusetts	8/5/1998
Flooding in Georgia	8/5/1998
Flooding in North Dakota	8/5/1998
Flooding in South Dakota	8/5/1998
Severe weather in West Virginia	8/5/1998
Severe weather in Ohio	8/5/1998
Tornadoes in Minnesota	8/5/1998
Flooding in New Hampshire	8/5/1998
Tornadoes in Kentucky	8/5/1998
Tornadoes in Alabama	8/5/1998
Flooding in Tennessee	8/6/1998
Tornadoes in North Carolina	8/6/1998
Flooding in New Jersey	8/6/1998
Flooding in Tennessee	8/6/1998
Severe weather in Iowa	8/12/1998
Flooding in Wisconsin	8/12/1998
Severe weather in Iowa	8/20/1998
Flooding in Texas	8/26/1998
Hurricane Bonnie in North Carolina	8/27/1998
Flooding in Texas	9/1/1998
Flooding in Wisconsin	9/1/1998
Flooding in Texas	9/2/1991
Hurricane Bonnie in North Carolina	9/4/1998
Hurricane Bonnie in Virginia	9/8/1998
Hurricane Earl in Florida	9/8/1991
Severe weather in New York	9/16/1991
Severe weather in New York	9/22/1998
Severe weather in Texas	9/24/1998
Severe weather in Louisiana	9/24/1998
This letter advises guaranty agencies in the Federal Family Education Loan (FFEL) Program of the potential impact of the ''Year 2000'' problem and the importance of an aggressive approach to ensure that the FFEL Program will continue unimpaired	3/1/1998
To provide general information concerning the forthcoming changes in Title IV program numbers used by participating institutions of postsecondary education, third party servicers, lenders, and guaranty agencies	3/1/1998
Extension of Guaranty Agency Quarterly/Annual Report (ED Form 1130) and Revised Instructions	3/1/1998
This letter announces a less burdensome way for Peace Corps volunteers to apply for economic hardship deferments on their Federal student loans	8/1/1998
Last Submission Date for Default Reinsurance Requests for FY 1998	8/1/1998
Revised Guaranty Agency Quarterly/Annual Report (ED Form 1130), Revised Instructions, Revised Due Dates and Extension of the Guaranty Monthly Claims and Collections Report (ED Form 1189)	11/01/1998

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
This letter advises institutions of the potential impact of the Year 2000 problem and the importance of an aggressive approach to ensuring that Title IV Student Financial Assistance (SFA) Programs will continue unimpaired. It also encloses a brief definition of the Year 2000 problem and compliance requirements, and it highlights the functions where postsecondary institutions and Department of Education SFA data systems interface	1/1/1998
This letter announces the staffing of the Institutional improvement Specialist for each Case Management Team in the Institutional Participation and Oversight Service, the functions that the Specialists perform, and their names and addresses	1/1/1998
Temporary procedures for drawing down Federal Direct Loan, Federal Pell Grant, and Campus-Based Program funds during the period in which the Department converts its payment system from the Payment Management System (PMS) to the new EDCAPS Grant Administration and Payment System (GAPS)	2/1/1998
Implementation of the NSLDS/CPS Post-Screening process during March of 1998 and reminder of institutional responsibility to monitor student eligibility	3/1/1998
To provide general information concerning the forthcoming changes in Title IV program numbers used by participating institutions of postsecondary education, third party servicers, lenders, and guaranty agencies	3/1/1998
Announcement of Rescheduled Transition from PMS to EDCAPS/GAPS	3/1/1998
Information regarding the eligibility of students enrolled in courses offered through distance education to receive financial assistance from the programs authorized by Title IV of the Higher Education Act of 1965, as amended (HEA)	5/1/1998
Changes to the Higher Education Act of 1965, as amended (HEA), made by Public Law 105–18	6/1/1998
This letter transmits A Guide to 1998–99 SARs and ISIRs	6/1/1998
This letter announces a conference for Third Party Servicers sponsored by the U.S. Department of Education August 27–28 in Arlington, VA	6/1/1998
Announces the availability of the NSLDS to accept Title IV Federal student aid overpayment information from institutions	7/1/1998
This letter announces three U.S. Department of Education Electronic Access Conferences (EAC) entitled ''Connect for Success'' to be held in Kansas City, MO November 17–19; Washington, D.C. December 1–3; and San Diego, CA December 15–17	7/1/1998
Announces a less burdensome way for Peace Corps volunteers to apply for economic hardship deferments on their Federal student loans	8/1/1998
Electronic dissemination to replace many SFA mailings	8/1/1998
This letter provides information, schedules and options for institutions wishing to request electronic and/or printed materials and files for the 1999–2000 Renewal Free Application for Federal Student Aid (Renewal FAFSA)	9/1/1998
I am writing to you to ask for your continued support as your financial aid office, business office, and computer processing services work with the Department of Education (the Department) to modernize the delivery of Federal student financial assistance beginning with the 1999–2000 academic year	10/1/1998
This letter announces the availability of Organization Contact Screens in the National Student Loan Data System (NSLDS)	10/1/1998
This letter describes the new procedures for enrolling and updating enrollment information for the Title IV Wide Area Network (Title IV WAN) that will be implemented during November 1998	11/1/1998
This letter provides information about changes and enhancements to the 1999–2000 application processing system, including changes to the Free Application for Federal Student Aid (FAFSA), the Student Aid Report (SAR), and the Institutional Student Information Record (ISIR)	11/1/1998
President Clinton signed the Higher Education Amendments of 1998 into law	11/1/1998
Office of Student Financial Assistance Programs (OSFAP) Update	11/1/1998
This letter transmits A Guide to 1999–2000 SARs and ISIRs	12/1/1998
This letter advises lenders in the Federal Family Education Loan (FFEL) Program of the potential impact of the ''Year 2000'' problem and the importance of an aggressive approach to ensure that the FFEL Program will continue unimpaired	3/1/1998
On September 30, 1997, the United States Court of Appeals for the District of Columbia Circuit affirmed a District Court decision concluding that the Department's interpretation of § 427A(i)(7) of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. § 1077a(i)(7) was incorrect. See *Bank of America N.T. & S.A.* v. *Riley,* 1997 U.S. App. LEXIS 28483 (D.C. Cir. 1997), aff'g 940 F.Supp. 348 (D.D.C. 1996)	3/1/1998
To provide general information concerning the forthcoming changes in Title IV program numbers used by participating institutions of postsecondary education, third party servicers, lenders, and guaranty agencies	3/1/1998
Extension of lender audit requirement deadline	3/1/1998
This letter provides guidance relating to the filing of the Lender's Interest and Special Allowance Request and Report (ED Form 799)	4/1/1998
Extension of filing deadline under Dear Colleague Letter 98–L–202	6/1/1998
Clarification of the Department of Education's method of payment for special allowance granted in the court decision *Bank of America NT & SEA.* v. *Riley*	7/1/1998
Announces a less burdensome way for Peace Corps volunteers to apply for economic hardship deferments on their Federal student loans	8/1/1998
This letter provides clarification of an institutional eligibility criteria for the awarding of increased amounts of unsubsidized loans under the Direct Loan and FFEL programs for certain Health Professions students	10/1/1998
This letter announces enhancements to the Federal Pell Grant customer support function, including expanded services available through the telephone number used to reach the Institutional Access System as well as new addresses for submission of payment data and correspondence	1/1/1998
This letter contains two sets of 1998–99 Federal Pell Grant Program Payment and Disbursement schedules—Regular and Alternative	1/1/1998
Procedures for 1997–98 Federal Pell Grant account adjustments after the September 30, 1998 submission deadline	9/1/1998
This letter is the second in a series that describes the new 1999–2000 Recipient Financial Management System (RFMS) for reporting and requesting funds under the Federal Pell Grant Program	9/1/1998
This letter invites institutions to consider volunteering to participate in a pilot of the Just-In-Time payment method in the Federal Pell Grant Program starting in the 1999–2000 award year	9/1/1998
This letter conveys the application that each participating State must submit to receive fiscal year 1998 funds for the State Student Incentive Grant (SSIG) Program	2/1/1998

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
To provide general information concerning the forthcoming changes in Title IV program numbers used by participating institutions of postsecondary education, third party servicers, lenders, and guaranty agencies	3/1/1998
Fiscal Year 1997 (1997–98 award year) State Student Incentive Grant (SSIG) Program Performance Report (ED Form 1288–1)	8/1/1998
This letter provides information on a preliminary estimate of your institution's 1997–98 Federal Work-Study funding. WE ARE SENDING YOU THIS LETTER ALONG WITH THE FISAP EDIT/VERIFICATION MATERIALS FOR 1997–98	2/24/1998
This letter describes two training series on the 1999—2000 EDExpress for Windows 32-bit software: One on Application Processing and the other on Packaging. A training calendar, description of the training sessions, and registration instructions are attached	2/1/1999
Informing and requesting partner input on SFA's organizational structure	3/25/1999
Announcing New Financial Aid Administrator Training	4/1/1991
This letter describes a nationwide series of Fiscal Officer Training (FOT) workshops, provides the agenda, sites and dates for the workshops; explains the registration procedures; and provides logistical information for these workshops	5/1/1999
This letter announces three additional Spring Training '99 workshops for Puerto Rico schools and includes agendas and a registration form	6/1/1999
The Department of Education is pleased to announce Direct Loan Consolidation training dates, locations, and how to register	6/1/1999
We are now offering Direct Loan Consolidation training in Boston, MA (Region I), Atlanta, GA (Region IV), and Kansas City, MO (Region VII)	7/21/1999
This letter announces a series of one-day federal student aid workshops for High School Counselors and TRIO counselors. The workshops will be presented from October 1999 through January 2000. This letter also contains a list of workshop locations and dates, and provides registration procedures	9/1/1999
October 7, 1999 SFA Satellite Videoconference	9/1/1999
We are now offering Direct Consolidation Loan training in Boston, MA (Region I)	10/1/1999
Letter announcing that 21 lessons in the new computer-based training course SFA COACH are available to download from *www.ifap.ed.gov/sfacoach*	10/1/1999
SFA Satellite Videoconference—December 2, 1999	10/1/1999
January 20, 2000 (1–3 p.m. Eastern Time) Student Financial Aid Videoconference for High School Counselors, TRIO Program Counselors, Students, and Parents	12/1/1999
Year 2000 disclosure notice on the FISAP software package	1/1/1999
Changes in the 2000–2001 FISAP for the Federal Perkins, FSEOG, and FWS Programs	1/1/1999
Tentative 1999–2000 Funding Levels for the Campus-Based Programs	1/1/1999
Tentative 1999–2000 Funding Levels for the Campus-Based Programs	1/1/1999
Application for Additional Allocation of FWS Funds for Fiscal Year 1999	2/1/1999
Information regarding your institution's final funding authorization under the Campus-Based Programs for the 1999–2000 award year	3/1/1999
Procedures to request a waiver of the 1999–2000 FWS community service expenditure requirement	5/1/1999
Additional methods by which an institution may submit its request for a waiver of the 1999–2000 FWS community service expenditure requirement	6/1/1999
This letter accompanies the 1997–98 Federal Perkins Loan Service Cancellations Payment Letter	6/1/1999
Notice to participating schools in the Campus-Based Programs of ED's intent to issue Award Letters, Funding Worksheets, and Cover Letters over Title IV WAN	7/1/1999
Release of Campus-Based Funds and Request for Supplemental FWS	7/1/1999
Waiver of the institutional-share requirement under the FWS Program for students employed as math tutors for elementary through ninth grade	7/1/1999
Calculating Default Rates in the Federal Perkins Loan Program	7/1/1999
Safeguard Activity Report for the Federal Perkins Loan Program	7/1/1999
Use of State scholarships and grants as the non-Federal share of FSEOG awards	8/1/1999
Campus-Based Programs Funding Formula Changes for the 2000–2001 Award Year	9/1/1999
Supplemental funding under the Campus-Based Programs for the 1999–2000 award year	9/1/1999
Reminder to Campus-Based Program participants about the FISAP	9/1/1999
Year 2000 disclosure notice on the FISAP V2.0 software package	10/1/1999
Campus-Based Programs 2000–2001 FISAP Edit/Verification	11/1/1999
Tornadoes in Tennessee	1/20/1999
Tornadoes in Arkansas	1/1/19991
Tornadoes in Tennessee	1/26/1991
Tornadoes in Arkansas	2/2/1999
Tornadoes in Arkansas	2/1/1999
Tornadoes in Tennessee	2/1/1999
Tornadoes in Louisiana.	4/14/1999
Tornadoes in Georgia	4/1/1999
Flood in Missouri	4/1/1999
Tornadoes in Oklahoma	5/1/1999
Tornadoes in Kansas	5/1/1999
Tornadoes in Texas	5/1/1999
Flood in Missouri	5/1/1999
Tornadoes in Oklahoma	5/10/1999
Severe weather in Tennessee	5/1/1999
Severe weather in Colorado	5/1/1999
Severe weather in Iowa	5/27/1999
Severe weather in Illinois	6/1/1999
Severe weather in North Dakota	6/9/1999
Severe weather in Iowa	6/10/1999
Severe weather in South Dakota	6/10/1999

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
Flood in Missouri	6/1/1999
Severe weather in Iowa	6/1/1999
Severe weather in Colorado	6/1/1999
Tornadoes in Kansas	6/1/1999
Tornadoes in Texas	6/1/1999
Severe weather in Iowa	6/1/1999
Discontinuation of ''Disaster Letters''	8/5/1999
Approval of Loan Deferment Forms for the FFEL Program	7/1/1999
Errors in Economic Hardship Deferment Request Form	10/1/1999
A summary of ED's guaranty agency-related contingency plans and general Y2K resources	12/1/1999
Year 2000 disclosure notice on the DL Module of the 1998—1999 EDExpress V4.4 software package	1/1/1999
Year 2000 disclosure notice on the Student Status Confirmation Reporting software package	1/1/1999
Year 2000 disclosure notice on the 1998—1999 Quality Assurance Program	1/1/1999
Year 2000 disclosure notice on the 1999–2000 EDExpress V5.0 software package, which contains the Applications Processing and Packaging modules	1/1/1999
Year 2000 disclosure notice on the 1999–2000 FAFSA Express software package	1/1/1999
Year 2000 disclosure notice on the 1999–2000 FOTW and Renewal FOTW software products	1/1/1999
Students receiving preparation to compete and succeed in the twenty-first century workplace	2/1/1999
Year 2000 disclosure notice on the Title IV Wide Area Network (TIVWAN) and the EDConnect for Windows 32-Bit software package	3/1/1999
Year 2000 disclosure notice on the DL Module of the 1999—2000 EDExpress V5.1 software package	3/1/1999
Year 2000 School Testing	3/1/1999
We are well underway as the nation's first Performance Based Organization	3/1/1999
The provision of the HEA related to student eligibility for Title IV financial aid due to drug convictions will not become effective until July 1, 2000	6/1/1999
Let Direct Loan Consolidation be a tool for you to help your students	6/1/1999
Changes to the process for requesting electronic and/or printed Renewal FAFSA for the 2000–2001 processing cycle	6/1/1999
This letter announces a conference for Third Party Services and Software Providers sponsored by the U.S. Department of Education August 26–27 in Arlington, Virginia	6/1/1999
ED Received An A Grade for Our Year 2000 Progress	7/1/1999
Implementation of Blanket Certificate of Loan Guaranty Pilot Program	8/1/1999
Three Electronic Access Conferences that will be offered in 1999. The conferences, entitled ''Power Up for 2000,'' will be held on November 2–4, 1999, in Miami, Florida; November 15–17, 1999, in Keystone, Colorado; and December 15–17, 1999, in San Antonio, Texas	8/1/1999
Step-by-step instructions and tips to schools wishing to request electronic files and/or printed materials for the 2000–2001 Renewal FAFSA	9/1/1999
Ordering bulk quantities of 2000–2001 Application Materials	9/1/1999
Guidance for helping Title IV participants affected by Hurricane Floyd	9/1/1999
Authorization for a borrower's current loan holder to release the borrower's loan information to consolidating lenders without sending current loan holder a Loan Verification Certificates (LVC) with the borrower's signature if certain condition are met	10/1/1999
Year 2000 disclosure notice on the Student Status Confirmation Reporting version 1.2 (SSCR V1.2) software package	10/1/1999
New enrollment document for the Student Aid Internet Gateway (SAIG)	10/1/1999
Revised Procedures Related to Death and Total and Permanent Disability Discharge Requests for the FFEL Program	11/1/1999
Recently enacted amendment to the Y2K Act (P.L. 106–37) and a reminder of the importance of testing student aid data exchanges with ED's systems	12/1/1999
Final ''Drug Worksheet'' to help explain question 28 on the FAFSA	12/1/1999
Changes and enhancements to the 2000–2001 Application Processing System, including changes to the FAFSA, SAR, the ISIR, our electronic application products, and our new SFA download website	12/1/1999
Information to schools and their servicers about what can still be done to mitigate Y2K system failures in the delivery of Federal title IV aid	12/1/1999
Updates the contingency plans that ED will implement in the event of a Y2K related computer system failure at a school or third-party servicer	12/20/1999
Summary of ED's lender and servicer related contingency plans and general Y2K resources	12/1/1999
Provides our lender and GA partners with information pertaining to loan processing and disbursement options and the Y2K and information about ED's plans to alleviate any issues that may arise when processing or disbursing loans	12/1/1999
Provides our lender and GA partners with information pertaining to student loan servicing and the Y2K and information about ED's plans to alleviate any issues that may arise when servicing loans	12/1/1999
Provides our lender and GA partners with information pertaining to student loan delinquency, default aversion, claim processing and post-claim activities and the Y2K and information about ED's plans to alleviate any issues that may arise during delinquent and defaulted loan activities	12/1/1999
Application to receive award year 1999–2000 funds for the LEAP Program	2/1/1999
1998–1999 award year Leveraging Educational Assistance Partnership Program Performance Report (ED Form 1288–1)	8/1/1999
Year 2000 disclosure notice on the 1998—1999 Pell Payment for Windows V3.0 software package	1/1/1999
1999–2000 Federal Pell Grant Program Payment and Disbursement Schedules	1/1/1999
Additional information regarding the new RFMS—first step is the submission of the origination record	4/8/1999
Additional information regarding the new RFMS—second step is the submission of the disbursement record	4/1/1999
Procedures for 1998–99 Pell account adjustments after the 9/30/1999 submission deadline	8/1/1999
Using the Recipient Financial Management System to submit more than one disbursement record per recipient for the Federal Pell Grant Program	10/1/1999
Year 2000 disclosure notice on the 1999—2000 EDExpress V5.4 software package, which contains the Pell Payment module	10/1/1999
Y2K mitigation plan for the Federal Pell Grant Program for the 1999–2000 award year	12/1/1999
2000–2001 Pell Grant Payment and Disbursement Schedules	12/1/1999

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
This letter describes a nationwide workshops series for Spring 2000 Reauthorization Training and includes the agenda, registration procedures, and logistical information for these workshops	1/1/2000
This letter describes a new training series on the 2000–2001 EDExpress Application Processing for Windows software. Workshop schedules and registration information are included	1/1/2000
We are pleased to announce Direct Consolidation Loan training. This announcement tells you what the training will cover, who should attend, the training dates, locations, and how to register	2/16/2000
This letter describes a nationwide series of National Student Loan Data System (NSLDS) workshops and lists the site, dates, and registration procedures	3/1/2000
This letter describes the series of ''Direct Loan Accounting Training: The Road to Reconciliation''	3/1/2000
This letter describes a new training series on the 2000–2001 EDExpress Pell/RFMS for Windows software. Workshop schedules and registration information are included	3/1/2000
This letter describes a new training series on the 2000–2001 EDExpress Packaging for Windows software. Workshop schedules and registration information are included	3/1/2000
This letter describes a new training series on the 2000–2001 EDExpress Direct Loan Program. Workshop schedules and registration information are included	3/1/2000
This letter describes a new training series on the 2000–2001 EDExpress Application Processing for Windows software. Workshop schedules and registration information are included	4/1/2000
This letter describes a series of training ''Super Weeks'' sponsored by the Office of Student Financial Assistance to be held in Guam, Hawaii, and Puerto Rico. Workshop schedules and registration information are included	4/1/2000
A Pre-Release Version of the Return of Title IV Funds Software is available for use on the Internet. You may also register for lab sessions at Regional Training Facilities and at some school sites	5/1/2000
SFA Publication Listing on the Web	6/1/2000
Attend one of our three Electronic Access Conferences offered in 2000	9/1/2000
October 26, 2000 SFA Satellite Videoconference	9/1/2000
December 7, 2000 SFA Satellite Videoconference	11/1/2000
Now we're glad to tell you that the first edition of the entire 36-lesson course is ready for downloading	2/15/2000
This letter provides information on Tentative 2000–2001 Funding Levels for the Campus-Based Programs	1/1/2000
Changes in the 2001–2002 FISAP for the Federal Perkins Loan, Federal Supplemental Educational Opportunity Grant (FSEOG), and Federal Work-Study (FWS) Programs	1/1/2000
Information regarding your institution's final funding authorization under the Campus-Based Programs for the 2000–2001 award year	3/1/2000
Safeguard Procedures Report for the Federal Perkins Loan Skiptracing Program	4/1/2000
Close-out of the 1998–1999 awards for the Federal Work-Study (FWS), Federal Perkins Loan, and/or Federal Supplemental Educational Opportunity Grant (FSEOG) Programs	5/1/2000
This letter provides information on requesting a waiver of the 2000–2001 Federal Work-Study (FWS) community service expenditure requirements	5/1/2000
This letter pertains to the 1998–1999 Federal Perkins Loan Service Cancellations Reimbursement and Payment Letter	5/1/2000
Fiscal Operations Report for 1999–2000 and Application to Participate for 2001–2002 (FISAP)	7/1/2000
The Campus-Based Reallocation Form (E40–4P)	7/1/2000
Information regarding the 2000–2001 Supplemental Campus-Based award process	9/1/2000
Use of State scholarships and grants as the non-Federal share of Federal Supplemental Educational Opportunity Grant awards	9/1/2000
Campus-Based Programs 2001–2002 FISAP Edit/Verification Process	1/11/2000
2000–08–01—(00–G–329) This letter notifies guaranty agencies, lenders, and servicers in the FFEL program of new Department procedures for processing enrollment information about FFEL borrowers	8/1/2000
2000–01–01—(GEN–00–01) This letter transmits A Guide to 2000–2001 SARs and ISIRs	1/1/2000
Beginning on February 28, 2000, the Direct Consolidation Loan Center will accept only the new ''Federal Direct Consolidation Loan Application and Promissory Note''	1/1/2000
This letter transmits the information necessary to comply with the requirements for providing to borrowers information on the Department's Office of the Ombudsman	3/1/2000
In January 2000, the Department's Office of Inspector General published the U.S. Department of Education's Audit Guide, Audits of Federal Student Financial Assistance Programs at Participating Institutions and Institution Servicers	4/1/2000
Requesting a waiver of the annual audit submission requirements—available for institutions that disburse less than $200,000 in Title IV funds each award year	6/1/2000
We invite you to attend the Third-Party Servicers and Software Providers Conference on August 10 and 11 in Arlington, Virginia. This letter describes the conference and tells you how to register	6/1/2000
SUMMARY: This letter provides advance information on the process for requesting electronic and/or printed Renewal Free Applications for Federal Student Aid (Renewal FAFSA) for the 2001–2002 processing cycle	7/1/2000
The purpose of this letter is to inform you and your staff that we will soon begin collection campus crime statistics as required by Section 485 (a) and (f) of the Higher Education Act (also known as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act) (20 U.S.C.1092(a) and (f). Providing this information is required by law as a condition of your institution's continued participation in the Federal student financial aid programs	7/1/2000
Elimination of the Paper Financial Aid Transcript (FAT)	8/1/2000
This letter is a follow-up to Action Letter #1 posted to IFAP in July 2000. It discusses the 2001–2002 Renewal Application process, including the upcoming release of SFA's newest standalone PC product called Renewal Applications for Windows 2001–2002, Version 1.0. This letter also provides step-by-step instructions and tips to schools wishing to request electronic files and/or printed materials for the 2001–2002 Renewal Free Application for Federal Student Aid (Renewal FAFSA) process	9/1/2000
Ordering bulk quantities of 2001–2002 Application Materials	9/1/2000
We are pleased to announce our new approach to helping you find answers to questions about our Title IV Student Financial Assistance (SFA) programs	9/1/2000
This action letter provides information about changes and enhancements to the 2001–2002 EDESuite software, which includes EDExpress modules	11/1/2000

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
SUMMARY: This letter provides advance notification of a Notice that will be published in the **Federal Register** informing schools of the deadline date for meeting updated minimum technical specifications in order to use our designated electronic processes	11/22/2000
Electronic participation in the SFA Programs	11/22/2000
This action letter provides information about changes and enhancements to the 2001–2002 Application Processing System, including changes to the Free Application for Federal Student Aid (FAFSA), the Student Aid Report (SAR), the Institutional Student Information Record (ISIR), Central Processing System edits, and database matches	11/22/2000
The final drug worksheet titled ''Worksheet for Question 35'' is now available	12/1/2000
Seven Final Rule packages were published on November 1, 2000	11/1/2000
This letter notifies guaranty agencies, lenders, and servicers in the FFEL program of new Department procedures for processing enrollment information about FFEL borrowers	8/1/2000
Application to Receive Award Year 2000–2001 Funds for the Leveraging Educational Assistance Partnership (LEAP) and Special Leveraging Educational Assistance Partnership (SLEAP) Programs	4/1/2000
Fiscal Year 1999 (1999–2000 award year) Leveraging Educational Assistance Partnership (LEAP) Program Performance Report (ED Form 1288–1)	11/1/2000
This letter provides you with additional information regarding the new Recipient Financial Management System (RFMS). RFMS is designed to report and request funds for the Federal Pell Grant Program. The Multiple Reporting Record (MRR) process is a new function available for 1999–2000. The MRR provides information to you about a student's origination and disbursement status at other institutions and the percentage of the student's scheduled award that has been disbursed at all institutions	1/1/2000
This letter provides you with information concerning the procedures for 1999–2000 Federal Pell Grant award adjustments after the October 2, 2000 submission deadline	9/1/2000
This letter contains two sets of 2001–2002 Federal Pell Grant Program Payment and Disbursement Schedules—Regular and Alternate	12/29/2000
Two new training workshops for 2001–2002-Delivery System/Application Processing and Packaging-are starting in February	1/12/2001
May 10, 2001 SFA Satellite Videoconference	4/23/2001
Two Direct Loan Program workshops for 2001–2002: Direct Loan Basic and Direct Loan Update will be available to participants from June through August all across the country	5/9/2001
2001 Software Developers Conference August 9 10, 2001 in Arlington, Virginia	7/6/2001
On behalf of the office of Student Financial Assistance (SFA), U.S. Department of Education, and its Operating Partners, I want to invite you to attend one of the three Electronic Access Conferences offered in 2001. These conferences, entitled ''Access for All'' will be held at John Ascuaga's Nugget, Reno, Nevada, November 5–7; the Baltimore Marriott Waterfront, Baltimore, Maryland, November 27–29; and the Hyatt Regency, Chicago, Illinois, December 11–13	8/30/2001
This letter announces 2001–02 Fiscal Management Training (FMT)	9/20/2001
It's time to start thinking about your 2002–2003 Packaging software! Training workshops for 2002–2003 EDExpress Packaging will be offered in most regions this October and November	9/25/2001
November 1, 2001 SFA Satellite Videoconference	9/26/2001
SUMMARY: December 6, 2001 SFA Satellite Videoconference	11/16/2001
First Annual Spring Update Conference	12/6/2001
Tentative CB funding authorization	1/22/2001
Changes in the 2002–2003 FISAP	2/1/2001
Final CB funding authorization	3/22/2001
Request for community service waiver	4/1/2001
Perkins cancellation reimbursement request for 1999–2000	5/10/2001
Close-out of the 1999–2000 awards	5/18/2001
Outdated Work-Colleges application	5/24/2001
CB disaster relief guidance for 1999–2000 or the 2000–2001 award years	7/12/2001
Fiscal Operations Report for 2000–2001 and Application to Participate for 2002–2003 (FISAP)	7/19/2001
The Campus-Based Reallocation Form (E40–4P) which is due to the Department by August 24, 2001	7/7/2001
The Campus-Based FISAP migration to Web	8/8/2001
Federal Perkins Loan Program IRS Skiptracing Service	8/29/2001
Announces new Perkins promissory notes	11/13/2001
Campus-Based Programs 2002–2003 FISAP/Edit Corrections and Update of Perkins Cash on Hand	11/23/2001
SUMMARY: Issuance of new Perkins promissory notes	11/28/2001
SUMMARY: Use of State scholarships and grants as the institutional share for FSEOG	12/31/2001
Teacher loan forgiveness forbearance and unpaid refund discharge forms	11/1/2001
(SAIG) enhancements	1/1/2001
Financial analysis clarification of long-term debt	1/1/2001
2001–2002 ISIRs SAR/ISIR Guide	2/1/2001
2001–2002 Electronic FAFSA changes	2/15/2001
Change in 2001–2002 FAFSA processing for non-responses to the ''Drug Conviction'' question (Question 35)	3/22/2001
Use of Electronic Signatures in the Federal Student Loan Programs	5/2/2001
Changes and enhancements to the 2002–2003 EDESuite software	11/2/2001
Sample Default Management Plan	6/30/2001
FAFSA, Renewal FAFSA, PIN changes	8/27/2001
Recent Terrorist Attacks—Relief for Borrowers in the Title IV Loan Programs	9/17/2001
Recent Terrorist Attacks—Institutional Reporting Deadlines	9/17/2001
Recent Terrorist Attacks—Persons Affected by Military Mobilization	9/24/2001
Final 2002–2003 drug worksheet	11/7/2001
Teacher loan forgiveness forbearance and unpaid refund discharge forms	11/1/2001
SFA Spring Conference	1/2/2002
This letter announces 2002–03 EDExpress training	4/9/2002
This letter announces a two-day workshop on Tools for Ensuring Program Integrity	4/10/2002

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
SFA COACH 2001–02 is available online	5/6/2002
October 24, 2002, Federal Student Aid (FSA) Satellite Videoconference	9/3/2002
December 12 Federal Student Aid Satellite Videoconference	11/21/2002
This letter announces workshops on Student Eligibility Basics and Delivery System 2003–2004	12/4/2002
This letter provides information on Tentative 2002–2003 Funding Levels for the Campus-Based Programs	1/23/2002
This letter provides information regarding the ''Institutional Application and Agreement for Participation in the Work-Colleges Program'' for the 2002–2003 award year	3/13/2002
Information regarding your institution's final funding authorization under the Campus-Based Programs for the 2002–2003 award year	3/20/2002
Close-out of the 2000–2001 awards for FWS, Perkins Loan, and/or FSEOG Programs	4/19/2002
Revised Policies and Procedures for Assigning Perkins Loans	4/26/2002
SUMMARY: Changes for the 2001–2002 Fiscal Operations Report and 2003–2004 FISAP for Perkins Loan, FSEOG, and FWS Programs	5/14/2002
This letter pertains to the 2000–2001 Federal Perkins Loan Service Cancellation Reimbursement and Payment Letter	5/16/2002
SUMMARY: This letter provides information on requesting a waiver of the 2002–2003 FWS Program community service expenditure requirements	6/27/2002
The Campus-Based Reallocation Form is due to the Department by August 23, 2002	7/24/2002
FISAP 2001–2002 and Application to Participate for 2003–2004	7/25/2002
Information regarding the 2002–2003 supplemental campus-based award process	9/19/2002
Federal Perkins Loan Program IRS Skiptracing Service	10/31/2002
Campus-Based Programs 2003–2004 FISAP Edit/Verification Process	10/31/2002
Expiration of the Current Statutory Exceptions to Certain Loan Disbursement Rules for Low-Default Rate Schools	8/13/2002
Eligibility of Home-School Students—Institutional and Student Eligibility	12/12/2002
This action letter provides information about changes and enhancements to the 2002–2003 Application Processing System, including changes to the FAFSA, SAR, the ISIR, Central Processing System edits, and database matches	1/3/2002
This letter transmits A Guide to 2002–2003 ISIRs	1/8/2002
Expiration of the current statutory exceptions to certain loan disbursement rules for low-default rate schools	8/13/2002
Eligibility of Home-Schooled Students—Institutional and Student Eligibility	11/27/2002
Expiration of the Current Statutory Exceptions to Certain Loan Disbursement Rules for Low-Default Rate Schools	8/13/2002
Eligibility of Home-Schooled Students—Institutional and Student Eligibility	12/12/2002
Summary: This letter contains two sets of 2002–2003 Federal Pell Grant Program Payment and Disbursement Schedules—Regular and Alternate	1/25/2002
This letter announces training for EDExpress Application Processing 2003–04	1/8/2003
This letter announces web-based training for 2003–04 EDExpress Basic functions	3/17/2003
This letter announces 2003–04 EDExpress Direct Loan training for full participants in COD	3/17/2003
This letter announces training for EDExpress Pell Grant Processing, 2003–04	3/17/2003
This letter announces the release of FSA COACH 2002–03	5/6/2003
This letter announces online training sessions through WebEx for 2003–04 EDExpress users	5/21/2003
Title IV Cash Management Training	7/14/2003
This letter announces online training sessions through WebEx for 2003–04 EDExpress users	8/4/2003
The U.S. Department of Education (ED) invites you and your colleagues to join us at one of our two Electronic Access Conferences (EACs)	8/25/2003
Title IV Cash Management Training	9/20/2003
This letter announces FSA's 2004–05 Delivery System Videoconference on October 22, from 1:00–3:00 p.m. Eastern time	9/25/2003
This letter reminds financial aid administrators that FSA's annual Delivery System Videoconference will be broadcast on October 22, from 1:00–3:00 p.m. Eastern Time, and provides registration information	10/8/2003
Application and Agreement for Participation in the Work-Colleges Program'' for the 2003–2004 award year	1/16/2003
Tentative 2003–2004 Funding Levels for the Campus-Based Programs	1/21/2003
Changes in the 2004–2005 FISAP	3/14/2003
Final funding authorization under the Campus-Based Programs for the 2003–2004 award year	3/24/2003
State Scholarships and Grants as the Non-Federal Share of SEOG	4/17/2003
Close-out of the 2001–2002 awards for the Federal Work-Study (FWS), Federal Perkins Loan, and/or Federal Supplemental Educational Opportunity Grant (FSEOG) Programs	4/30/2003
Requesting a waiver of the 2003–2004 Federal Work-Study Program community service expenditure requirements	5/16/2003
Federal Perkins Loan Service Cancellation Reimbursement	6/6/2003
Campus-Based Reallocation Form is due by August 22, 2003	7/15/2003
Fiscal Operations Report and Application to Participate (FISAP)	7/16/2003
Revised Perkins Loan Assignment Form and Assignment Procedures	8/4/2003
Supplemental Campus-Based Awards	9/3/2003
2004–2005 FISAP Edit/Verification Process	11/10/2003
State Scholarships and Grants as the Non-Federal Share of SEOG	12/11/2003
Federal Family Education Loan (FFEL) Program loan holders must respond to Consolidation Loan verification requests within 10 business days	1/24/2003
Administrative relief for students and borrowers affected by military mobilizations	3/25/2003
Foreign schools	8/25/2003
Martin Luther King, Jr. Scholarship Program	1/8/2003
Federal Family Education Loan (FFEL) Program loan holders must respond to Consolidation Loan verification requests within 10 business days	1/24/2003
New electronic notification process for draft and official cohort default rates in the FFEL and Direct Loan programs	3/19/2003
Administrative relief for students and borrowers affected by military mobilizations	3/25/2003
Dependency Overrides	5/2/2003

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
The Office of Federal Student Aid is adjusting the XML implementation schedule. This letter explains the reasons behind this adjustment	7/30/2003
Inclusion of School Information on FSA's Student Aid on the Web (previously known as the Students Portal)	9/15/2003
NSLDS Calculation of Aggregate Loan Amounts	10/15/2003
Martin Luther King, Jr., Scholars Program	12/8/2003
Federal Family Education Loan (FFEL) Program loan holders must respond to Consolidation Loan verification requests within 10 business days	1/24/2003
Administrative relief for students and borrowers affected by military mobilizations	3/25/2003
2003–2004 Federal Pell Grant Payment and Disbursement Schedules	2/27/2003
This letter announces FSA's one-day training session, ''Electronic Application Processing''	2/20/2004
This letter announces FSA's release of the first of two web-based 2004–05 EDExpress Basics training modules	2/25/2004
This letter announces FSA's release of three additional modules of 2004–05 EDExpress Basics: Pell Grants, Direct Loans, and Packaging	5/6/2004
This letter announces the upcoming replacement of FSA's current Training Registration System with a simpler, more user-friendly system, and a two-week period of ''down time'' while FSA transitions from the old system to the new. If you need to register for a course during this period, FSA will register you manually	5/13/2004
This letter announces the arrival of FSA's new, user-friendly Training Registration System	5/28/2004
This letter announces online, instructor-led training sessions for 2004–05 EDExpress users. Topics covered are: Origination, Disbursement, and Reconciliation	6/1/2004
This letter announces online, instructor-led training sessions for 2004–05 EDExpress users. Topics covered are: Direct Loan Origination, Disbursement, and Reconciliation	7/15/2004
This letter announces FSA's one-day training workshops (offered from September through December at locations throughout the country) covering Return of Title IV Funds, Analyzing Data, and Conflicting Information, and provides a link to FSA's new registration system, where all workshops and locations are listed	8/11/2004
This letter announces the release of the 2004–05 edition of FSA's online training course FSA COACH	8/16/2004
Please join us for FSA's videoconference The Application and Delivery System: What's New for 2005–2006 on November 18, 2004	10/28/2004
Don't forget! This is a reminder to tune in to FSA's videoconference, The Application and Delivery System: What's New for 2005–2006, on November 18, from 1:00–3:00 p.m. Eastern Time	11/18/2004
Campus-Based Tentative Funding Levels	1/23/2004
Participation in the Work-Colleges Program	1/28/2004
2005–2006 FISAP Change Letter	3/10/2004
2004–05 Final Funding Authorization Letters for the Campus-Based Programs	3/23/2004
2004–2005 Federal Work-Study Community Service Waiver Requests	3/23/2004
2002–2003 Campus-Based Awards Close-out	4/13/2004
Federal Perkins Loan Service Cancellation Reimbursement	5/10/2004
2003–2004 Campus-Based Reallocation Process	6/25/2004
Fiscal Operations Report and Application to Participate (FISAP)	6/25/2004
2004–2005 Supplemental Campus-Based Awards	9/1/2004
Federal Perkins Loan Program: Default Reduction Assistance Program	9/9/2004
Campus-Based Programs 2005–2006 FISAP Edit/Validation Process and Update of Perkins Cash on Hand	11/24/2004
Numbering of Dear Colleague/Dear Partner Letters for Financial Partners	2/17/2004
Exceptional Performer	3/16/2004
FFEL Consolidation loans for borrowers with both FFEL and non-FFEL Loans	4/30/2004
FFEL Consolidation loans for borrowers with both FFEL and non-FFEL loans	8/26/2004
Completion of Loan Verification Certificates (LVCs) by Direct Loan Servicing	8/26/2004
FFEL Consolidation Payoffs	12/17/2004
Availability of the 2003 Child Care Provider Loan Forgiveness Application	1/22/2004
Treatment of Coverdell Accounts and 529 Tuition Plans	1/22/2004
Return of Title IV Aid	2/13/2004
Additional Information Regarding E-mails to 2004–05 Financial Aid Applicants	5/11/2004
Adjusted XML implementation schedule	7/15/2004
Contact information for FSA's Student Loan Ombudsman's Office	7/19/2004
Required electronic processes and related system requirements	9/14/2004
Recent Hurricanes—Filing and Reporting Deadlines	9/21/2004
Requesting and Using an ED–PIN	9/27/2004
Reporting of Foreign Gifts, Contracts, and Relationships by Institutions	10/4/2004
Ordering of Paper FAFSAs	12/1/2004
Enactment of the ''Taxpayer-Teacher Protection Act of 2004''	12/3/2004
2004–2005 Federal Pell Grant Payment and Disbursement Schedules	1/30/2004
This letter announces FSA's release of the first of two web-based 2005–06 EDExpress Basics training modules	1/26/2005
This letter announces a series of one-day workshops on Managing Audits and Program Reviews: Paths for Success, which will also cover self-assessment tools for post secondary institutions to use. It also provides a link to FSA's new registration system, where all workshops and locations are listed	1/28/2005
This letter announces FSA's 2005–06 online, instructor-led training sessions for users of EDExpress and FAA Access to CPS On-line. Topics covered are: Application entry in EDExpress and FAA Access, Corrections in FAA Access, ISIR Request generation and software enhancements to both systems	3/21/2005
This letter announces FSA's 2005–06 online, instructor-led training sessions for users of EDExpress. Topics covered are: Pell Grant Processing including advanced uses of Multiple Entry, Disbursement Profile codes, Web functionality, software enhancements and the effect on school business processes	4/14/2005

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
This letter announces FSA's 2005–06 online, instructor-led training sessions for users of EDExpress. Topics covered are: Direct Loan processing including advanced uses of Multiple Entry, Disbursement Profile codes, Web functionality, software enhancements, new reports and the effect on school business processes	5/31/2005
This letter announces the availability of a recorded version of FSA's 2005–06 online, training session for users of EDExpress and FAA Access to CPS On-line. Topics covered are: Application entry in EDExpress and FAA Access, Corrections in FAA Access, ISIR Request generation and software enhancements to both systems. This is a pre-recorded session that demonstrates new and useful features of these FSA software products	6/20/2005
New Web site for FSA publication orders: *www.FSAPubs.org*	10/20/2005
This letter announces FSA's release of the first of three online, self-paced learning modules on EDExpress for 2006–07. This first module, ''Application Processing using FAA Access to CPS on the web'' covers FAA Access Menus and Navigation and Using EDconnect to transmit data	12/19/2005
This letter announces the posting to our eCB website of institutions' tentative 2005–2006 funding levels for the campus-based programs	1/24/2005
Participation in the Work-Colleges Program	2/14/2005
Use of State Scholarships and Grants as the Non-Federal Share of FSEOG Awards	2/25/2005
This letter announces the upcoming posting to our eCampus-Based (eCB) web site of schools' 2005–2006 final funding authorizations for the campus-based programs	3/23/2005
This letter provides information on requesting a waiver of the 2005–2006 community service expenditure requirements under the Federal Work-Study Program	4/6/2005
This letter provides information about the Fiscal Operations Report for 2004–2005 and Application to Participate for 2006–2007 (FISAP) for the Federal Perkins Loan (Perkins Loan), Federal Supplemental Educational Opportunity Grant (FSEOG), and Federal Work-Study (FWS) programs	5/13/2005
2003–2004 Campus-Based Awards Closeout	5/17/2005
2003–2004 Federal Perkins Loan Service Cancellation Reimbursement	6/6/2005
Final FISAP	6/30/2005
2004–2005 Campus-Based Reallocation Form and Process	6/30/2005
New Process for Federal Perkins Loan Program Default Reduction Assistance Program	7/7/2005
FISAP Edit Corrections and Perkins Cash on Hand Update Due December 15, 2005	11/16/2005
2004–2005 Campus-Based Awards Closeout	12/16/2005
Federal Family Education Loan (FFEL) Consolidation loans for borrowers with both FFEL and non-FFEL loans	9/20/2005
Invitation to Help Vision New Aid Delivery Processes	2/8/2005
Teacher Loan Forgiveness Application and Forbearance Forms (Revised)	3/9/2005
Notifications to 2005–06 Applicants Reminding Them to Update Estimated Income Information	3/14/2005
FEBI Has a New Name	4/1/2005
Requesting Approval to Make a Late Disbursement Beyond the 120-Day Period	4/14/2005
2006–2007 FAFSA on the Web Worksheet and Paper FAFSA Distribution Plan	9/1/2005
Availability of the Child Care Provider Loan Forgiveness Application for Renewal Benefits and the Child Care Provider Loan Forgiveness Forbearance Form	9/16/2005
Updated Guidance for Requesting Approval to Make a Late Disbursement Beyond the 120-Day Period	9/29/2005
Sample Default Prevention and Management Plan	9/30/2005
Notice of waiver of Title IV grant repayment for students affected by a disaster	11/9/2005
2005–2006 Federal Pell Grant Payment and Disbursement Schedules	1/4/2005
(1) Testing on summary	9/28/2005
This letter announces a series of one-day workshops on Fiscal Officer Training (FOT) for 2006. It also provides a link to the Federal Student Aid's registration system, where all workshops and locations are listed	1/24/2006
This letter announces FSA's release of the second of three online, self-paced learning modules on EDExpress for 2006–07. This module, ''Global Functions and Packaging'' covers all the global functions of the EDExpress software as well as the Packaging Module	3/1/2006
We are pleased to announce the release of the third of three online, self-paced learning modules on EDExpress for 2006–07. This module, ''Pell Grant and Direct Loan Processing'' covers all the Pell Grant Program and Direct Loan functions of the EDExpress software	4/11/2006
This letter announces FSA's release of a new online, self-paced learning session for the Return of Title IV Funds (R2T4) on the Web Software. This session covers all aspects of using the R2T4 on the web software including setup, reporting and calculating refunds for all institutional program types	4/24/2006
HERA Training Opportunities	5/30/2006
HERA WEBINAR June 21, 2006	6/14/2006
This letter announces ADDITIONAL SPACE AVAILABLE for the Federal Student Aid's online, instructor-led training sessions to inform Financial Aid Administrators of the provisions of the Higher Education Reconciliation Act (P.L. 109–171) signed by the President on February 8, 2006	6/19/2006
HERA WEBINAR August 2, 2006	7/18/2006
Federal Student Aid Conferences	8/18/2006
This letter announces a series of one-day workshops covering the provisions of the Higher Education Reconciliation Act, with a special focus on Academic Competitiveness Grants and National SMART Grants. This letter also includes a link to Federal Student Aid's ''Training for Financial Aid Professionals'' web page, where you can view the workshop schedule and register for the one that best meets your needs	9/1/2006
Summary: We are pleased to announce that the 2006–07 edition of FSA COACH is now available at *www.ed.gov/fsacoach.* This self-paced online training course offers a comprehensive introduction to FSA management and has been updated to include HERA requirements	10/12/2006
We are pleased to announce that the 2006–07 edition of FSA COACH for Foreign Schools is now available at *http://www.ed.gov/offices/OSFAP/fsacoach/foreignschools/index.html.* This self-paced online training course, based on the original FSA COACH for U.S. schools, offers foreign school personnel a comprehensive introduction to FFEL program management and has been updated to include HERA requirements	11/20/2006

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
Tentative 2006–2007 Funding Levels for the Campus-Based Programs	1/19/2006
Participation in the Work-Colleges Program	2/8/2006
Use of State Scholarships and Grants as the Non-Federal Share of FSEOG Awards	2/27/2006
2006–2007 Final Funding Authorizations for the Campus-Based Programs	3/20/2006
2006–2007 Federal Work-Study Program Community Service Waiver Requests	3/27/2006
Draft FISAP	3/30/2006
2004–2005 Federal Perkins Loan Service Cancellation Reimbursement	5/23/2006
Final FISAP	6/19/2006
2005–2006 Campus-Based Reallocation Form and Process	6/19/2006
Revised Assignment Form and Procedures for Assigning Perkins Loans	8/1/2006
2006–2007 Supplemental Campus-Based Awards	9/5/2006
New Process for Accessing the eCampus-Based System	10/25/2006
FISAP Edit Corrections and Perkins Cash on Hand Update Due December 15, 2006	11/21/2006
Federal Family Education Loan (FFEL) Consolidation Loans	3/17/2006
Special Allowance Payments for FFEL PLUS Loans	6/5/2006
Update on ADvance Implementation Schedule	2/15/2006
Correction to Dear Colleague Letter GEN–06–02, FP–06–01	3/14/2006
Academic Competitiveness Grant and National Science and Mathematics Access to Retain Talent (SMART) Grant Programs	4/5/2006
This letter provides the list of academic majors eligible for the National SMART Grants for the 2006–07 award year	5/2/2006
Additional Implementation Guidance—Academic Competitiveness Grant (ACG) and National Science and Mathematics Access to Retain Talent Grant (National SMART Grant) Programs	5/3/2006
Implementing Provisions of the HERA for the 2006–2007 Award Year	6/20/2006
National SMART Grant—Revised List of Eligible Majors	8/25/2006
2007–08 Publication Update: Includes FAFSA and FAFSA on the Web Worksheet Information	9/20/2006
Institutional Accreditation for Distance Learning Programs	9/28/2006
Implementation of ''Academic Year'' Definition in the Academic Competitiveness Grant (ACG) and National SMART Grant Programs	10/20/2006
The Third Higher Education Extension Act of 2006, Public Law 109–292	12/1/2006
2006–2007 Federal Pell Grant Payment and Disbursement Schedules	1/11/2006
Reminder: Federal Student Aid's three-day ''Financial Aid Basics'' training will be delivered in five cities throughout 2007	1–19–207
This letter announces Federal Student Aid's 2007–08 online, instructor-led training sessions on our Return of Title IV Funds software. Topics covered include using the on-line R2T4 calculation software properly to calculate the return of Federal funds resulting from student withdrawals. This session includes the changes to the R2T4 calculation resulting from the Higher Education Reconciliation Act of 2006	2/26/2007
This letter announces Federal Student Aid's 2007–08 online, instructor-led training sessions on Applicant Data Resolution. Topics covered include resolving student application data rejects and using the Department's Web based systems to correct errors	2/26/2007
Federal Student Aid's series of one-day workshops covering implementation of the ACG and National SMART Grant Training	3/21/2007
Federal Student Aid's 2007–08 online, instructor-led training sessions on COD Basics: Resolving Issues with Title IV Grants	4/11/2007
This letter announces FSA's release of the first of three online, self-paced learning modules on EDExpress for 2007–08. This first module covers FAA Access Menus and Navigation, Global functions, Packaging and Using EDconnect to transmit data	4/27/2007
This letter announces FSA's release of the second of three online, self-paced learning modules on EDExpress for 2007–08. This module, Pell Origination and Disbursement, covers all the Pell functions of the EDExpress software	4/27/2007
This letter announces ADDITIONAL SESSIONS AVAILABLE for the Federal Student Aid's 2007–08 online, instructor-led training sessions on COD Basics: Resolving Issues with Title IV Grants. The additional sessions will be available the afternoon of May 16 and May 17, 2007. All sessions will be conducted live through the Internet, which will allow you to participate without leaving your desk	5/3/2007
This letter announces Federal Student Aid's on-line training opportunities on the FSA Assessments, the ISIR Analysis Tool, and the Quality Assurance Program	5/2/2007
This letter announces Federal Student Aid's 2007–08 online, instructor-led training sessions on Applicant Data Resolution. Topics covered include resolving student application data rejects and using the Department's Web based systems to correct errors	5/4/2007
Summary: This letter announces FSA's release of the third of three online, self-paced learning modules on EDExpress for 2007–08. This module, Direct Loan Processing, covers all Direct Loan functions of the EDExpress software	5/22/2007
This letter announces additional sessions of Federal Student Aid's 2007–08 online, instructor-led training sessions on our Return of Title IV Funds software. Topics covered include using the on-line R2T4 calculation software properly to calculate the return of Federal funds resulting from student withdrawals. This session includes the changes to the R2T4 calculation resulting from the Higher Education Reconciliation Act of 2006	6/5/2007
This letter announces Federal Student Aid's online, instructor-led training sessions on National Student Loan Data System (NSLDS) Aggregate Loan Calculation. Topics covered include calculating Aggregate Loan limits using the NSLDS methodology and applying that information to student eligibility decisions. This session will also discuss loan types that impact aggregate limit calculations	6/8/2007
This letter announces Federal Student Aid's online, instructor-led training sessions on the National Student Loan Data System (NSLDS). Topics covered include an overview of the system, how to make changes to student data, add users, how to read codes within the system as well as report overpayments and use the transfer monitoring function	6/11/2007
This letter announces Federal Student Aid's online, instructor-led training sessions on Expected Family Contribution (EFC) Calculation training. Topics covered include calculating the expected family contribution using all three federal methodologies, the factors that affect the EFC and using professional judgment. This session will provide case study opportunities to calculate the EFC for a variety of students	6/26/2007

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
This letter announces Federal Student Aid's online, instructor-led training sessions on the Fiscal Operations Report and Application to Participate (FISAP) form. Topics covered include essential information on each section of the FISAP, discussion on the most common errors in completing the FISAP and current changes to the FISAP. There will also be time for questions and answers	7/23/2007
2007–08 Online, Instructor-Led Training Sessions on Improving Direct Loan Processing	9/10/2007
ISIR Analysis Tool Training Session for Beginners available for viewing	9/25/2007
This letter announces ADDITIONAL training sessions on National Student Loan Data System (NSLDS) Aggregate Loan Calculation using Federal Student Aid's Distance Education system	10/22/2007
This letter announces ADDITIONAL training sessions on the National Student Loan Data System (NSLDS) using the Department's Distance Education system	10/23/2007
This letter announces Federal Student Aid's Podcast of the recent 2007–2008 online, instructor-led training sessions on Applicant Data Resolution. Topics include resolving student application data rejects and using the Department's Web based systems to correct errors	10/25/2007
Live Internet Briefings (Webinars) on new Title IV Student Assistance Legislation and Regulations	11/15/2007
G5 Phase I Implementation Webinar	11/15/2007
Recorded Internet Briefings (Webinars) on new Title IV Student Assistance Legislation and Regulations Now Available	12/18/2007
Tentative 2007–2008 Funding Levels for the Campus-Based Programs	1/17/2007
Participation in the Work-Colleges Program	2/1/2007
2007–2008 Final Funding Authorizations for the Campus-Based Programs	3/15/2007
2007–2008 Federal Work-Study Program Community Service Waiver Requests	3/26/2007
Use of State Scholarships and Grants as the Non-Federal Share of FSEOG Awards	3/4/2007
Draft FISAP and Instruction Booklet	4/24/2007
2005–2006 Campus-Based Awards Closeout	4/26/2007
FWS Community Service Requirements	5/17/2007
2005–2006 Federal Perkins Loan Service Cancellation Reimbursement	5/29/2007
New Federal Minimum Wage and the Federal Work-Study Program	6/18/2007
FISAP Form/Instructions	6/18/2007
2006–2007 Campus-Based Reallocation Form and Process	7/5/2007
2007–2008 Supplemental Campus-Based Awards	8/29/2007
FISAP Edit Corrections and Perkins Cash on Hand Update Due December 15, 2007	11/14/2007
Correction to Dear Colleague Letter FP–07–03	4/2/2007
Borrower Choice of FFEL Lender	3/30/2007
2007–2008 Academic Competitiveness Grant (ACG) and National SMART Grant Award Amounts and Approved Majors	4/27/2007
National SMART Grant—Revised List of Eligible Majors for Academic Year 2007–2008	9/24/2007
Enrollment Requirements for the National SMART Grant Program	10/9/2007
Approval of Loan Discharge Application for Spouses and Parents of September 11, 2001 Victims	11/9/2007
2007–2008 Federal Pell Grant Payment and Disbursement Schedules	2/21/2007
Elimination of the Alternative Federal Pell Grant Payment and Disbursement Schedules	10/12/2007
Training sessions on the National Student Loan Data System (NSLDS) using the Department's Distance Education system	2/15/2008
Regulatory and Legislative Update—Spring, 2008 workshop series	3/19/2008
TEACH Grant Implementation and Processing Webinar	3/20/2008
2008–09 Online, Instructor-Training Sessions on Improving Direct Loan Processing	3/31/2008
TEACH Grant Implementation and Processing Webinar Recording	5/1/2008
Webinar Recording—2008–09 Online, Instructor-Training Sessions on Improving Direct Loan Processing	5/19/2008
Live Internet Briefing (Webinar) on Title IV Federal Student Financial Assistance Program Changes	6/9/2008
William D. Ford Federal Direct Loan (Direct Loan) Program Overview—Online, Instructor-Led Training	6/9/2008
This letter announces FSA's release of the first of three online, self-paced learning modules on EDExpress Basics for 2008–09	8/8/2008
Webinar Recording—June 17, 2008 Live Internet Briefing (Webinar) on Title IV Federal Student Financial Assistance Program Changes	8/11/2008
Webinar Recording—Online, Instructor-Led Training Session—William D. Ford Federal Direct Loan (Direct Loan) Program Overview	8/15/2008
Live Internet Webinar on Fiscal Operations Report and Application to Participate (FISAP)	9/3/2008
Financial Aid Basics workshops	9/18/2008
Webinar Recording—Online, Instructor-Led Training Session— Fiscal Operations Report and Application to Participate (FISAP)	9/29/2008
Tentative 2008–2009 Funding Levels for the Campus-Based Programs	1/17/2008
Participation in the Work-Colleges Program	1/29/2008
2008–2009 Final Funding Authorizations for the Campus-Based Programs	3/18/2008
Draft FISAP and Instruction Booklet	4/16/2008
Use of State Scholarships and Grants as the Non-Federal Share of FSEOG Awards for the 2007–2008 Award Year	5/2/2008
2006–2007 Campus-Based Awards Closeout	5/8/2008
2006–2007 Federal Perkins Loan Service Cancellation Reimbursement	5/21/2008
FISAP Form/Instructions	6/25/2008
2007–2008 Campus-Based Reallocation Form and Process	6/25/2008
2008–2009 Supplemental Campus-Based Awards	9/19/2008
FISAP Edit Corrections and Perkins Cash on Hand Update Due December 15, 2008	11/14/2008
Use of State Scholarships and Grants as the Non-Federal Share of FSEOG Awards for the 2008–2009 Award Year	11/20/2008
Lender-of-Last-Resort Services in the Federal Family Education Loan Program	4/14/2008
National SMART Grant—Request for Designation of Additional Eligible Majors	2/6/2008
FFEL Lender-of-Last-Resort Loan Program	5/6/2008
School Use of a Preferred Lender List in the FFEL Program	5/9/2008
National SMART Grant Program—List of Eligible Majors for Academic Year 2008–2009	6/20/2008
Reminder of guidance for helping Title IV participants affected by a disaster	6/24/2008

OFFICE OF POSTSECONDARY EDUCATION (OPE)—Continued

Title	Date issued
2008–2009 Federal Pell Grant Payment and Disbursement Schedules	1/14/2008
Subject: EDExpress Basics—Final Release of EDExpress Basics for 2009–2010	10/13/2009
Subject: Reminder—Direct Loan Webinar Training Suite	10/13/2009
Subject: Live Internet Webinar—FFEL, Direct Loan, and Perkins Loan Final Regulations	10/30/2009
Subject: Live Internet Webinar—General Title IV and Non-Loan Programmatic Issues Final Regulations	10/30/2009
Subject: Training Recording—Verification: A School Responsibility	11/20/2009
Subject: Webinar Recording—FFEL, Direct Loan, and Perkins Loan Final Regulations	12/15/2009
Subject: Webinar Recording—General Title IV and Non-Loan Programmatic Issues Final Regulations	12/15/2009
Subject: Live Internet Webinar Series on Higher Education Opportunity Act (HEOA)	2/5/2009
Subject: Live Internet Webinar on Direct Loan Processing for New Participants	2/12/2009
Subject: Demonstration Recordings—Electronic Cohort Default Rate Appeals Release 2.1 Demonstration Sessions	2/18/2009
Subject: Additional Classroom Space—March and April 2009 Live Internet Webinar Sessions on Direct Loan Processing for New Participants	2/27/2009
Subject: FSA COACH—Redesign and 2008–2009 Update	3/19/2009
Subject: Additional Classroom Space—March and April 2009 Live Internet Webinar Sessions on Direct Loan Processing for New Participants (Second Increase)	3/19/2009
Subject: Live Internet Webinar—HEOA Changes to Pell Grant and TEACH Grant Programs and ECASLA Changes to ACG and National SMART Grant Programs	4/20/2009
Subject: Live Internet Webinar—HEOA Changes to FFEL and Direct Loan Programs	4/20/2009
Subject: Live Internet Town Hall Meeting—Higher Education Opportunity Act	4/22/2009
Subject: EDExpress Basics—Release of First EDExpress Basics for 2009–2010 Module	5/1/2009
Subject: Reminder—Live Internet Town Hall Meeting on Higher Education Opportunity Act	5/12/2009
Subject: EDExpress Basics—Release of Second EDExpress Basics for 2009–2010 Module	6/1/2009
Subject: Live Internet Webinar—Direct Loan Tools	7/10/2009
Subject: Live Internet Webinar—Direct Loan Processing for EDExpress for Windows Users	7/10/2009
Subject: EDExpress Basics—Release of Third EDExpress Basics for 2009–2010 Module	7/13/2009
Subject: Webinar Recording—Direct Loan Processing for New Participants	7/24/2009
Subject: Webinar Recording—HEOA Changes to FFEL and Direct Loan Programs	7/24/2009
Subject: Town Hall Meeting Recording—Higher Education Opportunity Act	7/24/2009
Subject: Live Internet Webinar—FFEL, Direct Loan, and Perkins Loan Notices of Proposed Rulemaking	8/5/2009
Subject: Additional Session—Live Internet Webinar on Direct Loan Processing for New Participants in August 2009	8/5/2009
Subject: Training Workshops—Fundamentals of Title IV Administration	8/5/2009
Subject: Additional Session—Live Internet Webinar on Direct Loan Processing for EDExpress for Windows Users in September 2009	8/18/2009
Subject: Training Recording—National Student Loan Data System (NSLDS) Aggregate Loan Calculation (Updated March 16, 2011)	8/24/2009
Subject: Live Internet Webinar—Completing the FISAP	8/27/2009
Subject: Live Internet Webinar—General Title IV and Non-Loan Programmatic Issues Notice of Proposed Rulemaking	8/28/2009
Subject: Training Recording—Return of Title IV Funds (R2T4) Overview	9/2/2009
Subject: Training Recording—Return of Title IV Funds (R2T4) on the Web	9/2/2009
Subject: Demonstration Recordings—Electronic Cohort Default Rate Appeals 2.2 Demonstration Sessions	9/18/2009
Subject: Training Recording—Pell Calculations for Clock-Hour Programs	9/25/2009
Subject: Live Internet Webinars—Direct Loan Webinar Training Suite	9/28/2009
Campus-Based Waivers and Reallocation Based on a Major 2008 Natural Disaster	5/15/2009
Completion of Loan Verification Certificates	4/3/2009
National SMART Grant—Designation of Additional Eligible Majors	3/26/2009
National SMART Grant Program—List of Eligible Majors for Award Year 2009–2010	7/6/2009
Teaching in a high-need field in order to satisfy the TEACH Grant Program Agreement to Serve	8/13/2009
Minor Prior Year Charges	9/8/2009
2009–2010 Federal Pell Grant Payment and Disbursement Schedules	2/20/2009
Subject: Webinar Recordings—Direct Loan Business Officer Training	8/12/2010
Subject: EDExpress Online Training—Release of Third EDExpress Online Training for 2010–2011 Module	8/13/2010
Subject: EDExpress Online Training—Final Release of EDExpress Online Training for 2010–2011	9/13/2010
Subject: Webinar Recording—Private Education Loan Disclosure Requirements	9/15/2010
Subject: Training Recording—Completing the FISAP	9/15/2010
Subject: Webinar Recording—Direct Loan Reconciliation	10/26/2010
Subject: Live Internet Webinar—Default Prevention and Federal Student Loan Servicing Overview	10/28/2010
Subject: Webinar Recordings—Foreign School Direct Loan Training	10/29/2010
Subject: Webinar Recordings—Direct Loan Webinar Training Suite	11/4/2010
Subject: Training Recording—Direct Loan Reconciliation	12/6/2010
Subject: Live Internet Webinars—Direct Loan Webinar Training Suite	1/11/2010
Subject: Live Internet Webinars—Year-Round Pell Grant Webinar for Term-Based Schools and Year-Round Pell Grant Webinar for Clock-Hour/Non-Term Schools	1/21/2010
Subject: Reminder—Direct Loan Webinar Training Suite	1/21/2010
Subject: FSA COACH—2009–2010 Update	2/4/2010
Subject: Live Internet Webinars—Direct Loan Webinars for Graduate/Professional Schools	2/17/2010
Subject: Live Internet Webinar—DUNS Number and TIN Registration with Central Contractor Registration Database By March 31, 2010	2/25/2010
Subject: Demonstration Recordings—Electronic Cohort Default Rate Appeals 3.0 Demonstration Sessions	3/5/2010
Subject: Live Internet Webinars—Direct Loan Business Officer Training	3/5/2010
Subject: Live Internet Webinars—Additional Year-Round Pell Grant Webinar for Term-Based Schools and Year-Round Pell Grant Webinar for Clock-Hour/Non-Term Schools	3/16/2010

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Title	Date issued
Subject: Live Internet Town Hall Meeting—Year-Round Pell Grant Q & A	3/25/2010
Subject: Podcasts—FSA Assessments	3/30/2010
Subject: Live Internet Webinars—Direct Loan Webinar Training Suite	4/5/2010
Subject: Training Recording—Using EDExpress to Process Direct Loans	4/26/2010
Subject: Live Internet Webinar—What's New for Direct Loans	4/28/2010
Subject: Live Internet Webinars—Direct Loan Webinars for Graduate/Professional Schools	4/29/2010
Subject: Training Workshops—Direct Loan Training for Foreign Schools	4/30/2010
Subject: Training Recording—Professional Judgment, Session One: An Overview	5/5/2010
Subject: Additional Sessions—Live Internet Webinar on What's New for Direct Loans	5/14/2010
Subject: Live Internet Webinar—Using EDExpress to Process Direct Loans	5/14/2010
Subject: EDExpress Online Training—Release of First EDExpress Online Training for 2010–2011 Module	5/24/2010
Subject: Webinar Recordings—Year-Round Pell Grant Webinar for Term-Based Schools and Year-Round Pell Grant Webinar for Clock-Hour/Non-Term Schools	5/25/2010
Subject: Live Internet Webinar—Direct Loan Questions and Answers	5/25/2010
Subject: Live Internet Webinars—Direct Loan Webinar Training Suite	6/1/2010
Subject: Reminder—Live Internet Webinars on Direct Loans for Graduate/Professional Schools	6/15/2010
Subject: Live Internet Webinar—Using EDExpress to Process Direct Loans	6/16/2010
Subject: Reminder—Direct Loan Webinar Training Suite	6/24/2010
Subject: Live Internet Webinar—Program Integrity Notice of Proposed Rulemaking	7/9/2010
Subject: EDExpress Online Training—Release of Second EDExpress Online Training for 2010–2011 Module	7/27/2010
Subject: Training Workshops—Fundamentals of Title IV Administration	8/2/2010
Subject: Live Internet Webinars—Foreign School Direct Loan Training	8/3/2010
Subject: Live Internet Webinar—Private Education Loan Disclosure Requirements	8/10/2010
General guidance for accrediting agencies and institutions on the treatment of campuses of Title IV-eligible institutions that have been determined to qualify for independent accreditation	2/25/2010
National SMART Grant—Designation of Additional Eligible Majors	4/2/2010
Support for Schools Transitioning to Direct Loans	4/20/2010
Implementation Guidance for the Deadline for Making Loans under the FFEL Program	6/16/2010
National SMART Grant Program—List of Eligible Majors for Award Year 2010–2011	6/18/2010
Temporary Authority for the Consolidation of Loans in an In-School Status	6/29/2010
2010–2011 Federal Pell Grant Payment and Disbursement Schedules	01/13/210
REVISED 2010–2011 Federal Pell Grant Payment and Disbursement Schedules	4/8/2010
Subject: Training Workshops—Regulatory Update 2011	1/28/2011
Subject: Webinar Recording—Default Prevention and Federal Student Loan Servicing Overview	2/1/2011
Subject: Additional Sessions—Training Sites Added in Tennessee, Arizona, and Colorado for Regulatory Update 2011 Training Workshops	2/10/2011
Subject: Additional Sessions—Training Sessions Added in New York, Kansas City, and Boston for Regulatory Update 2011 Training Workshops	2/15/2011
Subject: FSA COACH—2010–2011 Update	2/6/2011
Subject: Training Workshops—Participant Materials Now Available for Regulatory Update 2011 Training Workshops	2/17/2011
Subject: EDExpress Online Training—Release of First EDExpress Online Training for 2011–2012 Module	3/21/2011
Subject: EDExpress Online Training—Release of Second EDExpress Online Training for 2011–2012 Module	4/8/2011
Subject: Training Workshops—Cancellation of Certain Regulatory Update 2011 Workshops Due to the Potential Government Closure	4/8/2011
Subject: Live Internet Webinars—Regulatory Update 2011	4/20/2011
Subject: Live Internet Webinar—Implementation of the Reporting and Disclosure Requirements of the October 29, 2010 Final Regulations Related to Gainful Employment Programs	5/5/2011
Subject: Training Recording—Professional Judgment, Session Two	5/16/2011
Subject: Live Internet Webinar—COD and *StudentLoans.gov* Enhancements for 2011–2012 Direct Loan Processing	6/3/2011
Subject: Live Internet Webinar—Reporting Gainful Employment Data to NSLDS	6/13/2011
Subject: EDExpress Online Training—Release of Third EDExpress Online Training for 2011–2012 Module	6/13/2011
Subject: EDExpress Online Training—Release of Direct Loan Tools Online Training Module	8/1/2011
Subject: Training Workshops—Fundamentals of Title IV Administration	8/1/2011
Subject: Training Recording—Completing the FISAP	8/23/2011
Subject: Live Internet Webinar—Adding a New Gainful Employment Program	9/7/2011
Subject: Live Internet Webinar—Additional Information on the NSLDS Gainful Employment Reporting Process	9/19/2011
Subject: EDExpress Online Training—Release of 508-Compliant Versions of EDExpress Online Training for 2011–2012 and Direct Loan Tools Online Training	9/26/2011
Subject: Live Internet Webinar—Direct Loans, COD, and *StudentLoans.gov* for 2011–2012	10/3/2011
Subject: Additional Session—Session Added for NSLDS Gainful Employment Reporting Process Webinar	10/4/2011
Subject: Live Internet Webinars—Business Officer Training	10/6/2011
Subject: Live Internet Webinar—Direct Loan Reports	10/17/2011
Subject: Additional Sessions—Live Internet Webinar on Direct Loans, COD, and *StudentLoans.gov* for 2011–2012	10/25/2011
Subject: Live Internet Webinar—Direct Loan Primers	10/27/2011
Subject: Webinar Recordings—Direct Loan Reports and Direct Loan Primer	12/12/2011
Subject: Live Internet Webinar—Gainful Employment Data Corrections	12/21/2011
Status of the Federal Perkins Loan Program	2/17/2011
Enhancements to the FAFSA–IRS Data Retrieval Process	2/23/2011
Guidance to Institutions and Accrediting Agencies Regarding a Credit Hour as Defined in the Final Regulations Published on October 29, 2010	3/18/2011
Guidance on Students Enrolled in Study-Abroad Programs in Japan	3/29/2011
Implementation of Regulatory Requirements Related to Gainful Employment Programs	4/20/2011

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Title	Date issued
AMENDED—State authorization under the Program Integrity Regulations	4/20/2011
2012–2013 Award Year: FAFSA Information to be Verified, and Acceptable Documentation	7/13/2011
Implementation of Program Integrity regulations	7/20/2011
Expected Family Contributions of 99,999	12/6/2011
2011–2012 Federal Pell Grant Payment and Disbursement Schedules	2/1/2011
Impact of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 on the Federal Pell Grant Program	4/27/2011
Subject: Reminder—Live Internet Webinar on Gainful Employment Data Corrections	1/6/2012
Subject: Training Recording—Return of Title IV Funds (R2T4)	1/11/2012
Subject: Live Internet Webinar—Calculation of Gainful Employment Debt Measures and Implications for Institutions	2/8/2012
Subject: Live Internet Webinar—COD System and Direct Loan Update	2/9/2012
Subject: Live Internet Webinar—Business Officer Training Q & A	2/14/2012
Subject: Webinar Recording—Business Officer Training Q & A	3/21/2012
Subject: Training Recording—Direct Loan Reconciliation (Interactive)	3/22/2012
Subject: Live Internet Webinar—Direct Loan Reconciliation and Program Year Closeout: Start to Finish	3/26/2012
Subject: Live Internet Webinars—Delinquency and Default Management Webinar Conference	4/13/2012
Subject: Live Internet Webinar—Gainful Employment: How to Read Your GE Back-Up Detail Report	5/2/2012
Subject: Live Internet Webinar—Direct Loan Tools	5/30/2012
Subject: Live Internet Webinar—Direct Loan Reconciliation and Program Year Closeout for Hispanic-Serving Institutions	6/1/2012
Subject: Live Internet Webinar—COD System Update—July 2012 Enhancements	6/7/2012
Subject: Webinar Recording—Direct Loan Reconciliation and Program Year Closeout: Start to Finish	6/19/2012
Subject: Live Internet Webinar—Gainful Employment: Just Released Rates	6/25/2012
Subject: Webinar Recording—Direct Loan Tools	6/27/2012
Subject: Live Internet Webinar—Gainful Employment: How to Read Your GE Back-Up Detail Report—Question and Answer Session	6/28/2012
Subject: Webinar Recordings—Delinquency and Default Management Webinar Conference	7/2/2012
Subject: Training Recording—2012–2013 EDExpress Updates for Release 1.0	7/18/2012
Subject: Training Recording—Completing the FISAP	8/27/2012
Subject: Live Internet Webinars—2012 Fall Webinar Training Series	9/7/2012
Subject: Training Workshops—Fundamentals of Federal Student Aid Administration (Updated September 14, 2012)	9/10/2012
Subject: Training Recording—2012–2013 EDExpress Updates for Release 2.0	9/24/2012
Subject: Reminder—Live Internet Webinars—2012 Fall Webinar Training Series	10/9/2012
Subject: FSA COACH—2012–2013 Update	10/10/2012
Subject: Live Internet Webinar—Gainful Employment Webinar #10: Understanding the NSLDS Corrections Functionality	12/10/2012
Subject: Webinar Recordings—2012 Fall Webinar Training Series	12/4/2012
Loan Verification Certificate for Special Direct Consolidation Loans	1/20/2012
NSLDS Enrollment Reporting Process	3/30/2012
Title IV Eligibility for Students Without a Valid High School Diploma	12/6/2012
2013–2014 Award Year: FAFSA Information to be Verified and Acceptable Documentation	7/17/2012
Financial Aid Shopping Sheet for 2013–14	7/25/2012
Charges Incurred at Bookstores	11/28/2012
2012–2013 Federal Pell Grant Payment and Disbursement Schedules	1/12/2012
Subject: Reminder—Training Workshops—Fundamentals of Federal Student Aid Administration	1/7/2013
Subject: Live Internet Webinar—COD System Update: 2013–2014 New Award Year Setup	3/4/2013
Subject: Live Internet Webinar—Software Developers Webinar May 2013	5/2/2013
Subject: Live Internet Webinar—COD Reporting of Academic Year and Loan Period	5/22/2013
Subject: Live Internet Webinar—150% Direct Subsidized Loan Time Limit	5/22/2013
Subject: Training Resource—The New Federal Student Aid E-Training Web Site	6/17/2013
Subject: EDExpress Online Training—EDExpress Release 1.0 Online Training for 2013–2014	6/24/2013
Subject: Webinar Recordings—COD Reporting of Academic Year and Loan Period and 150% Direct Subsidized Loan Time Limit	7/5/2013
Subject: Live Internet Webinar—Software Developers Conference	7/18/2013
Subject: Training Recording—Completing the FISAP	8/16/2013
Subject: Webinar Recording—Software Developers Webinar May 2013	8/21/2013
Subject: Webinar Recording—Software Developers Conference August 2013	9/3/2013
Subject: Training Workshops—Fundamentals of Federal Student Aid Administration	9/20/2013
Subject: Live Internet Webinar—150% Direct Subsidized Loan Limit Webinar #3: Review of Basics and Implementation Update	9/26/2013
Subject: EDExpress Online Training—EDExpress Release 2.0 Online Training for 2013–2014	10/22/2013
Subject: Rescheduled—Live Internet Webinar—150% Direct Subsidized Loan Limit Webinar #3: Review of Basics and Implementation Update	10/24/2013
Subject: Live Internet Webinar—Default Aversion and Management	11/7/2013
Subject: Training Resource—90/10 Regulation and Calculation Presentation Materials	11/7/2013
Subject: Live Internet Webinar—Software Developers December 2013 Webinar	11/13/2013
Subject: Webinar Recording—150% Direct Subsidized Loan Limit Webinar #3: Review of Basics and Implementation Update	12/9/2013
Subject: FSA COACH—2013–2014 Update for Domestic Schools	12/30/2013
Dear Colleague Letters Issued Under GEN and ANN Types Beginning January 2013	1/14/2013
Invitation to Participate in Experiments Under the Experimental Sites Initiative	1/17/2013
2013–2014 Federal Pell Grant Payment and Disbursement Schedules	1/30/2013
Extension of Invitation to Participate in the Experimental Sites Initiative	2/27/2013
Renewal of Private Education Loan Applicant Self-Certification Form (Updated June 21, 2013)	6/12/2013
2014–2015 Award Year: FAFSA Information to be Verified and Acceptable Documentation	6/13/2013
Invitation to Participate in the Experimental Sites Initiative	8/9/2013
FY 2014 Sequestration Changes to the Title IV Student Aid Programs (Updated October 25, 2013)	10/17/2013

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Title	Date issued
Experimental Sites Initiative—Solicitation of Ideas	12/4/2013
2014–2015 Financial Aid Shopping Sheet	12/13/2013
IMPORTANT UPDATE: Change to FY 2014 Sequestration-Required Reduction for TEACH Grant	12/23/2013
Subject: Webinar Recording—Software Developers December 2013 Webinar	1/6/2014
Subject: Webinar Recording—Default Aversion and Management	1/8/2014
Subject: Live Internet Webinar—New Direct Consolidation Loan Process	2/20/2014
Subject: Online Training Module—Default Aversion and Management	2/24/2014
Subject: FSA COACH—2013–2014 Update for Foreign Schools	2/28/2014
Subject: Rescheduled—Live Internet Webinar—New Direct Consolidation Loan Process	3/14/2014
Subject: Live Internet Webinar—COD System Update: 2014–2015 New Award Year Setup	3/19/2014
Subject: Webinar Recording—New Direct Consolidation Loan Process	4/3/2014
Subject: Online Training Module—Satisfactory Academic Progress	4/21/2014
Subject: Live Internet Webinar—Software Developers June 2014 Webinar	5/14/2014
Subject: FSA Coach—2014–2015 Update	5/30/2014
Subject: EDExpress Online Training—EDExpress Release 1.0 Online Training for 2014–2015	6/6/2014
Subject: Live Internet Webinars—150% Direct Subsidized Loan Limit Webinar #4 and Webinar #5: New NSLDS Program-Level Enrollment Reporting Requirements	6/27/2014
Subject: Webinar Recording—Software Developers June 2014 Webinar	7/22/2014
Subject: Online Training Module—Consumer Information	7/25/2014
Subject: Webinar Recordings—150% Direct Subsidized Loan Limit Webinar #4 and Webinar #5: New NSLDS Program-Level Enrollment Reporting Requirements	8/7/2014
Subject: Live Internet—Webinar—Experimental Sites Initiative (ESI) Experiments	8/8/2014
Subject: Online Training Module—Completing the 2015–2016 FISAP	8/14/2014
Subject: Online Training Module—Institutional Eligibility	8/18/2014
Subject: Training Workshops—Fundamentals of Federal Student Aid Administration	8/19/2014
Subject: EDExpress Online Training—EDExpress Release 2.0 Online Training for 2014–2015	8/26/2014
Subject: Webinar Recording—Experimental Sites Initiative (ESI) Experiments	8/29/2014
Subject: Online Training Module—Default Prevention and Management	9/29/2014
Subject: EDExpress Online Training—EDExpress Release 3.0 Online Training for 2014–2015	10/14/2014
Subject: Live Internet Webinar—Software Developers January 2015 Webinar (Updated December 17, 2014)	12/10/2014
Subject: Online Training Module—Return of Title IV Funds	12/11/2014
Subject: Live Internet Webinar—Gainful Employment: Reporting Data to NSLDS	12/16/2014
2014–2015 Federal Pell Grant Payment and Disbursement Schedules	1/31/2014
Military Service and Post-Active Duty Student Deferment Request; deadline extension for implementing	1/31/2014
IRS Tax Return Transcript Processes for 2014–2015	3/24/2014
Recognized Equivalent of a High School Diploma	4/11/2014
Revised Income-Driven Repayment Plan Request Form	4/18/2014
FY 2015 Sequester Required Changes	5/2/2014
2015–2016 Award Year: FAFSA® Information to be Verified and Acceptable Documentation	6/30/2014
Revised Direct Loan and FFEL Program Discharge Forms	10/8/2014
Revised Teacher Loan Forgiveness Application and Teacher Loan Forgiveness Forbearance Request forms	10/8/2014
Competency-Based Education Programs—Q&A	12/19/2014
Subject: Webinar Recording—Gainful Employment: Reporting Data to NSLDS	1/23/2015
Subject: Webinar Recording—Software Developers January 2015 Webinar	2/3/2015
Subject: Live Internet Webinar—Implementation of Regulatory Changes to the Adverse Credit History Provisions of the Direct PLUS Loan Program (Updated February 16, 2015)	2/6/2015
Subject: Rescheduled—Live Internet Webinar—Implementation of Regulatory Changes to the Adverse Credit History Provisions of the Direct PLUS Loan Program	2/18/2015
Subject: Live Internet Webinar—COD System Update: 2015–2016 New Award Year Setup	2/23/2015
Subject: Webinar Recording—Implementation of Regulatory Changes to the Adverse Credit History Provisions of the Direct PLUS Loan Program	3/23/2015
Subject: EDExpress Online Training—EDExpress Release 1.0 Online Training for 2015–2016	4/8/2015
Subject: Webinar Recording—COD System Update: 2015–2016 New Award Year Setup	4/28/2015
Subject: Training Workshops—Fundamentals of Federal Student Aid Administration	7/1/2015
Subject: EDExpress Online Training—EDExpress Release 2.0 Online Training for 2015–2016	7/13/2015
Subject: Live Internet Webinar—Software Developers August 2015 Webinar	7/17/2015
Subject: Online Training Module—Completing the 2016–2017 FISAP	8/14/2015
Subject: Webinar Recording—Software Developers August 2015 Webinar	9/2/2015
Subject: FSA Coach—2015–2016 Basic Training for Domestic and Foreign Schools	9/8/2015
Subject: Live Internet Webinar—Protecting Student Information: IT Security Best Business Practices	10/7/2015
Subject: Live Internet Webinars—Gainful Employment: Interpreting the GE Completers List and How to Submit a Challenge to the GE Completers List	11/3/2015
Subject: Webinar Recordings—Gainful Employment: Interpreting the GE Completers List and How to Submit a Challenge to the GE Completers List	11/30/2015
Subject: Webinar Recording—Protecting Student Information: IT Security Best Business Practices	12/7/2015
Subject: Live Internet Webinar—Verification and Unusual Enrollment History	12/30/2015
Subject: Live Internet Webinar—Experimental Sites Initiative: Dual Enrollment Experiment	12/30/2015
2015–2016 Federal Pell Grant Payment and Disbursement Schedules	1/29/2015
FY 2016 Sequester Required Changes to the Title IV Student Aid Programs	4/23/2015
Title IV Eligibility for Students Without a Valid High School Diploma Who Are Enrolled in Eligible Career Pathway Programs	5/22/2015
State Authorization Regulations Effective Date July 1, 2015	6/19/2015
2016–2017 Award Year: FAFSA® Information to be Verified and Acceptable Documentation	6/29/2015

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Title	Date issued
Regulatory Requirements Related to GE Programs	6/30/2015
Repayment Agreements and Liability for Collection Costs on FFELP Loans	7/10/2015
Protecting Student Information	7/29/2015
Direct Loan and FFEL Program Reaffirmation Agreement	10/19/2015
OMB Approval of Federal Perkins Loan Program MPN	11/12/2015
Clarifies flexibility for accrediting agencies	11/5/2015
Outlines previous Administration's accreditation agenda	11/1/2015
Subject: FSA Coach—2015–2016 Intermediate Training Course	1/21/2016
Subject: Live Internet Webinar—Cash Management Regulations	1/27/2016
Subject: Training Workshops—Regional Drive-In Workshop Series	2/8/2016
Subject: Webinar Recording—Cash Management Regulations	2/18/2016
Subject: Webinar Recording—Verification and Unusual Enrollment History	2/18/2016
Subject: Live Internet Webinar—Software Developers March 2016 Webinar	3/3/2016
Subject: Online Training Modules—FSA Quick Takes	4/22/2016
Subject: Webinar Recording—Software Developers March 2016 Webinar	4/29/2016
Subject: Live Internet Webinars—Gainful Employment: Reading Your Draft GE Completers List Files and Submitting GE Completers List Corrections	5/13/2016
Subject: Webinar Recording—Gainful Employment: Reading Your Draft GE Completers List Files	6/13/2016
Subject: Webinar Recording—Gainful Employment: Submitting GE Completers List Corrections	6/22/2016
Subject: Training Workshops—Fundamentals of Federal Student Aid Administration	7/1/2016
Subject: Online Training Module—Completing the 2017–2018 FISAP	8/24/2016
Subject: Live Internet Webinars—Gainful Employment: Reading Your Draft GE Debt-to-Earnings (D/E) Rates Files and Submitting Challenges	9/26/2016
Live Internet Webinar—Software Developers November 2016 Webinar	10/17/2016
Subject: Webinar Recording—Gainful Employment: Reading Your Draft GE Debt-to-Earnings (D/E) Rates Files	11/2/2016
Subject: Webinar Recording—Gainful Employment: Submitting Draft GE Debt-to-Earnings (D/E) Challenges	11/3/2016
Subject: FSA Coach—2016–2017 Basic Training for Domestic Schools	11/14/2016
2016–2017 Federal Pell Grant Payment and Disbursement Schedules	1/29/2016
Approval of Deferment and Mandatory Forbearance Request Forms for the Direct Loan, FFEL, and Perkins Loan Programs	1/29/2016
Approval of General Forbearance Request Form for the Direct Loan, FFEL, and Perkins Loan Programs	3/11/2016
2017–2018 Award Year: FAFSA® Information to be Verified and Acceptable Documentation	4/5/2016
Changes to Title IV Eligibility for Students Without a Valid High School Diploma Who Are Enrolled in Eligible Career Pathway Programs	5/9/2016
FY 2017 Sequester Required Changes to the Title IV Student Aid Programs	5/31/2016
2017–2018 Early FAFSA—Identification and Resolution of Conflicting Information	8/3/2016
Revision of the Income-Driven Repayment Plan Request Form for the Direct Loan and FFEL Programs	10/11/2016
2017–2018 Federal Pell Grant Payment and Disbursement Schedules	10/18/2016
Encouraging information-sharing between the Department and accrediting agencies; encouraging accrediting agencies to avail themselves of risk-based reviews	1/20/2016
Clarifies and encourages use of flexibility for differentiated reviews by accrediting agencies	4/22/2016
Outlines previous Administration's accreditation agenda	2/1/2016
Subject: FSA Coach—2016–2017 Intermediate Training Course	1/5/2017
Subject: FSA Coach—2016–2017 Basic Training for Foreign Schools	2/28/2017
Subject: Training Workshops—Fundamentals of Federal Student Aid Administration	6/1/2017
Subject: Live Internet Webinar—EDESuite Software Upgrades for 2018–2019 and Beyond	6/6/2017
Subject: Webinar Recording—EDESuite Software Upgrades for 2018–2019 and Beyond	7/19/2017
Subject: Online Training Module—Completing the 2018–2019 FISAP	8/2/2017
Subject: FSA Coach—2017–2018 Advanced Training Course	8/7/2017
Subject: Live Internet Webinar—Software Developers September 2017 Webinar	8/18/2017
Subject: Live Internet Webinar—COD System Update	8/18/2017
Subject: FSA Coach—2017–18 Basic Training for Domestic Schools	12/5/2017
Withdrawal of Dear Colleague Letter 15–14	3/16/2017
Revision of the Military Service and Post-Active Duty Student Deferment Request	4/17/2017
Subject: 2018–2019 Award Year: FAFSA® Information to be Verified and Acceptable Documentation	5/25/2017
Outlines categories of terminology used by accrediting agencies to describe actions and statuses, and provides guidance to federally recognized accrediting agencies	11/16/2016
Announces forthcoming guidance on information-sharing and transparency	1/11/2017
Subject: FSA Coach—2017–18 Basic Training for Foreign Schools	2/7/2018
Subject: Live Internet Webinar—Correcting Reported Gainful Employment Data in NSLDS	2/9/2018
Subject: Live Internet Webinar—The FISAP in the COD System	2/20/2018
Subject: Webinar Recording—Correcting Reported Gainful Employment Data in NSLDS	3/13/2018
Subject: FSA Coach—2017–18 Intermediate Training Course	3/14/2018
Subject: Webinar Recording—The FISAP in the COD System	3/22/2018
Subject: Live Internet Webinar—Submitting Draft GE Completers List Corrections in NSLDS	4/17/2018
Subject: Webinar Recording—Submitting Draft GE Completers List Corrections in NSLDS	5/25/2018
Subject: Training Workshops—Fundamentals of Federal Student Aid Administration	7/2/2018
Subject: Online Training Module—Completing the 2019–2020 FISAP	8/1/2018
Subject: 2018–2019 Federal Pell Grant Payment and Disbursement Schedules	1/31/2018
Subject: Modifications to the Campus-Based Programs for institutions and students affected by Hurricanes or Tropical Storms Harvey, Irma, and Maria	3/26/2018
Subject: REVISED 2018–2019 Federal Pell Grant Payment and Disbursement Schedules	4/10/2018
Subject: Training Resource—Upcoming Change to Federal Student Aid E-Training Web Address	4/2/2019

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Title	Date issued
Subject: Live Internet Webinar—How to Correct Historical Enrollment Reporting in NSLDS	5/20/2019
Subject: Webinar Recording—How to Correct Historical Enrollment Reporting in NSLDS	6/19/2019
Subject: Online Training Module—Completing the 2020–2021 FISAP	8/8/2019
Subject: Online Training Resource—Financial Aid Administrator's Tool Kit	9/10/2019
Subject: Online Training Module—Next Gen First Time Login to *StudentAid.gov*	12/20/2019

[FR Doc. 2020–19144 Filed 8–26–20; 4:15 pm]

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FEDERAL REGISTER

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Part VI

Environmental Protection Agency

40 CFR Part 60
Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units Review; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2003–0156; FRL–10013–19–OAR]

RIN 2060–AU60

Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In accordance with requirements under the Clean Air Act (CAA), the U.S. Environmental Protection Agency (EPA) performed a periodic review of the emissions standards and other requirements for Other Solid Waste Incineration (OSWI) units, covering certain very small municipal waste combustion (VSMWC) and institutional waste incineration (IWI) units. Although the EPA is not proposing revisions to the OSWI New Source Performance Standards (NSPS) and Emission Guidelines (EG) specifically based on its statutory periodic review, the EPA is otherwise—in accordance with its authority under the CAA—proposing changes to the OSWI NSPS and EG.

DATES: *Comments.* Comments must be received on or before October 15, 2020. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before September 30, 2020.

Public hearing. If anyone contacts us requesting a public hearing on or before September 8, 2020, the EPA will hold a virtual public hearing. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on requesting and registering for a public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2003–0156, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2003–0156 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2003–0156.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2003–0156, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004.

The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday—Friday (except Federal holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. 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 coronavirus disease 2019 (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.* Refer to the **SUPPLEMENTARY INFORMATION** section below for additional information.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Dr. Nabanita Modak Fischer, Sector Policies and Programs Division (E143–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5572; fax number: (919) 541–0516; and email address: *modak.nabanita@epa.gov.*

SUPPLEMENTARY INFORMATION:

Participation in virtual public hearing. Please note that the EPA is deviating from its typical approach because the President has declared a national emergency. Due to the current Centers for Disease Control and Prevention (CDC) recommendations, as well as state and local orders for social distancing to limit the spread of COVID–19, the EPA cannot hold in-person public meetings at this time.

If requested, the virtual public hearing will be held on September 15, 2020. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 5:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details on the virtual public hearing at *https://www.epa.gov/stationary-sources-air-pollution/other-solid-waste-incinerators-oswi-new-source-performance.*

The EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/stationary-sources-air-pollution/other-solid-waste-incinerators-oswi-new-source-performance* or contact Ms. Virginia Hunt at (919) 541–0832 or by email at *hunt.virginia@epa.gov.* The last day to pre-register to speak at the hearing will be September 14, 2020. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/stationary-sources-air-pollution/other-solid-waste-incinerators-oswi-new-source-performance.*

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule.

Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to Dr. Nabanita Modak Fischer and Ms. Virginia Hunt. The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/stationary-sources-air-pollution/other-solid-waste-incinerators-oswi-new-source-performance.* While the EPA expects the hearing to go forward, if requested, as described in this preamble, please monitor our website or

contact Ms. Virginia Hunt at (919) 541–0832 or *hunt.virginia@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing with Ms. Virginia Hunt and describe your needs by September 8, 2020. The EPA may not be able to arrange accommodations without advance notice.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2003–0156. All documents in the docket are listed on the *Regulations.gov* website. Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available electronically through *https://www.regulations.gov/.*

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2003–0156. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risks 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/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our federal partners so that we can respond rapidly as conditions change regarding COVID–19.

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in Instructions above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2003–0156. Note that written comments containing CBI and submitted by mail may be delayed and no hand deliveries will be accepted.

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

ACI air curtain incinerator
ANSI American National Standards Institute
AOGA Alaska Oil and Gas Association
ASME American Society of Mechanical Engineers
Cd cadmium
CAA Clean Air Act
CBI Confidential Business Information
CDC Centers for Disease Control and Prevention
CDX Central Data Exchange
CEDRI Compliance and Emissions Data Reporting Interface
CEMS continuous emissions monitoring systems
CFR Code of Federal Regulations
CISWI commercial and industrial solid waste incineration
CO carbon monoxide
COVID–19 coronavirus disease 2019
D.C. Circuit U.S. Court of Appeals for the District of Columbia Circuit
DCOT digital camera opacity technique
DF dioxins/furans
ECHO Enforcement and Compliance History Online
EG emission guidelines
EPA Environmental Protection Agency
ERT Electronic Reporting Tool
ET Eastern Time
FVF fuel variability factor
HCl hydrochloric acid
Hg mercury
HMIWI hospital, medical, and infectious waste incineration
ICR Information Collection Request
IWI institutional waste incineration
MACT maximum achievable control technology
MSW municipal solid waste
MWC municipal waste combustor
NEI National Emissions Inventory
ng/dscm nanograms per dry standard cubic meter

N nitrogen
NO_X oxides of nitrogen
NRDC Natural Resources Defense Council
NSPS new source performance standards
NTTAA National Technology Transfer and Advancement Act
OSWI other solid waste incineration
Pb lead
PM particulate matter
ppmvd parts per million by dry volume
PRA Paperwork Reduction Action
RFA Regulatory Flexibility Act
SO2 sulfur dioxide
SRI small remote incinerator
SSM startup, shutdown, and malfunction
TEQ toxic equivalency factor
TMB total mass basis
TPD tons per day
µg/dscm micrograms per dry standard cubic meter
UMRA Unfunded Mandates Reform Act
VCS voluntary consensus standards
VSMWC very small municipal waste combustion
XML extensible markup language

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

I. General Information

A. Does this action apply to me?

Categories and entities potentially affected by the proposed action are those that operate OSWI units. The NSPS and EG for OSWI, hereinafter referred to as ''the OSWI standards,'' affect the categories of sources identifed in Table 1 of this preamble:

TABLE 1—INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Source category	NAICS code [1]	Examples of potentially regulated entities
Any state, local, or tribal government using a VSMWC unit.	562213, 92411	Solid waste combustion units burning municipal solid waste (MSW).
Any correctional institutions using an IWI unit	922 7213	Correctional institutions.
Any nursing or residential care facilities using an OSWI unit.	623	Any nursing care, residential intellectual and developmental disability, residential mental health and substance abuse, or assisted living facilities.
Any federal government agency using an OSWI unit	928, 7121	Department of Defense (labs, military bases, munition facilities) and National Parks.
Any educational institution using an OSWI unit	6111, 6112, 6113	Primary and secondary schools, universities, colleges, and community colleges.
Any church or convent using an OSWI unit	8131	Churches and convents.
Any civic or religious organization using an OSWI unit	8134	Civic associations and fraternal associations.
Any industrial or commercial facility using a VSMWC unit.	114, 211, 212, 221, 486	Oil and gas exploration operations; mining; pipeline operators; utility providers; fishing operations.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that the EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in 40 CFR 60.2885, 60.2981, and 60.2991. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

B. What is the background?

Section 129 of the CAA requires the EPA to develop and adopt NSPS and EG for solid waste incineration units in accordance with CAA sections 129 and 111. Section 129(a) of the CAA requires the EPA to establish NSPS for new sources, and CAA section 129(b) requires the EPA to establish procedures for states to submit plans for implementing EG for existing sources (and see CAA sections 111(b) and (d)). The EPA proposed NSPS and EG for OSWI units on December 9, 2004, and promulgated them on December 16, 2005 (70 FR 74870), at 40 CFR part 60, subparts EEEE and FFFF.[1] Following that final action, the Administrator received a petition for reconsideration of the OSWI standards, and on June 28, 2006, the EPA announced reconsideration on the final OSWI rules (71 FR 36726). After consideration of comments and information received through the reconsideration process, we concluded that no additional changes were necessary to the final OSWI rules (72 FR 2620, January 22, 2007).

In addition to the administrative reconsideration requests, some entities petitioned for judicial review of the 2005 OSWI standards. The judicial

[1] The regulations were revised on November 24, 2006 (71 FR 67802) in a direct final rule to address corrections.

review proceedings initially were stayed and, ultimately, the EPA requested a voluntary remand of the OSWI standards. By Order dated April 21, 2016, the U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) granted the EPA's request for a remand. *Sierra Club* v. *EPA,* No. 06–1066. The remand was requested to allow the EPA to consider potential revisions, if any, to the OSWI standards that might be appropriate in light of certain legal developments, including 2007 and 2008 decisions from the D.C. Circuit.

The OSWI standards establish maximum achievable control technology (MACT) emission limits for OSWI units. Under current regulations, the term ''OSWI unit'' means either a VSMWC unit or an IWI unit. A VSMWC unit is any municipal waste combustion unit that has the capacity to combust less than 35 tons per day (TPD) of MSW or refuse-derived fuel. An IWI unit is any combustion unit that combusts institutional waste and is a distinct operating unit of the institutional facility that generated the waste. The OSWI standards set emission standards for nine pollutants: Cadmium (Cd), carbon monoxide (CO), dioxins/furans (DF), hydrochloric acid (HCl), lead (Pb), mercury (Hg), oxides of nitrogen (NO_X), particulate matter (PM), and sulfur dioxide (SO_2) and also establish opacity standards.

CAA section 129(a)(5) requires the EPA, every 5 years, to review and, in accordance with CAA sections 129 and 111, revise standards and other requirements for solid waste incineration units (such as the OSWI standards). In 2018, the U.S. District Court for the District of Columbia found that the EPA had failed to undertake the requisite CAA section 129(a)(5) periodic review of the OSWI standards and ordered the EPA to do the review; publish a proposed rulemaking by August 31, 2020; and promulgate a final rule by May 31, 2021. *Sierra Club* v. *Wheeler,* 330 F.Supp.3d 407.

C. What action is the Agency taking?

The EPA has conducted the requisite CAA section 129(a)(5) 5-year review, and we are giving notice of that review. We are not proposing any revisions to the OSWI standards specifically based on that review, but we are proposing various changes to the OSWI standards, including some changes that were occasioned by the 2016 voluntary remand of the OSWI standards (and the legal developments related to that request for a remand). In accordance with the EPA's general authority under CAA section 129(a) and and as discussed further in sections II.A and II.B of this preamble, we are proposing: (1) Certain MACT floor redeterminations; (2) changes to applicability provisions; (3) testing and monitoring flexibilities so that units with rudimentary designs can demonstrate compliance with the rule; (4) revised regulatory provisions related to emissions during periods of startup, shutdown, and malfunction (SSM); (5) provisions for electronic reporting of certain notifications and reports; (6) revisions to recordkeeping and reporting provisions consistent with the revised testing and monitoring; (7) changes to title V permitting requirements; and (8) other technical edits, clarifications, and revisions intended to improve the understanding of the rule and improve consistency with other CAA section 129 rules.

D. What is the Agency's authority for taking this action?

Section 129 of the CAA requires the EPA to establish NSPS and EG pursuant to sections 111 and 129 of the CAA for new and existing solid waste incineration units, including ''other categories of solid waste incineration units.'' This action amends the OSWI standards under such authority. In addition, CAA section 129(a)(5) specifically requires the EPA to periodically review and revise the standards and the requirements for solid waste incineration units, including OSWI units.

The EPA has substantial discretion to distinguish among classes, types, and sizes of incinerator units within a category while setting standards. CAA section 129(a)(2) provides that standards ''applicable to solid waste incineration units promulgated under . . . [section 111] and this section shall reflect the maximum degree of reduction in emissions of . . . [certain listed air pollutants] that the Administrator, taking into consideration the cost of achieving such emission reduction and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new and existing units in each category.'' This level of control is referred to as a maximum achievable control technology, or MACT standard. CAA section 129(a)(4) further directs the EPA to set numeric emission limits for certain enumerated pollutants (Cd, CO, DF, HCl, Pb, Hg, NO_X, PM, and SO_2). In addition, the standards ''shall be based on methods and technologies for removal or destruction of pollutants.'' CAA section 129(a)(3).

In promulgating a MACT standard, the EPA must first calculate the minimum stringency levels for new and existing solid waste incineration units in a category, generally based on levels of emissions control achieved in practice by the subject units. The minimum level of stringency is called the MACT ''floor,'' and there are different approaches to determining the floors for new and/or existing sources. For new (and reconstructed sources), CAA section 129(a)(2) provides that the ''degree of reduction in emissions that is deemed achievable . . . shall not be less stringent than the emissions control that is achieved in practice by the best controlled similar unit, as determined by the Administrator.'' Emissions standards for existing units may be less stringent than standards for new units, but CAA section 129(a)(2) requires that the standards ''shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category.'' The MACT floors form the least stringent regulatory option the EPA may consider in the determination of MACT standards for a source category. The EPA must also determine whether to control emissions ''beyond-the-floor,'' after considering the costs, non-air quality health and environmental impacts, and energy requirements of such more stringent control.

In general, all MACT analyses involve an assessment of the emissions from the best performing units in a source category. The assessment can be based on actual emissions data, knowledge of the air pollution control in place in combination with actual emissions data, or on other information, such as state regulatory requirements, that enables the EPA to estimate the actual performance of the regulated units. For each source category, the assessment involves a review of actual emissions data with an appropriate accounting for emissions variability. Other methods of estimating emissions can be used provided that the methods can be shown to provide reasonable estimates of the actual emissions performance of a source or sources. Where there is more than one method or technology to control emissions, the analysis may result in several potential regulations (called regulatory options), one of which is selected as MACT for each pollutant. Each regulatory option the EPA considers must be at least as stringent as the minimum stringency ''floor'' requirements. The EPA must examine, but is not necessarily required to adopt, more stringent ''beyond-the-floor'' regulatory options to determine MACT. Unlike the floor minimum stringency requirements, the EPA must consider

various impacts of the more stringent regulatory options in determining whether MACT standards are to reflect ''beyond-the-floor'' requirements. If the EPA concludes that the more stringent regulatory options have unreasonable impacts, the EPA selects the ''floor-based'' regulatory option as MACT. If the EPA concludes that impacts associated with ''beyond-the-floor'' levels of control are acceptable in light of additional emissions reductions achieved, the EPA selects those levels as MACT.

Under CAA section 129(a)(2), for new sources, the EPA determines the best control currently in use for a given pollutant and establishes one potential regulatory option at the emission level achieved by that control with an appropriate accounting for emissions variability. More stringent potential beyond-the-floor regulatory options might reflect controls used on other sources that could be applied to the source category in question.

For existing sources, the EPA determines the average emissions limitation achieved by the best performing 12 percent of units to form the floor regulatory option. More stringent beyond-the-floor regulatory options reflect other or additional controls capable of achieving better performance.

As noted above, CAA section 129(a)(5) requires the EPA to conduct a review of the standards at 5-year intervals and, in accordance with CAA sections 129 and 111, revise the standards. In conducting periodic reviews under CAA section 129(a)(5), the EPA attempts to assess the performance of and variability associated with control measures affecting emissions performance at sources in the subject source category (including the installed emissions control equipment), along with recent developments in practices, processes, and control technologies, and determines whether it is appropriate to revise the NSPS and EG. This approach is consistent with the requirement that standards under CAA section 129(a)(3) ''shall be based on methods and technologies for removal or destruction of pollutants before, during or after combustion.'' We do not interpret CAA section 129(a)(5), together with CAA section 111, as requiring the EPA to recalculate MACT floors in connection with this periodic review.[2] This general approach is similar to the approach taken by the EPA in periodically reviewing CAA section 111 standards, which, under CAA section 111(b)(1)(B), requires the EPA, except in specified circumstances, to review NSPS promulgated under that section every 8 years and to revise the standards if the EPA determines that it is appropriate to do so.

E. What data collection activities were conducted?

The EPA reviewed the inventory of OSWI units developed for the current standards and performed data gathering to identify additional units.[3] The current OSWI rule covers VSMWC and IWI as well as air curtain incinerators (ACIs) combusting municipal solid waste or institutional waste. ACIs burning only wood waste, clean lumber, and yard waste are only subject to opacity requirements in the OSWI rule. The EPA identified 97 VSMWC, IWI, and ACI units at 84 facilities from the prior inventory. Data searches to identify additional units encompassed review of the existing EPA databases, state permit databases, manufacturers' websites, other government agencies, and military and police sources.

The EPA's Enforcement and Compliance History Online (ECHO) website allows users to search for facilities by NSPS subparts.[4] The ECHO database provides integrated compliance and enforcement information for approximately 800,000 regulated facilities nationwide. For facilities identified by ECHO as subject to the OSWI NSPS, the EPA conducted web searches and reviewed online state air permits, where available. The EPA added 20 units at 20 facilities to the OSWI inventory from the ECHO search results. No emissions data were found for these units.

The EPA also searched the 2014 National Emissions Inventory (NEI), Version 2, to identify facilities with OSWI units. The NEI is a database that contains information about sources that emit certain air pollutants, known as ''criteria'' pollutants, their precursors, and hazardous air pollutants. The database includes estimates of annual air pollutant emissions from sources in the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The EPA collects this information and releases an updated version of the NEI database every 3 years. The NEI also includes information about control devices and control approaches. Based on the NEI, four units at four facilities were added to the EPA's inventory of OSWI sources. Emissions data are available for only three of these units; no emissions data were found for the remaining unit.

The EPA searched state permit databases and reviewed online permits, including title V and general permits, to identify additional OSWI units. Fourteen additional units at 14 facilities were identified and added to the OSWI inventory as a result of the permit reviews. No emissions data were found for these units in the permit documents; however, Pima County Department of Environmental Quality (PDEQ) provided a recent test report from 2019 for one unit in Arizona.

The EPA reviewed customer lists available on two incinerator manufacturer websites. These incinerators are small, portable incinerators, and the customer lists included universities and other entities. Ten units at 10 facilities were added to the OSWI inventory from incinerator manufacturer customer lists. Other searches included the EPA's WebFIRE database, the U.S. Drug Enforcement Administration website, the National Park Service website, the EPA's Toxics Release Inventory, and the California Air Resources Board and Air Quality Maintenance Districts websites. No units were added to the OSWI inventory from these data sources.

In addition to the OSWI units identified through the data searches described above, we also considered and included 29 remote incinerators at 25 facilities and associated emissions test and waste information collected from commercial and industrial facilities in Alaska (as further discussed in section II.B of this preamble). Taking these all together, a total of 174 OSWI units at 157 facilities were identified. These searches are documented in the memorandum, *Documentation of Data Gathering Efforts for Other Solid Waste Incineration (OSWI) Units,* which is available in the docket for this action.

F. What other relevant background information and data are available?

In addition to inventorying OSWI units, the EPA reviewed the ECHO and the NEI information, as well as state permit databases, for representative emissions data for OSWI units. In state permit databases, we obtained limited information for two OSWI units, both with capacities greater than 10 TPD (but

[2] Elsewhere in the CAA, including under CAA section 112(d)(6), the EPA is also obliged to undertake periodic reviews. Although the nature or scope of the periodic review under CAA section 112(d)(6) is different than under CAA section 129(a)(5), it may be worth noting that, even under CAA section 112(d)(6), the EPA is not obligated to recalculate MACT floors in the course of a periodic review. *NRDC* v. *EPA,* 529 F.3d 1077, 1084 (D.C. Cir. 2008); *Nat'l Ass'n for Surface Finishing* v. *EPA,* 795 F.3d 1, 7–9 (D.C. Cir. 2015).

[3] An OSWI inventory was developed for the 2005 rulemaking and included in Docket ID No. EPA–HQ–OAR–2003–0156.

[4] See *https://echo.epa.gov/.*

less than 35 TPD), one located at a Texas facility and the other at an Arizona facility. The information for the Texas facility included an emissions test report for the nine OSWI pollutants for one OSWI unit, and the information for the Arizona facility included a test summary for one OSWI unit. The EPA also obtained limited emissions data (for the nine pollutants) from the 2014 NEI, Version 2 for three of the four OSWI units identified in the NEI. The NEI data did not include control device information for these four units. We also reviewed data collected during the development of the NSPS and EG for Commercial and Industrial Solid Waste Incineration (CISWI) units,[5] as well as additional test data submitted by the Alaska Oil and Gas Association (AOGA) for small remote incinerators (SRI) in Alaska (submitted in connection with a request that the EPA modify the SRI emission limits established in the February 7, 2013, final CISWI rule).[6]

G. What are the incremental costs and benefits of this action?

We have estimated that this proposed rule will decrease burden by $57,000 annually. We anticipate about 31 tons per year in emission reductions in the CAA section 129 pollutants as a result of the proposed amendments. See section III of this preamble for additional information.

II. OSWI Review and Proposed Revisions

A. CAA Section 129(a)(5) Review

1. How did the EPA conduct the review under CAA section 129(a)(5)?

In conducting periodic reviews under CAA section 129(a)(5), the EPA attempts to assess the performance of and variability associated with control measures affecting emissions performance at sources in the subject source category (including the installed emissions control equipment), along with developments in practices, processes, and control technologies. For development of the proposed rule, the EPA reviewed available performance data for currently operating OSWI units or the best representative sources. In reviewing the standards based on currently available emissions information, we address the CAA section 129(a)(5) review's goals of assessing the performance efficiency of the installed equipment and ensuring that the emission limits reflect the performance of the technologies required by the MACT standards. In addition, we considered whether new technologies and processes and improvements in practices have been demonstrated at sources subject to the 2005 OSWI rule.

Our review focused on identifying OSWI units to develop an inventory of units and evaluating developments in processes and control technologies that have occurred since the OSWI standards were promulgated. Where we identified additional units or new developments at units, we analyzed their emissions and controls and the technical feasibility, estimated costs, energy implications, and non-air environmental impacts of any identified controls. We also considered emission reductions associated with applying each development, if any. This analysis informed our decision of whether to revise the OSWI emissions standards. In addition, we considered the appropriateness of applying controls to new sources versus retrofitting existing sources. For these purposes, we considered any of the following to be a development:

- Any add-on control technology or other equipment that was not identified and considered during development of the original standards;
- any improvements in previously identified and considered add-on control technology or other equipment that could result in additional emissions reduction;
- any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the original standards; and
- any significant changes in the cost (including cost effectiveness) of applying controls (including controls the EPA considered during the development of the original standards).

In addition to reviewing the processes and control technologies that were considered at the time we originally developed the OSWI standards, we reviewed, as discussed in sections I.E and I.F of this preamble, a variety of data sources in our investigation of potential processes or controls to consider.

2. Results and Proposed Actions From the EPA's CAA Section 129(a)(5) Review

We identified limited emissions data for three out of four OSWI units from the NEI, and emissions test data for two new large OSWI units from state permit documentation that demonstrate compliance with the OSWI standards through use of add-on control devices similar to those considered during the original OSWI rule development. From the limited data available, we did not identify any new developments in practices, processes, or control technologies for any OSWI units. Based strictly on our 5-year review analysis, we do not believe that any changes to the OSWI standards are appropriate, and, accordingly, the EPA is not proposing any revisions pursuant to CAA section 129(a)(5).

B. What other actions are we proposing?

Although not predicated on the CAA section 129(a)(5) review, the EPA is taking the opportunity to propose certain changes to the OSWI standards in light of other developments and our experience with the CAA section 129 solid waste incinerator rules, as well as considerations associated with the 2016 remand of the 2005 OSWI standards. Thus, we are proposing changes to OSWI sub-categories and related MACT floor recalculations. Additionally, we are proposing other applicability-related and definitional changes. These proposed revisions are discussed in sections II.B.1 and II.B.2 of this preamble. We are also proposing changes to the SSM provisions; the testing, monitoring, recordkeeping, and reporting requirements; the applicability of title V permitting for certain ACIs; and miscellaneous other technical and editorial changes to the regulatory text. These proposed changes are discussed in sections II.B.3 through II.B.8 of this preamble.

1. Proposed Revisions to the MACT Floor

We are proposing MACT floor recalculations for the OSWI source category in light of the 2016 voluntary remand of judicial proceedings relating to the OSWI standards, as well as public comments regarding the final OSWI standards (70 FR 74870, December 16, 2005) that raised issues that, upon further consideration, we believe should be readdressed. At the time the EPA set the OSWI standards, we lacked emissions data on OSWI units, and the emission limits were based on information for similar sources in the hospital, medical, and infectious waste incineration (HMIWI) unit source

[5] Includes emissions data collected from Phase II of the CISWI ICR survey used to support the March 21, 2011 CISWI final rule (76 FR 15704) as well as the 2013 CISWI final reconsideration (78 FR 9112, February 7, 2013).

[6] As further discussed in sections II.B.1 and II.B.2 of this preamble, the EPA has re-evaluated the applicability of the CISWI rules to certain incinerators burning more than 30-percent MSW and is also proposing to revise the OSWI rules such that the OSWI standards will be applicable to these incinerators, which would be treated as VSMWC units.

category, considering the similarities in combustion unit size, design, operations, and waste composition between OSWI and HMIWI units.[7] We have now collected additional information on two new OSWI units (constructed after the OSWI standards were issued) and emissions information for certain existing small incineration units located in Alaska that previously have been regarded as CISWI units, as small remote incinerators (SRI), but—under this proposal—are treated as OSWI units.[8] We are proposing to consider the existing SRI units as VSMWC units subject to the OSWI standards. In light of the voluntary remand and the additional data gathered, we are proposing revised subcategories and MACT standards that better reflect actual emissions test data from OSWI units and the population of OSWI. These standards are based, in part, on the size of the OSWI unit. The proposed standards are more representative of and better reflect the emissions achievable for new and existing units in each category required under CAA sections 129(a)(2) and (4).

The EPA did not previously address SRI units in the OSWI standards. At the time the OSWI standards were promulgated, we contemplated regulating the small incinerators that are located at commercial businesses or industrial sites as CISWI units under future revisions to the final CISWI rules (70 FR 74882). Prior to revising the CISWI standards, we had insufficient information about the small units operated in the commercial and industrial facilities (*e.g.,* operating at oil exploration sites or oil-field based camps) to determine if they could be treated as VSMWC units. In 2010, in connection with a CISWI rulemaking, the EPA conducted an Information Collection Request (ICR) to collect data for these small incinerators. The data, however, did not provide detailed information on the type of waste these units were burning (*i.e.,* industrial waste or municipal-type waste generated onsite) and the percentages of each type being combusted. Consistent with our stated intent during the OSWI rulemaking, the EPA set the emission standards for the SRI subcategory under the CISWI rule because such combustion units are located at commercial/industrial facilities (typically in isolated areas of Alaska).

In June 2017, AOGA submitted to the EPA data that provided additional information on waste characterization for SRI in Alaska. The new data indicated that most such units burn more than 30-percent municipal type solid waste; that is, the type of waste material—regardless whether it is collected from households, the general public, institutions, commercial or industrial operations, or some combination—that is typically regarded as municipal waste.

Based on the new information provided by AOGA in 2017 and a re-evaluation of the OSWI definition of MSW and related terms, we reconsidered the dividing line between the OSWI standards and the CISWI standards. Units that combust more than 30 percent MSW, even units located at commercial or industrial facilities, that otherwise meet the definition of VSMWC (as proposed herein), including units with a capacity of three TPD or less located away from MSW landfills, should be subject to the OSWI rule instead of the CISWI standards.[9] Consistent with this revised approach on the coverage or applicability of the OSWI standards, we have considered the information from AOGA in recalculating the MACT floors—for certain subcategories of OSWI units.

As noted in section I.F of this preamble, we have also gathered emissions information on two OSWI units constructed since 2005, with waste capacities greater than 10 TPD (but less than 35 TPD), including one at a Texas facility and one at a facility in Arizona. Both of these units are continuously-fed rotary combustors that use add-on air pollution control devices, including wet and dry scrubbers and fabric filters, to comply with the current OSWI standards.

In light of the design and compliance information obtained for two OSWI units (one in Arizona and one in Texas) and the addition of design and operational information from the CISWI ICR and the AOGA for the SRI units, we are proposing to subcategorize IWI and VSMWC units based on size. The two subcategories proposed are large units that have capacities greater than 10 TPD and small units that have capacities less than or equal to 10 TPD. For incineration units, differences in size typically reflect differences in operation and equipment complexity. Units with capacities less than or equal to 10 TPD typically feed waste to the unit in batches and some units may not even be equipped with stacks. Units larger than 10 TPD typically feed waste to the unit continuously or semi-continuously and also typically have stacks or flues that can be routed to air pollution control devices. Therefore, we are proposing subcategories as follows: (1) VSMWC units with a capacity to combust less than or equal to 10 TPD of MSW or refuse-derived fuel; (2) IWI units with a capacity to combust less than or equal to 10 TPD of institutional waste; (3) VSMWC units with a capacity to combust greater than 10 TPD of MSW or refuse-derived fuel (but less than 35 TPD); and (4) IWI units with a capacity to combust greater than 10 TPD of institutional waste. In connection with this size-based sub-categorization, we are also proposing to add a definition of ''small OSWI unit,'' a unit with a capacity less than or equal to 10 TPD. (Accordingly, the term ''small OSWI unit'' will be used, hereinafter, to refer to units with capacities less than or equal to ten TPD.)

Based on the updated inventory, emissions, and waste data provided by AOGA, we have developed revised emission limits for existing small OSWI units, using the average emission limitation of the best performing 12 percent of such sources and also considering variability in emissions, consistent with CAA section 129(a)(2). To calculate the MACT floor emission limits for small existing OSWI sources, we considered the available test run data[10] provided in response to the 2010

[7] The 2005 MACT standards were developed based on the best representative sources. For new IWI and VSMWC units, the MACT floor emission limits were based on emissions information from HMIWIs similar in size, design, and operation and using medium-efficiency wet scrubbers for emissions control. For existing IWI and VSMWC units, the EPA considered the MACT floor based on emissions test information from small, uncontrolled, modular/starved air municipal waste combustion (MWC) units that were collected during the MWC regulatory development process. However, the EPA had also identified one existing OSWI unit, an IWI unit, with a medium efficiency wet scrubber. Therefore, the EPA ultimately set beyond-the-floor standards for existing OSWI reflecting the use of a medium-efficiency wet scrubber, based on the emission limits that were achievable considering the available HMIWI data.

[8] The CISWI NSPS are found at 40 CFR part 60, subpart CCCC, and the EG are found at 40 CFR part 60, subpart DDDD (collectively the ''CISWI standards''). The CISWI standards initially were promulgated in 2000 (60 FR 75338) and revised in 2005 (70 FR 55568), 2011 (76 FR 15704), 2013 (78 FR 9112), and 2016 (81 FR 40956). The CISWI standards generally apply to operating units of commercial or industrial facilities that combust solid waste (see, *e.g.,* 40 CFR 60.2015 and 60.2265). The CISWI standards cover certain small, remote incinerators (SRI) that combust three TPD or less of solid waste and are located more than 25 miles from a MSW landfill (see, *e.g.,* 40 CFR 60.2265).

[9] Incinerators that burn less than 30-percent MSW and are located at an industrial or commercial facility, including SRI, would remain subject to the CISWI rule. However, the units under consideration here are burning greater than 30-percent MSW, according to AOGA members. For a more detailed discussion of OSWI applicability-related issues and proposals relating to OSWI definitions, see the discussion in section II.B.2 of this preamble.

[10] Run data includes the emissions data captured during a stack test comprising at least three sampling runs.

ICR and test data from 2014 submitted in June 2017 by AOGA in their attempt to address concerns that they had with the 2010 ICR data pertaining to the emissions test data representativeness and waste variability. In the MACT floor analysis, we used the run data from the 2010 and 2014 emission tests to calculate the 99th percentile upper limits (UL) statistical interval for the best 12 percent of such incineration units for each pollutant to address the range of operating conditions of the incinerator. The UL is a common statistical interval used to address variability and was the same statistical interval used to calculate the CISWI SRI emission limits (76 FR 15723, March 21, 2011).

In addition to addressing the range of operating conditions of the incinerator, AOGA noted that the waste profile of the 2010 emissions test data was not representative of the range of wastes combusted during normal operations. The AOGA asserted that the testing sites seemed to misinterpret the goal of the testing and may have prepared ''best case'' waste for the 2010 testing instead of a more representative waste profile. To address this, accompanying the additional emission tests conducted in 2014, AOGA also submitted waste composition and elemental analysis data for nitrogen (N), Cd, Pb, Hg, chlorine, and sulfur in the wastes combusted (sometimes also referred to as the ''fuel'' in similar fuel variability factor (FVF) calculations used in boiler and CISWI standards for certain pollutants). We applied the EPA's previous analytical approach of calculating FVF to calculate an analogous ''waste variability factor'' (WVF) for small OSWI units since these units are not designed to co-fire waste with coal or other solid fuels, and applied this WVF to the 99-percentile UL calculation for the six pollutants that are influenced directly by waste composition; Cd, HCl, Pb, Hg, SO_2, and NO_X. A detailed discussion of the emission limit calculation can be found in the memorandum, *OSWI Emission Limit Calculations for Existing and New Sources,* which is available in the docket for this action.

The new proposed emission limits for the pollutants regulated under CAA section 129(a)(4) (Cd, HCl, Pb, Hg, SO_2, NO_X, PM, DF, and CO) are shown in Table 2 of this preamble. We are providing two options for limits for DF, one based on the total mass basis (TMB) and one based on the toxic equivalency factor (TEQ). As we have done for other CAA section 129 standards, sources may meet one or the other of the DF limits, but are not required to meet both. We are proposing to apply these revised emission limits for small VSMWC and IWI units (with capacity less than or equal to 10 TPD of solid waste), as the data reflect our best knowledge of existing OSWI units of this size.

TABLE 2—REVISED OSWI STANDARDS FOR EXISTING SMALL OSWI UNITS [1]

Pollutant	Concentration units	Revised emission limit
Cd	µg/dscm [2]	2,000
HCl	ppmvd [3]	500
Pb	µg/dscm	32,000
Hg	µg/dscm	69
SO_2	Ppmvd	130
NO_X	Ppmvd	210
PM	mg/dscm	280
DF (TMB) [4]	ng/dscm [5]	4,700
DF (TEQ) [4]	ng/dscm	86
CO	Ppmvd	220

[1] Emission limits are for small existing VSMWC and IWI units with capacities less than or equal to 10 TPD.
[2] Micrograms per dry standard cubic meters.
[3] Parts per million by dry volume.
[4] For DF, you must meet either the TMB limit or the TEQ limit.
[5] Nanograms per dry standard cubic meters.

We are also proposing to revise the MACT floors for new, small OSWI units (both VSMWC and IWI). Section 129(a)(2) of the CAA requires that MACT for new sources be no less stringent than the emissions control achieved in practice by the best controlled similar unit. Therefore, the approach for new sources was similar to that used with the existing sources (*i.e.,* 99 percentile UL with FVF applied for the pollutants influenced by waste composition), except the top performing unit's data were used to calculate the MACT floor emission limit instead of the average of the best performing 12 percent of units. A detailed discussion of the emission limit calculation can be found in the memorandum, *OSWI Emission Limit Calculations for Existing and New Sources,* which is available in the docket for this action. The new source emission limits are shown in Table 3 of this preamble.

TABLE 3—REVISED OSWI STANDARDS FOR NEW SMALL OSWI UNITS [1]

Pollutant	Concentration units	Revised emission limit
Cd	µg/dscm	400
HCl	ppmvd	210
Pb	µg/dscm	26,000
Hg	µg/dscm	12
SO_2	ppmvd	38
NO_X	ppmvd	180
PM	mg/dscm	210
DF (TMB)	ng/dscm	3,100

TABLE 3—REVISED OSWI STANDARDS FOR NEW SMALL OSWI UNITS [1]—Continued

Pollutant	Concentration units	Revised emission limit
DF (TEQ)	ng/dscm	40
CO	ppmvd	69

[1] Emission limits are for small new VSMWC and IWI units with capacities less than or equal to 10 TPD.

For OSWI units that are not small OSWI units, we have not recalculated the MACT floors and are not proposing any changes to the emissions limitations. As mentioned before, large VSMWC and IWI units (with capacities greater than 10 TPD) have a different design and mode of operation than small OSWI units. We do not have sufficient information on these units that would enable us to revise the MACT floor for these existing OSWI units, and we are not proposing any changes to the current OSWI limits for existing sources for these units. Emissions data for two units in this size category demonstrate that sources require use of add-on control devices similar to those considered in the development of the 2005 OSWI standards to meet the emission limits, which supports our decision to retain the 2005 OSWI emission limits for this OSWI subcategory. Information provided on the units shows that the units are meeting the current OSWI emission limits and are in compliance with the current rule. We are not proposing any changes to the current OSWI emission limits for VSMWC and IWI units with capacities greater than 10 TPD (new and existing).

The EPA also examined whether it was appropriate to adopt more stringent ''beyond-the-floor'' regulatory options to determine MACT. Unlike the floor minimum stringency requirements, the EPA must consider various impacts of the more stringent regulatory options in determining whether MACT standards are to reflect ''beyond-the-floor'' requirements, including considering the costs, non-air quality health and environmental impacts, and energy requirements of such more stringent control. Small OSWI units often are of very basic, rudimentary design and function, as discussed in section II.B.4 of this preamble. Requiring additional controls on small OSWI units is infeasible or simply would be cost prohibitive. For OSWI units with capacities greater than 10 TPD, the 2005 final rule already incorporated beyond-the-floor requirements. We do not have sufficient information for large OSWI units that would enable us to revise the beyond the floor limits in this action. However, based on the information we have from the 2005 rule, requiring any further controls would likely only provide minimal emissions reductions with substantial cost investments. Considering these factors, we concluded that revised beyond-the-floor limits are unreasonable for the OSWI subcategories. A more detailed discussion of the beyond-the-floor analyses is provided in the memordandum, *OSWI Emission Limit Calculations for Existing and New Sources,* which is available in the docket for this action.

In the 2005 final OSWI rule, we also established opacity standards for ACI units that would otherwise meet the definitions of IWI or VSMWC units, but burn only 100-percent wood wastes, 100-percent clean lumber, 100-percent yard waste, or 100-percent mixture of only wood waste, clean lumber, and yard waste. We are not proposing any changes to the opacity standards for these units. However, ACIs that do not burn only 100-percent wood wastes, clean lumber, or yard wastes and that would meet the definition of an IWI or VSMWC unit would be required to meet the applicable OSWI standards.

The emission limits, including the proposed revised limits for small OSWI units and the (unchanged) limits for units with capacities greater than 10 TPD, are summarized in Table 4 of this preamble.

TABLE 4—LIMITS FOR OSWI UNITS, INCLUDING PROPOSED LIMITS FOR SMALL OSWI UNITS

Pollutant	Concentration units	Existing VSMWC and IWI units		New VSMWC and IWI units	
		Small [1]	Large [2]	Small [1]	Large [2]
Cd	µg/dscm	2,000	18	400	18
HCl	ppmvd	500	15	210	15
Pb	µg/dscm	32,000	226	26,000	226
Hg	µg/dscm	69	74	12	74
SO_2	ppmvd	130	3.1	38	3.1
NO_X	ppmvd	210	103	180	103
PM	mg/dscm	280	30	210	30
DF (TMB)	ng/dscm	4,700	33	3,100	33
DF (TEQ)	ng/dscm	86	-[3]	40	-[3]
CO	ppmvd	220	40	69	40

[1] Small units include those with capacity less than or equal to 10 TPD.
[2] Limit basis is from 2005 OSWI Rule. For PM, the 2005 OSWI standard is shown as mg/dscm rather than grains per dscf.
[3] DF TEQ basis was not calculated for the 2005 rule.

2. Proposed Revisions to Applicability of OSWI Requirements

We are proposing two changes to the applicability of the OSWI standards in order to resolve inconsistent definitions between OSWI and other CAA section 129 rulemakings, and update aspects of the rule that we have reconsidered based on new data. The proposed changes include (1) removing the definition of the term ''collected from'' as used in, and limiting the definition of, ''municipal solid waste'' in order to place the focus on the source and type or nature of the waste, rather than the manner in which is it ''collected'' and (2) modifying the OSWI definition of

''municipal waste combustion unit'' to make it clear that pyrolysis/combustion units are not OSWI units.

First, we are clarifying that the applicability of the OSWI standards to VSMWC units is based on the source and type or nature of waste incinerated rather than the particular manner in which the waste is collected. The regulatory history of the MWC rules indicates that the EPA intended to determine the applicability of the MWC rule based on the type of waste combusted in a unit and not based on the location of the incineration unit (54 FR 52261, December 20, 1989). The 2005 OSWI rule finalized a definition of ''municipal solid waste'' that was similar to the definition of ''municipal waste'' provided in CAA section 129(g)(5), but interpreted this, for the purposes of VSMWC applicability under OSWI, to mean that the municipal waste must be ''collected from'' certain or multiple sites. We have since re-evaluated our interpretation in OSWI where the rule explains municipal waste must be limited to those collected from outside the site of the incinerator. Other existing CAA section 129 incinerator rules do not necessarily place the same emphasis on where the waste is collected. The principal MWC rules, for example, do not focus on or even define ''collected from,'' and, instead, more broadly include materials discarded by a wide range of sources, regardless of how or where the waste may be ''collected'' (see, *e.g.,* 40 CFR 60.51b and 60.1465). We are proposing to modify the definitions in the OSWI standards to remove the specific definition of ''collected from'' and, thus, to eliminate the limitation that waste may not be burned at the same site where it is generated in order for it to be considered MSW.

We are, accordingly, proposing a different approach to the treatment of MSW under the OSWI standards than we opted to pursue when the standards were promulgated. There, we stated that ''small incinerators that are located at commercial business (such as stores, restaurants and apartments) or industrial sites are not VSMWC units because they do not burn waste which has been 'collected from.' '' (70 FR 74882). Under this proposal, such incinerators would no longer be subject to this ''collected from'' limitation and would qualify as VSMWC (provided these units burn more than 30-percent MSW).[11] We believe this approach is more consistent with the EPA's other CAA section 129 MWC rules. We also believe, on further review, that this approach is more consistent with the CAA section 129 definition of ''municipal waste.'' Section 129(g)(5) of the CAA essentially defines the term ''municipal waste'' to mean refuse ''collected from the general public and from residential, commercial, institutional, and industrial sources consisting of paper, wood, yard wastes, food wastes, plastics, leather, rubber and other combustible materials and non-combustible materials such as metal, glass and rock.'' We do not read this definition as necessitating that, to constitute MSW, the material or refuse must be a cumulative collection of refuse from each and every one of the sources identified (that is, the ''general public,'' ''residential,'' or ''commercial'' sources) or even necessarily of multiple such sources. Moreover, the term ''collected from'' is not defined in the CAA, and we do not read it as necessarily requiring (for waste to be considered MSW) that the waste must be transferred from one site and burned at another site.

Next, we are proposing to revise the OSWI definition of ''municipal waste combustion unit'' to remove the reference to ''pyrolysis/combustion units.'' The term is not defined in the current regulation and there is no similar specific reference to such units in the institutional waste incineration unit definition. In the preamble to the OSWI standards, we briefly stated that ''pyrolysis/combustion units (two chamber incinerators with a starved air primary chamber followed by an afterburner to complete combustion) within the VSMWC and IWI subcategories are considered OSWI units'' (70 FR 74876 and 74877). In the recent past, however, the EPA has received several inquiries about OSWI applicability to pyrolysis/combustion units, and we believe that there is considerable confusion in the regulated community regarding the reference to pyrolysis/combustion units in the definition of municipal waste combustion unit. Upon further review of the language in the final OSWI rule (70 FR 74876 and 74877), we believe the reference to pyrolysis/combustion units as MWC should not apply to OSWI units because such units are used to combust uncontained gases and do not involve the combustion of solid waste as defined in the OSWI rule. See 70 FR 74877 (where we noted that units that are used to combust uncontained gases and are not used to dispose of solid waste generally are not subject to the OSWI standards).

An OSWI unit is either a VSMWC or an IWI, and both types of units combust ''solid waste.'' Solid waste includes solid, liquid, and semisolid material. Solid waste also includes ''contained gaseous material,'' defined as gases that are in a container when that container is combusted (40 CFR 60.2977, 60.3078).

The combustion of uncontained gases in pyrolysis/combustion units is inconsistent with the definition of solid waste and the associated definition of ''contained gaseous material'' in OSWI, and therefore, with solid waste combustion for the purpose of the OSWI rule. The EPA understands pyrolysis to be a process that takes place in an inert environment. In a closely coupled pyrolysis/combustion chamber, the gaseous material comes out of the pyrolysis chamber and immediately is incinerated in the combustion chamber. The pyrolysis gas is not placed into a container and then combusted. Therefore, the pyrolysis gas in the closely coupled pyrolysis/combustion chamber is not ''contained gaseous material,'' as referenced in the definition of solid waste. We noted in connection with the promulgation of the OSWI standards that thermal oxidizers, catalytic oxidizers, and flameless thermal oxidizers are not considered to be subject to the OSWI rule if these units are used to combust uncontained gas from an industrial process (70 FR 74877). Moreover, unlike combustion, the pyrolysis process is endothermic and does not require the addition of oxygen (*i.e.* the partial pressure of oxygen during a pyrolysis process is maintained close to zero). Based on this understanding, we recognize that the pyrolysis process, by itself, is not combustion. In summary, because the pyrolysis itself is not combustion and pyrolysis gases are not a ''solid waste'' under OSWI, a pyrolysis-combustion unit should not be referenced in the definition of MWC unit for the purposes of the OSWI rule.[12] Accordingly, we are

[11] An incinerator is not considered to be combusting MSW ''if it combusts a fuel feed stream, 30 percent or less of the weight of which is comprised, in aggregate, of municipal solid waste.'' See, *e.g.,* 40 CFR 60.2977.

[12] Discarded material that is processed in such a unit would still be a solid waste under the Resource Conservation and Recovery Act (RCRA), and, therefore, subject to state RCRA Subtitle D solid waste management program requirements. In the case of hazardous waste, RCRA sections 3002(a) and 3004(a) grant the EPA the authority to control gaseous emissions from hazardous waste management as may be necessary to protect human health and the environment. RCRA sections 3004(n), and (o)(1)(B), further direct the EPA to regulate air emissions from, respectively, hazardous waste treatment, storage and disposal facilities, and hazardous waste incinerators. The authority provided in RCRA section 3004(q) to regulate fuel produced from hazardous waste also encompasses gaseous fuels (when they are produced from

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proposing to revise the definition of ''municipal waste combustion unit'' in 40 CFR 60.2977 and 40 CFR 60.3078 to remove the reference to ''pyrolysis/combustion units'' from the definition, reflecting our view that such units should not be regarded as municipal waste combustion units under the OSWI rule.

3. Proposed Removal of SSM Provisions

Currently, the OSWI standards do not apply during SSM periods (see 40 CFR 60.2918, 60.3025). The EPA proposes to eliminate this limitation or qualification on the applicability of the OSWI standards. The EPA proposes this change in light of the 2016 remand and certain legal developments, including a decision by the D.C. Circuit that invalidated certain regulations related to SSM in the 40 CFR part 63 General Provisions (*Sierra Club* v. *EPA,* 551 F.3d 1019 (2008)). While the decision did not specifically address the SSM provisions in the OSWI standards, it calls those provisions into question.

We are not proposing separate emission standards for OSWI units that would apply during SSM periods. We determined that OSWI units will be able to meet the emission limits during periods of startup because most units burn natural gas or clean distillate oil to start, and waste is not added until the unit has reached combustion temperatures. Emissions from burning natural gas or distillate fuel oil would generally be significantly lower than from burning solid wastes. During shutdown periods, emissions are also generally significantly lower than emissions during normal operations because the materials in the incinerator will be almost fully combusted before shutdown occurs. Control of the lower emissions during startup and shutdown should be able to be accomplished using the same technological controls required for emissions during normal operations. Furthermore, the approach for establishing the revised MACT floors for OSWI units ranked individual OSWI or similar units based on actual performance for each pollutant, with an appropriate accounting of emissions variability. Because we accounted for emissions variability and established appropriate averaging times to determine compliance with the proposed OSWI standards, we believe we have adequately addressed any minor variability that may potentially occur during startup or shutdown. However, we note that we do not have available data for OSWI units during periods of startup and shutdown. We request comment on the proposed removal of the SSM provisions and the proposal to leave in place the OSWI standards during SSM periods, including any additional information for consideration for startup and shutdown periods for OSWI units.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead they are, by definition, sudden, infrequent, and not reasonably preventable failures of emissions control, process, or monitoring equipment (see 40 CFR 60.2). The EPA interprets CAA section 129 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 129 standards. Under CAA section 129, emissions standards for new sources must be no less stringent than the level ''achieved'' by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation ''achieved'' by the best performing 12 percent of sources in the category. There is nothing in CAA section 129 that directs the Agency to consider malfunctions in determining the level ''achieved'' by the best performing sources when setting emission standards. As the D.C. Circuit has recognized, the phrase ''average emissions limitation achieved by the best performing 12 percent of'' sources ''says nothing about how the performance of the best units is to be calculated.'' *Nat'l Ass'n of Clean Water Agencies* v. *EPA,* 734 F.3d 1115, 1141 (DC Cir. 2013). While the EPA accounts for variability in setting emissions standards, nothing in CAA section 129 requires the Agency to consider malfunctions as part of that analysis. The EPA is not required to treat a malfunction in the same manner as the type of variation in performance that occurs during routine operations of a source. A malfunction is a failure of the source to perform in a ''normal or usual manner'' and no statutory language compels the EPA to consider such events in setting CAA section 129 standards. The EPA's approach to malfunctions in the analogous circumstances (setting ''achievable'' standards under CAA section 112) has been upheld as reasonable by the D.C. Circuit in *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016).

As the D.C. Circuit recognized in *U.S. Sugar Corp.,* accounting for malfunctions in setting standards would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree, and duration of various malfunctions that might occur. *Id.* at 608 (''the EPA would have to conceive of a standard that could apply equally to the wide range of possible boiler malfunctions, ranging from an explosion to minor mechanical defects. Any possible standard is likely to be hopelessly generic to govern such a wide array of circumstances.'') As such, the performance of units that are malfunctioning is not ''reasonably'' foreseeable. See, *e.g., Sierra Club* v. *EPA,* 167 F.3d 658, 662 (D.C. Cir. 1999) (''The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study. '') See also, *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978) (''In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.''). In addition, emissions during a malfunction event can be significantly higher than emissions at any other time of source operation. For example, if an air pollution control device with 99-percent removal goes off-line as a result of a malfunction (as might happen if, for example, the bags in a baghouse catch fire) and the emission unit is a steady state type unit that would take days to shut down, the source would go from 99-percent control to zero control until the control device was repaired. The source's emissions during the malfunction would be 100 times higher than during normal operations. As such, the emissions over a 4-day malfunction period would exceed the annual emissions of the source during normal operations. As this example illustrates,

hazardous wastes). The authority provided in RCRA section 3004(u) to control ''releases'' of hazardous constituents from solid waste management units at a facility seeking a RCRA permit also encompasses gaseous releases (when the gases are hazardous constituents). The authority granted under these sections of the statute is independent of the EPA's authorities over solid waste. As an example, the EPA has authority to regulate emissions generated during treatment of hazardous waste, including volatilization and incineration of hazardous waste.

accounting for malfunctions could lead to standards that are not reflective of (and significantly less stringent than) levels that are achieved by a well-performing non-malfunctioning source. It is reasonable to interpret CAA section 129 to avoid such a result. The EPA's approach to malfunctions is consistent with CAA section 129 and is a reasonable interpretation of the statute.

Although no statutory language compels the EPA to set standards for malfunctions, the EPA has the discretion to do so where feasible. For example, in the Petroleum Refinery Sector Risk and Technology Review, the EPA established a work practice standard for unique types of malfunction that result in releases from pressure relief devices or emergency flaring events because the EPA had information to determine that such work practices reflected the level of control that applies to the best performers. 80 FR 75178, 75211 through 14 (December 1, 2015). The EPA will consider whether circumstances warrant setting standards for a particular type of malfunction and, if so, whether the EPA has sufficient information to identify the relevant best performing sources and establish a standard for such malfunctions. We note that there are no provisions for establishing work practice standards under CAA section 129.

In the event that a source fails to comply with the applicable CAA section 129 standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA would also consider whether the source's failure to comply with the CAA section 129 standard was, in fact, sudden, infrequent, not reasonably preventable, and was not instead caused, in part, by poor maintenance or careless operation. 40 CFR 60.2 (definition of malfunction).

If the EPA determines in a particular case that an enforcement action against a source for violation of an emission standard is warranted, the source can raise any and all defenses in that enforcement action and the federal district court will determine what, if any, relief is appropriate. The same is true for citizen enforcement actions. Similarly, the presiding officer in an administrative proceeding can consider any defense raised and determine whether administrative penalties are appropriate.

In summary, the EPA's interpretation of the CAA and, in particular, CAA section 129, is reasonable and encourages practices that will avoid malfunctions. Administrative and judicial procedures for addressing exceedances of the standards fully recognize that violations may occur despite good faith efforts to comply and can accommodate those situations. *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016).

For these reasons, we are proposing to remove and reserve 40 CFR 60.2918 and 40 CFR 60.3025, which provided exceptions for SSM. We are proposing minor harmonizing revisions to other rule requirements that reference SSM, such as revisions to the definition of ''Deviation'' to remove language for periods of SSM, for consistency with these changes.

4. Proposed Revisions to Testing and Compliance

For small OSWI units, we are proposing alternatives to conducting the initial and annual performance tests and to remove the requirements to install, calibrate, maintain, and operate continuous emissions monitoring systems (CEMS). The OSWI standards currently require owners and operators of OSWI units to conduct initial and annual performance tests to demonstrate compliance (40 CFR 60.2927, 60.2932 and 60.3030, 60.3033). Owners and operators may conduct performance tests less often than annually for a given pollutant if they are able to demonstrate compliance with the emissions limitations for three consecutive annual tests (40 CFR 60.2934, 60.3035). The OSWI standards also require CEMS for CO and oxygen (40 CFR 60.2939, 60.3038).

We are proposing a new substitute means of compliance demonstration for small OSWI units, as we recognize that testing can impose substantial financial burdens and technical challenges on owners and operators of these sources. Based on the limited information available, we expect that most OSWI units are likely small incinerators that are not equipped with stacks from which to sample emissions during a performance test, and a stack or extension would be needed in order to perform the testing required by the OSWI standards. In some instances, it physically may not be possible to equip the incinerator with a stack, and in other cases, costs for doing so may be prohibitive. Transporting, installing, and supporting the extension for testing in the field can present additional issues, such as space or property constraints that may require additional construction of scaffolding, ducting, or modifications to underlying structures to install the appropriate extensions and sampling ports.[13] Additionally, many of these small OSWI units are located in remote and difficult to access areas of the country, and it is difficult to mobilize stack testing crews to some of these locations.

These technical and economic infeasibilities are magnified for existing sources, which have previously installed units that may have never been equipped with a stack and for which additional space or property modifications may be infeasible. Further, owners and operators may find it economically infeasible to conduct initial or annual performance tests of these small units due to the cost of stack testing. We believe that similar difficulties may arise in connection with monitoring, including installation and operation of CEMS. Although we recognize these challenges exist for certain sources, adequate demonstration of initial and on-going compliance is necessary.[14] Therefore, we are proposing alternatives to the testing and monitoring requirements to provide

[13] The OSWI standards are found in 40 CFR part 60, subparts EEEE (NSPS) and FFFF (EG). In addition, subpart A (General Provisions) of part 60 contains various generally-applicable provisions, including provisions relating to performance testing (see, for example, 40 CFR 60.8). These generally-applicable performance testing provisions require, in part, owners and operators to provide performance testing facilities, including sampling ports. We believe, however, that for small OSWI units there could be significant challenges to conducting such modifications in the field to fit units at every site. In any event, the application of the General Provisions in subpart A to the other part 60 subparts is subordinate to the specific provisions found in the other subparts, such as the OSWI standards. See, for example, 40 CFR 60.8(b) (performance test shall be conducted in accordance with the methods and procedures in each applicable subpart), 60.8(f) (performance testing shall be conducted in a prescribed manner, unless otherwise specified in the applicable subpart), and 60.11 (compliance shall be determined in accordance with 40 CFR 60.8, unless otherwise specified in the applicable standard). Moreover, the EPA retains the authority to limit or modify the application of subpart A in subsequent rulemaking, including rulemaking relating to other part 60 subparts, such as the OSWI standards. In the event of a conflict between the performance testing provision of subpart A and the provisions of subparts EEEE and FFFF, the provisions of the source specific subparts (here, EEEE and FFFF) control.

[14] CAA 129(c) requires, in part, the EPA to include emissions monitoring as part of solid waste incinerator standards. This requirement has been construed as requiring assurance of compliance with emission standards. *Nat'l Ass'n of Clean Water Agencies* v. *EPA,* 734 F.3d 1115, 1160 (DC Cir. 2013). The EPA believes that, for the other solid waste incineration source category, the package of testing, monitoring, reporting, and recordkeeping requirements associated with the proposed substitute means of compliance testing for small OSWI units will adequately assure compliance with the standards.

regulatory flexibilities for small OSWI units.

At present, the OSWI standards require new sources to conduct initial performance testing within 60 days after the OSWI unit reaches the charge rate by which it will operate, but not later than 180 days after initial startup (40 CFR 60.2928); existing sources must conduct initial performance testing no later than 180 days after the final compliance date. We are proposing to retain this requirement, but we are also proposing—for small OSWI units—to add a substitute means of compliance demonstration, under which such initial performance testing would not be required. In lieu of that initial performance testing, owners and operators of small OSWI units would have the option to submit detailed information concerning the unit—including the make, model and manufacturer of the unit, and the type and capacity of the unit, information on the unit's air pollution control devices (if any), waste type and quantity information, and the charge rate—and to identify in the EPA's WebFIRE database a representative performance test.[15] The test must be representative for the small OSWI unit in terms of similar throughput, method of processing and burning waste, operating temperatures, types of wastes or supplemental fuels burned, and waste profiles. If there is no representative performance test available in the WebFIRE database, the small OSWI unit cannot use the substitute means of compliance demonstration and must comply with the initial performance testing requirements.

To use this alternative option, the owner/operator must submit a notification including the manufacturer, make, model, and type of unit, and documentation that the capacity of the unit is less than or equal to 10 TPD. We are proposing that owners and operators of new small OSWI units (constructed after August 31, 2020) and small OSWI units modified or reconstructed six months after the effective date of the final rule would be required to either complete their initial performance test within 60 days after the unit reaches the charge rate at which it will operate, but no later than 180 days after its initial startup,[16] or submit a notification of intention to use the substitute means of compliance demonstration to the Administrator within 6 months after the date of publication of the final rule (currently estimated by the EPA—depending on the actual date of publication of the final rule—to be on or about November 30, 2021), or within 60 days after initial startup, whichever of these dates is later. Owners and operators of existing small units (constructed on or before August 31, 2020) would not be required to submit a notification of intention to the Administrator, but would be required to identify the results of an existing performance test in the EPA's WebFIRE that is representative of their OSWI unit or conduct an initial performance test, no later than 3 years after a state plan is approved or no later than 5 years after the date of promulgation of the final rule, whichever of these dates is earlier.

The proposed substitute means of compliance demonstration relies on the availability of the results of performance tests conducted on potentially representative sources in the EPA's WebFIRE database. One way the EPA envisions this option could be implemented is through one or more testing coordinators that would develop a testing protocol and conduct performance tests for representative units from similar source groups.[17] [18] For example, each owner/operator opting to use the substitute means of compliance demonstration would submit to a testing coordinator information on its small OSWI unit, including unit design, operations information and waste profiles. It is our expectation that the testing coordinator would review the data provided and identify a representative unit for each similar source group, establish the waste profile for the similar source group, and coordinate and/or conduct the performance test on the representative unit from the similar source group. The results of the test could then be used to demonstrate initial compliance by owners and operators of any small OSWI unit for which the test is representative. To aid implementation of this option, the EPA intends to provide a grant or contract to testing coordinators. To conserve resources, if there are multiple testing coordinators, the testing coordinators should work together in conducting performance tests in order to provide performance test results that will be representative for the largest number of small OSWI units.

Another way that the EPA envisions this representative testing alternative might be implemented is if owners and operators of small OSWI units that are similar in design and operation and burn the same waste types combine resources. One small OSWI unit in the group would be tested, and once the results are available in WebFIRE, that performance test would be used to demonstrate initial compliance for any small OSWI unit for which the test is representative.

Beginning on the effective date for new sources (6 months after publication of the final rule in the **Federal Register**), and until the owner/operator identifies a representative performance test, each owner/operator of a small OSWI unit would be required to collect data on a weekly basis to characterize the unit operations and the waste profiles for the OSWI unit. The waste profile information would be used to capture the differing waste streams and waste variability for the unit in order to develop a representative waste profile. The owner/operator would use these data to locate the results of a representative performance test in the

[15] Some tests in the WebFIRE database may not qualify for use as a representative performance test. Representative performance tests must be conducted according to the requirements in the OSWI rule, demonstrate compliance with the OSWI standards, and include the following information in the report: Unit design (including air pollution control devices), charge rate during the test, type of operation, combustion temperature during the test, types of waste burned during the test and the relative amount of each waste to the total waste burned, type and amount of supplemental fuels used during the test, and, if the tested unit has an air pollution control device, the operating parameter data for the control device during the test.

[16] For units that start-up between August 31, 2020 and the date that is 6 months after publication of the final rule, the initial performance test must be conducted within 60 days after your OSWI unit reaches the charge rate at which it will operate, but no later than 180 days after its initial startup, or by the date 240 days after publication of the final rule (currently estimated by the EPA to be on or about February 28, 2022), whichever date is later.

[17] A ''testing coordinator'' may be, for example, a state or university that would collect waste data from a group of sources, form similar groups of facilities based of the information provided, develop a testing protocol, and conduct performance tests for representative units from similar source groups.

[18] ''Similar source groups'' may include units of similar throughput, method of processing and burning waste, operating temperatures, waste variability, and estimated waste profiles. It is expected that a performance test conducted on one unit in a similar source group would likely be representative for all of the units in the similar source group. The proposed option would allow for a testing coordinator to have some latitude to determine what constitutes a similar source group. For example, the testing coordinator would have the discretion to test representative units for existing sources (constructed on or before August 31, 2020), and new sources (constructed after August 31, 2020), from similar source groups separately. Alternatively, the testing coordinator might be able to select a new source (*e.g.,* a model unit constructed after August 31, 2020, that has a similar design that would be carried forward into future years) from a similar source group that is also similar to existing sources. In this latter case, if the new unit tested is able to demonstrate initial compliance with the emissions limits for VSMWC and IWI units under the NSPS and EG, then both the existing and new units described by the similar source group may be able to use the test data to demonstrate initial compliance.

EPA's WebFIRE database. The owner/operator would submit information on the representative performance test and documentation of how the performance test is representative for their small OSWI unit (*e.g.,* based on the unit type and design, charge rate, operating temperatures, types of waste burned, and any air pollution control devices) to the Administrator through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). Owners and operators would maintain a record (*i.e.,* copy) of the representative performance test report (acquired from the EPA's WebFIRE database) and the submitted documentation of how the test is representative.

Because we anticipate this approach would need to afford time for testing coordinators to determine similar source groups, develop testing protocols, and coordinate with each other, owners and operators of existing and new small units who wish to use the substitute means of compliance demonstration are encouraged to submit their notification of intent to use the substitute means of compliance demonstration and identify their waste variability and waste characterization and profile data as soon as possible following the promulgation of the final rule. We note that, if this alternative initial compliance option is finalized, owners and operators who do not provide their initial waste characterization data to a testing coordinator in a timely manner could miss the opportunity to avail themselves of this option due to the amount of planning, time, and resources required for coordinators to perform these tests as well as the fact that their unit may not be of the similar source group tested. Owners and operators who cannot find a representative test conducted for a unit that is similar to their units would be required to conduct their own initial performance tests. Because the compliance date for new sources is earlier than the compliance date for existing sources, and it is uncertain how many tests could be conducted with the EPA-supplied grant or contract money, owners and operators of existing sources are encouraged to start collecting information that would be useful in conducting similar sources tests and submit this information to the testing coordinators as soon as possible. This will greatly increase the likelihood that a representative test is available in the WebFIRE database prior the compliance deadline.[19]

We anticipate that the testing coordinators would be able to complete testing on OSWI units that are representative of most existing and new small units and submit the results of the testing within 18 months of the date of publication of the final rule. The testing results for these potentially representative units will be submitted to the EPA's CEDRI, and would then be available to owners and operators in the EPA's WebFIRE database. (See section II.B.6 of this preamble for a discussion of electronic reporting.) We are proposing a time period of 21 months following the date of publication of the final rule in the **Federal Register** or 60 days after the OSWI unit reaches the maximum charge rate at which it will operate, but no later than 180 days after initial startup, whichever date is later, for owners and operators of small OSWI unts to identify a representative performance test in WebFIRE and submit information to the Administator identifying the representative performance test. This period allows time for a testing coordinator conducting the test to develop the testing protocol, conduct performance tests, and electronically submit the results of the test through CEDRI; for the EPA to transfer these results to the EPA's WebFIRE database; and for owners and operators to find a representative performance test and submit information on how it is representative to the Administrator.

For demonstrating continuous compliance, we are also proposing, for small OSWI units, an alternative waste characterization option in lieu of the current annual performance testing requirements, as many of the concerns about the availability or feasibility of initial testing for small OSWI units also apply to annual testing. We are proposing the alternative continuous compliance option for small OSWI units in lieu of annual testing (or the requirements to conduct testing less often than annual for specific pollutants) because the option is a more readily available compliance option for units with rudimentary designs or units without a stack and the costs associated with waste stream characterization are less prohibitive than those for an annual stack test. This alternative continuous compliance demonstration option includes periodic, robust operational recordkeeping in lieu of conducting an annual performance test. Following the facility's initial performance test or representative performance test (if using the substitute means of compliance demonstration), an owner/operator would demonstrate continuous compliance through recordkeeping. The recordkeeping requirements would include recording the source-specific waste profiles and incinerator unit operating parameters, including the daily average charge rate and the 3-hour average combustion chamber temperature of the unit. To demonstrate compliance, the weekly records of the source-specific waste profile would need to indicate that the waste combusted is consistent, within +/− 15 percent by weight, of the percentage established for that waste category according to the waste profiles established during the representative performance test (if using the substitute means of compliance demonstration) or the facility's initial performance test.[20] Additionally, the records would need to demonstrate that the unit is operated within the charge rate and temperature ranges established during the initial performance test or the representative performance test.

If the facility anticipates combusting a waste stream with a different profile, the owner/operator would be required to conduct a performance test of the unit with a waste stream representative of the new waste profile, or, alternatively, identify a representative performance test report in the WebFIRE database, before combusting the modified waste stream (*i.e.,* the owner or operator must identify that the unit is of similar throughput, method of processing and burning waste, charge rate, operating temperatures, waste management plan, estimated waste variability and waste profiles to the representative unit). Similarly, if the facility anticipates exceeding or operating outside of the established operating parameter ranges, the owner/operator would be required to conduct a performance test of the unit while operating at the new parameter limits (or find a representative

[19] When deciding the sources to test, a testing coordinator has multiple options: (1) Select an existing source similar to other existing sources; (2) select a unit that is representative of both new and existing sources; (3) select a new source that is similar to other new sources; and (4) select a unit with a design that would be carried forward into future years. The decision on which sources will be tested will be based in part on the pool of data that is available to the testing coordinator at the time that the testing protocols are developed. If the testing coordinator does not have data on existing sources, it may not be feasible to conduct performance tests that are representative for any existing units. If a performance test is conducted on an existing unit, it must, among other things, demonstrate initial compliance with the emissions limits for new units in order for a new unit to use it as a representative performance test.

[20] If, for example, the paper component of the waste stream during initial testing was 20 percent then burning waste streams with a paper component between 5 and 35 percent of the total waste stream would be acceptable weekly operation and, assuming all other requirements are met, additional testing would not be required for the source.

performance test with those operating parameter limits in the WebFIRE database) to confirm that the unit continues to meet the OSWI emission standards under the new operating parameter limits. Failure to comply with the retesting requirement would constitute a deviation from the OSWI standards.

Finally, we are proposing to modify the monitoring requirements for small OSWI units that use the alternative continuous compliance option in lieu of complying with the annual performance testing requirements by removing the requirement for CO and oxygen CEMS. We are proposing this change for the same reasons that we are proposing an alternative to the annual performance test. In addition to the cost of maintaining CEMS, part of calibrating a CEMS generally requires an annual stack test to verify the operation of the CEMS. Relieving owners and operators of small OSWI units of the obligation to conduct an annual performance test without likewise removing the requirement for CEMS, which includes performing an annual stack test, would not achieve the stated goals and benefits of removing the annual performance test.

For OSWI units other than small OSWI units, we are also proposing that such units may use CO CEMS data in lieu of initial and annual testing for CO, provided the CEMS has been previously certified and is meeting the ongoing quality assurance/quality control requirements. Facilities that use this option would be allowed to use a 12-hour rolling average of the 1-hour arithmetic average CEMS data to determine compliance with the CO emission limitations. However, the initial performance evaluation (certification) must be conducted prior to collecting CEMS data for the initial compliance demonstration. Under the proposed rules, such units could also use CO CEMS data in lieu of conducting an annual performance test for CO. This proposed change would provide flexibility for sources and reduce the burden associated with testing, while assuring compliance based on continuously measured emissions data.

5. Proposed Recordkeeping and Reporting Revisions

We are proposing several revisions to the recordkeeping and reporting requirements. A number of proposed recordkeeping changes are associated with the proposal to establish—for small OSWI units—a substitute compliance demonstration option (for initial performance testing, as well as continuous compliance testing). For small OSWI units using the substitute compliance demonstration process, we propose (in connection with the initial compliance test requirement) owners and operators will be required to maintain records of the notification of intent to use the substitute means of compliance demonstration and the documentation demonstrating the design, operation, and unit capacity, copies of the initial waste characterization and operating data, and documentation related to the representative (substitute) performance test and how the test is representative of the unit. The new proposed recordkeeping requirements for owners and operators of small OSWI units—and associated with the proposed substitute continuous compliance requirements—include records on such particulars as unit start and end times of operation, the quantity or weight of each waste type (*e.g.,* pounds of solid waste, food waste, wood or yard waste), the quantities of supplemental fuels burned (flow rate or percentage of operating time), percentage of each waste type of total waste burned, and the temperature (three-hour average) and charge rate (TPD), and records for units using air pollution controls such as a wet scrubber, dry scrubber, electrostatic precipitator, or fabric filters. The proposed recordkeeping is intended to help ensure that small OSWI units that choose the proposed substitute continuous compliance option are able to demonstrate compliance with the emission and operating limits of the OSWI standards. Among other things, the recordkeeping requirements help to demonstrate that the waste types burned by small OSWI units are within +/−15 percent of the percentages established for each waste category according to the profiles established during the initial performance test or representative performance test.

We are also proposing reporting-related changes, especially changes associated with the substitute compliance testing program for small OSWI units. For example, we are proposing—for small OSWI units using the substitute continuous compliance option—that owners and operators would be required to include in annual reports a statement that there were no deviations from the weekly waste characterization requirements and the unit has been operated within the operating parameter limits. The proposed recordkeeping and reporting is intended to help ensure that there is adequate information available to determine compliance with the standards and the severity of any failure to meet a standard, and to further assure compliance with the standards at all times. We are also proposing to clarify the timeline for submittal of an annual report for owners and operators that choose to comply with the substitute means of compliance in lieu of an initial performance test; for these units, an annual report must be submitted no later than 12 months following the submission of the representative performance test and the description of the how the test is representative for the OSWI unit.

We are also proposing to revise the recordkeeping and reporting requirements for deviations, which apply to both large and small OSWI units. Currently, these requirements focus on identifying malfunctions and deviations from the emission limitations or operating limits that apply, including whether any monitoring system used to determine compliance with the emission limitations or operating limits was inoperative, inactive, malfunctioning or out of control. We are proposing several additional requirements to clarify that a deviation includes any ''failure to meet an applicable standard'' and what must be recorded and reported. The proposed changes include the following:

- Revising the definition of ''deviation'' to remove language for periods of SSM, as discussed in section II.B.3 of this preamble.
- Revising 40 CFR 60.2932(c) and 40 CFR 60.3033(c) to clarify the alarm time that constitutes a deviation from the operating limit for OSWI units with fabric filters and bag leak detection systems.
- Revising 40 CFR 60.2932(d) and 40 CFR 60.3033(d) to include deviations from the weekly waste characterization requirements, provide for performance testing when the waste profile of the OSWI unit is modified, and clarify that failure to conduct a performance test or identify a representative test when the waste profile has changed constitutes a deviation.
- Revising 40 CFR 60.2942(f) and 40 CFR 60.3033(f) to clarify that, for OSWI units using CEMS, failure to collect required data is a deviation of the monitoring requirements.
- Revising 40 CFR 60.2949 and 40 CFR 60.3046 to specify that facilities must retain a record identifying the calendar dates, times, and durations of malfunctions and a description of the failure and the corrective action taken.
- Revising 40 CFR 60.2956(e) and 40 CFR 60.3051(e) to clarify that for OSWI units with CMS, the annual report must include a statement that there were no periods during which the CMS were

inoperative, inactive, malfunctioning or out of control.

- Removing deviation reporting requirements (40 CR 60.2956(g); 40 CFR 60.3051(g)) previously included as part of the annual report to remove redundant reporting; these requirements are included in the deviation report submitted on a semiannual basis (40 CFR 60.2958; 40 CFR 60.3053).
- Modifying the annual reporting requirements in 40 CFR 60.2956 and 40 CFR 60.3051 to require facilities to provide a statement that there was no deviation identified from the weekly waste characterization (*i.e.,* the waste types burned are within 15-percent variation of the profiles established during the initial performance test) and the unit has been operated within the charge rate and temperature ranges established when no deviations have occurred during the reporting period.
- For deviation reporting, revising the title of 40 CFR 60.2957 and 60.3052 to ''What other reports must I submit if I have a deviation?'', and reorganizing these sections to be consistent with the definition of ''deviation'' and in order to better reflect the types of deviations which must be reported.
- Clarifying the requirements of 40 CFR 60.2958 and 40 CFR 60.3053 to clarify the contents of the deviation report, including identifying the calendar dates, times, and durations of any deviations and a description of any corrective actions taken, and adding new requirements to report deviations from the weekly waste characterization and operating parameter limits established for small OSWI units.

We are proposing additional changes to the recordkeeping and reporting requirements that include consistency edits based on the proposed revisions to allow for use of CO CEMS data in lieu of annual testing for CO (for OSWI units that have capacities greater than 10 TPD), and proposed revisions to the monitoring requirements that ensure consistency with other CAA section 129 rules (*e.g.,* adding operating parameters for controls other than a wet scrubber that may be employed for OSWI units and clarifying the frequency of the data recording or averaging for each required operating parameter). These proposed changes to the monitoring requirements are described further in sections II.B.4 and II.B.8 of this preamble.

6. Proposed Requirements for Electronic Reporting

The EPA is proposing that owners and operators of OSWI units submit electronic copies of required performance test reports, performance evaluation reports, deviation reports, and annual compliance reports through the EPA's CDX using CEDRI. A description of the electronic data submission process is provided in the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* which is available in the docket for this action. The proposed rule requires that performance test results collected using test methods that are supported by the EPA's Electronic Reporting Tool (ERT) as listed on the ERT website [21] at the time of the test be submitted in the format generated through the use of the ERT, or an electronic file consistent with the extensible markup language (XML) schema on the ERT website, and that other performance test results be submitted in portable document format (PDF) using the attachment module of the ERT. Similarly, performance evaluation results of CEMS measuring relative accuracy test audit pollutants that are supported by the ERT at the time of the test must be submitted in the format generated through the use of the ERT, or alternatively, an electronic file consistent with the XML schema on the ERT website, and other performance evaluation results, be submitted in PDF using the attachment module of the ERT.

For deviation reports and annual compliance reports, the proposed rule requires that owners and operators use the appropriate spreadsheet template to submit information to CEDRI. A draft version of the proposed templates for these reports is included in the docket for this action.[22] The EPA specifically requests comment on the content, layout, and overall design of the templates. Facilities would have 1 year from the date of publication of the final rule, or once the reporting forms have been made available in CEDRI for at least 1 year, whichever date is later, to submit these reports.

Additionally, the EPA has identified two broad circumstances in which electronic reporting extensions may be provided. In both circumstances, the decision to accept the claim of needing additional time to report is within the discretion of the Administrator, and reporting should occur as soon as possible. The EPA is providing these potential extensions to protect owners and operators from noncompliance in cases where they cannot successfully submit a report by the reporting deadline for reasons outside of their control. The situation where an extension may be warranted due to outages of the EPA's CDX or CEDRI that preclude an owner or operator from accessing the system and submitting required reports is addressed in 40 CFR 63.2961(d) and 40 CFR 63.3056(d). The situation where an extension may be warranted due to a *force majeure* event, which is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents an owner or operator from complying with the requirement to submit a report electronically as required by this rule is addressed in 40 CFR 63.2961(e) and 40 CFR 63.3056(e). Examples of *force majeure* events are acts of nature, acts of war or terrorism, or equipment failure or safety hazards beyond the control of the facility. See proposed requirements at 40 CFR 60.2961 and 40 CFR 60.3056.

The electronic submittal of the reports addressed in this proposed rulemaking will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability and transparency, will further assist in the protection of public health and the environment, will improve compliance by facilitating the ability of regulated facilities to demonstrate compliance with requirements and by facilitating the ability of delegated state, local, tribal, and territorial air agencies and the EPA to assess and determine compliance, and will ultimately reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic reporting also eliminates paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors, and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public. Moreover, electronic reporting is consistent with the EPA's plan [23] to implement Executive Order 13563 and is in keeping with the EPA's Agency-wide policy [24] developed in response to the White House's Digital Government

[21] *https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert.*

[22] See *OSWI_Annual_Report_Template.xlsx* and *OSWI_Deviation_Report_Template.xlsx*, available at Docket ID. No. EPA–HQ–OAR–2003–015.

[23] The EPA's *Final Plan for Periodic Retrospective Reviews of Existing Regulations,* August 2011. Available at: *https://www.regulations.gov/document?D=EPA-HQ-OA-2011-0156-0154.*

[24] E-Reporting Policy Statement for EPA Regulations, September 2013. Available at: *https://www.epa.gov/sites/production/files/2016-03/documents/epa-ereporting-policy-statement-2013-09-30.pdf.*

Strategy.[25] For more information on the benefits of electronic reporting, see the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* referenced earlier in this section.

7. Proposed Revisions to Title V Permitting Requirements for ACIs Burning Only Wood Waste, Clean Lumber, and Yard Waste

The 2005 OSWI rule contains a regulatory requirement that ACIs that burn only wood waste, clean lumber, and yard waste must apply for an obtain a tile V operating permit. The EPA is proposing to eliminate this regulatory title V permitting requirement for such ACIs that are not located at a major source or subject to title V for other reasons. The EPA has received feedback from several states indicating that the title V requirements are unnecessarily burdensome and expensive for states to maintain for these ACIs. Based on available data, ACI that burn exclusively wood waste, clean lumber, and yard waste are commonly located at facilities that would not otherwise require a title V operating permit.[26]

In previous rulemaking, we provided for title V permitting for these ACIs for various reasons, as explained in the final OSWI rule (70 FR 74884–74885, Decemeber 4, 2005). In particular, we believed initially that compliance with a title V permit was necessary to assure compliance with the opacity requirements established for such incinerators. In this rulemaking we are reconsidering the need for a regulatory requirement for title V permitting for these air curtain incineration units that are only subject to an opacity limitation and related requirements to assure compliance, because such units are not considered solid waste incineration units under section 129. Also, based on input from various states on the burdens and costs of title V permitting for such incinerators, we no longer believe it is appropriate or necessary to require title V permitting.

8. Proposed Technical Edits, Clarifications, and Additional Revisions To Improve the OSWI Standards

We are proposing several additional technical corrections, harmonizing changes, clarifications, and improvements to the OSWI standards that are intended to improve the understanding of the rule and to improve consistency with other CAA section 129 rules.

We are proposing several harmonizing changes throughout the OSWI standards, in keeping with the proposed revisions discussed in sections II.B.1 through 7 of this preamble, to incorporate the revised emission limits, operating limits, alternatives to testing and monitoring, and recordkeeping and reporting. These harmonizing changes include incorporation of compliance dates and other revisions to clarify applicability of existing requirements to small OSWI units, such as revisions to the title of the standards to remove old compliance dates; redefining when a small OSWI unit is considered a new or existing incineration unit based on date of construction, reconstruction, or modification; clarifying the timeline for when the changes for small OSWI units become effective; and updating the timeline for the submittal of an operator training course, site-specific documentation, conduct of the initial performance test or substitute means of compliance demonstration, and submittal of title V reports for small OSWI units. For the emission guidelines, the proposed changes also include specifying the timeline of submittal and approval for revisions to state plans to include the requirements for small OSWI units, the compliance schedule that must be included in state plans, and the EPA's authority to implement and enforce a federal plan if a state plan is not approved. We are also proposing changes that would clarify and improve the organization of the rule, enhance readability, and improve compliance.

In some cases, we are proposing to remove redundant language, for example, 40 CFR 60.2970(b) and 40 CFR 60.3062(b). These paragraphs repeat the requirements for ACIs burning only 100-percent wood waste, clean lumber, yard waste, or a mixture of these wastes, which are already provided in 40 CFR 60.2888(b) and 40 CFR 60.2994(b). We are also proposing revisions to add or correct cross-references to add clarity to existing requirements; for example, we are proposing to clarify the implementation and enforcement authorities in 40 CFR 60.2889 and 40 CFR 60.2990 that are not transferred to state, local, or tribal authorities by adding cross-references to specific rule provisions. Similarly, we are proposing to clarify 40 CFR 60.2966 and 40 CFR 60.3059 to specify that units must obtain a title V operating permit based on when they meet the applicability criteria for OSWI units.

We are proposing additional clarifications that would improve compliance with the existing requirements; for example, we are adding a requirement that the incinerator operator training course under 40 CFR 60.2905(c) and 40 CFR 60.3014(c) must include coverage of good combustion practices as well as waste characterization procedures, and related actions for prevention and correction of malfunctions, which must be included to maintain operator qualifications and kept in required site-specific documentation. These clarifications ensure that owners and operators will be aware of good combustion practices that reduce the products of incomplete combustion and prevent conditions that lead to malfunctions. Similarly, we are adding a provision to 40 CFR 60.2911 and 40 CFR 60.3020 to clarify the qualified operator requirements for batch units. Because batch units are designed to provide for flexibility in operation and allows for owner or operator discretion for the timing of individual batches, we have added a requirement that batch units must have a qualified operator accessible at times during the operation of the unit.

In several cases, we are proposing revisions such that the OSWI standards are more consistent with the monitoring requirements in other CAA section 129 rules. For example, the 2005 final OSWI standards only provide operating requirements for wet scrubbers as an air pollution control device. We are proposing to include operating limits and operating parameter monitoring requirements for additional controls that may be employed for OSWI units, including dry scrubbers, electrostatic precipitators, and fabric filters (see proposed 40 CFR 60.2916 and Table 2 to subpart EEEE; 40 CFR 60.3023 and Table 3 to subpart FFFF). Additionally, we are proposing to clarify that OSWI units that use an alternate method for air pollution control beyond a wet scrubber, dry scrubber, electrostatic precipitator, or fabric filter, including other methods such as material balance, may petition the EPA for specific operating parameter limits in these cases. The proposed requirements would add flexibility for facilities by

[25] *Digital Government: Building a 21st Century Platform to Better Serve the American People,* May 2012. Available at: *https://obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html.*

[26] CAA section 129(e) generally requires title V permits for ''solid waste incineration units.'' Under CAA section 129(g)(1), however, the term ''solid waste incineration unit'' does not include air curtain incinerators that only burn wood wastes, yard wastes, and clean lumber (and that comply with opacity limitations). In addition, in our view, the opacity limitations applicable, under CAA 129, to such ACIs are not standards or regulations ''under section 7411,'' such that the ACIs would be subject to a title V permitting requirement under CAA section 502(a).

expanding the control options available. In addition, we are proposing to revise the requirements for owners and operators of OSWI units using control options to require that the minimum operating parameters (*e.g.,* combustion operating chamber temperature, pressure drop, liquid flow rate, etc.) established for initial compliance are calculated based on the lowest 1-hr average as measured during the most recent performance test (or representative performance test) demonstrating compliance. The current OSWI standards require that these parameters are calculated using the average as measured during the most recent performance test. Similarly, we are proposing to revise the continous compliance requirements to specify the averaging times for continous compliances for operating parameters for the extended control options (which is generally based on three-hour rolling averages). The proposed revisions include harmonizing edits to the recordkeeping and reporting requirements. The proposed revisions would provide additional flexibility for owners and operators and are consistent with other CAA section 129 rules.

We are also proposing, for consistency with other CAA section 129 rules and so that the standards apply at all times, to revise the compliance requirements for OSWI units that require continuous monitoring to clarify that the 12-hour rolling average values must include CEMS data during startup and shutdown. We are adding a definition of ''CEMS data during startup and shutdown'' and specifying that such data are not corrected for O_2 content when estimating averages. The proposed changes also include revisions to the equations used to calculate the 12-hour rolling average for CO and the associated recordkeeping and reporting requirements.

Other proposed minor corrections, clarifications, and edits for consistency with the proposed revisions in sections II.B.1 through II.B.7 of this preamble include:

- Updating 40 CFR 60.2890 and 40 CFR 60.2998 to clarify the principal components of the subparts include definitions and table.
- For existing units, adding new section 40 CFR 60.3003 to clarify that certain substitute means of compliance demonstration requirements must be completed prior to the compliance date.
- Modifying 40 CFR 60.2910 to 40 CFR 60.3019 to clarify that site-specific documentation must include procedures for establishing initial and continuous compliance, such as procedures to determine waste characterization.
- Updating requirements for initial and annual performance tests such that they must be conducted according to the methods and meet the revised emissions limitations specified in Tables 1 through 1b to subpart EEEE and Tables 2 and 2b to subpart FFFF, as applicable.
- Updating 40 CFR 60.2922(e), 40 CFR 60.2940(c), 40 CFR 60.3027(e), and 40 CFR 60.3039(c) to add references to ANSI/ASME PTC 19.10–198 Part 10 (2010), ''Flue and Exhaust Gas Analyses'' (previously approved as an alternative method to EPA Method 3B in the 2005 OSWI rule).
- Proposing to add an additional test method, ASTM D7520–16, ''Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere,'' as an acceptable alternative to EPA Method 9 for opacity. This test method was identified as an acceptable alternative to EPA Method 9 when specific provisions are followed, as discussed in section V.J of this preamble.
- Revising 40 CFR 60.2932(d) and 40 CFR 60.3033(d) to specify that small OSWI units using control devices must continuously monitor operating parameters and specifying the averaging values to demonstrate continuous compliance.
- Revising 40 CFR 60.2939 and 40 CFR 60.3038 (requirements for installation and calibation of CEMS) such that they apply only to OSWI units with a capacity greater than 10 TPD.
- Clarifying the installation and calibration requirements for operating parameter equipment in 40 CFR 60.2944 and 40 CFR 60.3043, including adding new requirements for bag leak detection systems.
- Revising 40 CFR 60.2949(b) and 40 CFR 60.3046(b) to incorporate recordkeeping for data from OSWI units that use an alternate method for air pollution control beyond a wet scrubber, dry scrubber, electrostatic precipitator, fabric filter, or other method such as material balance.
- Clarifying that for CO CEMS, records of annual performance evaluations must be maintained (40 CFR 60.2949(g) and 40 CFR 60.3046(g)).
- Adding a recordkeeping requirement for notifications submitted for excluded units, such as temporary-use incinerators.
- Revising 40 CFR 60.2954 to clarify that a copy of the waste management plan must be submitted following the initial performance test, for consistency with 40 CFR 60.3049(c).
- Clarifying that for facilities with a title V permit, the permit may address the submittal timeline of the annual report (40 CFR 60.2955, 40 CFR 60.3050).
- Minor clarifications to the content of the annual reports and deviation reports, including what information must be submitted if a performance test is conducted during the annual period and what information may be excluded if the reports are submitted via CEDRI (40 CFR 60.2956, 40 CFR 60.3051).
- Removing outdated requirements for timelines for submittal of title V permits for OSWI units constructed prior to promulgation of the final rule.
- Other minor grammatical or technical edits (*e.g.,* corrections to typographical errors or cross-references within existing provisions, or to clarify existing provisions).

C. What compliance dates are we proposing?

We are proposing compliance dates for the amended rule in accordance with CAA section 129(f). The compliance date depends on whether the OSWI unit is small and whether the OSWI unit is a new or existing unit.

Under the proposed rule, OSWI units with a capacity greater than 10 TPD—continue, with limited changes, to be subject to the requirements of the current OSWI standards—either the NSPS or to a plan promulgated pursuant to the EG, respectively.[27] With certain exceptions (discussed below), these sources will continue to follow the emission and operating limits, including compliance, monitoring, and testing provisions, associated with the current OSWI standards; therefore, the compliance dates are unchanged from the current OSWI standards. For new large OSWI units, some limited requirements apply before construction is initiated and, otherwise, the limits apply when the unit begins operation (see 40 CFR 60.2881). For existing large OSWI units (that is, units constructed on or before December 9, 2004), CAA section 129(f)(2) provides that performance standards and other requirements shall be effective as expeditiously as practicable after approval of a state plan or promulgation of a federal plan, but in no event later than 5 years after such standards or requirements are promulgated. Therefore, consistent with the current

[27] Consistent with the OSWI standards, if you commenced construction of an OSWI unit with a capacity greater than 10 TPD on or before December 9, 2004, you were considered an existing unit, subject to a plan promulgated pursuant to the EG (see 40 CFR 60.2981). Otherwise, if you commenced construction after December 9, 2004, or if you commenced reconstruction or modification on or after June 16, 2006, you were considered a new OSWI unit, subject to the NSPS (40 CFR part 60, subpart EEEE).

OSWI standards, compliance for existing sources must be demonstrated no later than three years after the effective date of a state plan approval or December 16, 2010, whichever is earlier.

We recognize that our action proposes to make some changes to the OSWI standards, as applicable to existing large OSWI units, including eliminating the SSM provisions at 40 CFR 60.3025 and adding electronic reporting. The elimination of the SSM provisions does not necessitate the installation of additional technological controls, but rather ensures more continuous application of the emission limitations and operating limits. And, as previously noted, the proposed electronic reporting provisions ultimately will reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic reporting also eliminates paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, and minimizing data reporting errors. Accordingly, for existing large OSWI units, we propose that these changes to the current OSWI EG—the elimination of the SSM provision and the addition of electronic reporting—will be effective the date the state plan is approved (or after a federal plan is promulgated), but not later than 5 years after the date of publication of the final rule (here, not later than on or about May 31, 2026, assuming a final rule reflecting this proposed action is promulgated on or about May 31, 2021).

As for small OSWI units, we are proposing revised MACT standards and revised compliance, monitoring, and testing requirements. For new sources, CAA section 129(f)(1) requires that performance standards and other requirements shall be effective 6 months after the promulgation of the final rule (here, on or about November 30, 2021, assuming a final rule reflecting this proposed action is promulgated on or about May 31, 2021). For these purposes, a new small OSWI unit is a unit that commenced construction after August 31, 2020, or commenced modification or reconstruction on or after the effective date of the final rule (on or about November 30, 2021). We are proposing that these new units must demonstrate compliance no later than 6 months after promulgation of the final rule (on or about November 30, 2021), or the date the unit first begins operation, whichever is later.

For existing sources, CAA section 129(f)(2) requires that the performance standards and other requirements shall be effective not later than 3 years after the state plan is approved or 5 years after the date such standards or requirements are promulgated (here, on or about May 31, 2026), whichever is earlier. For these purposes, an existing small OSWI unit is one for which construction commenced on or before August 31, 2020. So, for such small OSWI units, we are proposing a compliance date of 5 years after the date the emission standards or requirements are promulgated (here, on or about May 31, 2021)—or May 31, 2026—or 3 years after the effective date of a state plan approval, whichever is earlier. Incineration units with a capacity less than 10 TPD that were constructed prior to August 31, 2020 and that are subject to a current OSWI standard must continue to comply with the current standard until the compliance date of the OSWI standards for these sources is revised in accordance with this proposal. Existing solid waste incinerators that were constructed prior to August 31, 2020, and are subject to other incinerator standards or requirements (such as the CISWI rule) that would be subject to the OSWI standards as revised in accordance with this proposal, must continue to comply with such other applicable incinerator standards or requirements until the effective date (or final compliance date) of these revised OSWI standards (not later than 5 years after the date of publication of the final rule, or on or about May 31, 2026).

III. Summary of Cost, Environmental, and Economic Impacts

A. What are the affected sources?

The EPA estimates that there are approximately 174 OSWI units at 157 facilities that would be affected by the proposed amendments. The basis of our estimate of affected facilities is provided in the memorandum, *Documentation of Data Gathering Efforts for Other Solid Waste Incineration (OSWI) Units,* which is available in the docket for this action. We have not received any input on, and do not anticipate, any new sources over the next 3 years.

B. What are the air quality impacts?

We anticipate a reduction of 31.3 tons per year of total CAA section 129 pollutants due to the proposed rule. We assumed no additional add-on controls would be needed to meet the proposed rule. Emission reductions would result from facilities reducing the quantities or pollutant-emission causing waste being burned to meet the emission limits. The proposed amendments would also eliminate the SSM exemptions and require that the OSWI standards be met at all times. As such, we expect that emissions during these periods would be minimized, which will protect public health and the environment. Additionally, the proposed amendments requiring electronic submittal of performance tests, deviation reports, and annual compliance reports will streamline reporting for affected sources, increase the usefulness of the data and improve data accessibility for the public, will further assist in the protection of public health and the environment, and will ultimately result in less burden on the regulated community.

Indirect or secondary air emissions impacts are impacts that would result from the increased electricity usage associated with the operation of control devices (*i.e.,* increased secondary emissions of criteria pollutants from power plants). Energy impacts consist of the electricity and steam needed to operate control devices and other equipment that would be required under this rule. The EPA expects no secondary air emissions impacts or energy impacts from this rulemaking.

C. What are the cost impacts?

We anticipate that the proposed rule would ultimately result in a burden reduction for affected sources. To determine whether the proposed requirements would add to, or reduce, costs from what OSWI facilities are already incurring by complying with the current rule, we compared the costs for the new requirements with the costs incurred by meeting the current OSWI standards.

We do not have sufficient information on the number of OSWI units that are in compliance with the current OSWI standards because the OSWI federal plan was not finalized, resulting in states not developing or incorporating the federal plan requirements into state rules. Additionally, the 2005 final OSWI rule did not require electronic reporting, and as such, we do not have internal compliance reports from existing facilities that would definitively demonstrate their compliance. Therefore, the number of units in compliance could conceivably have been zero. However, from our data gathering efforts, we are aware of several units that are complying with the OSWI standards. Therefore, the actual number is not zero, but is still unknown and likely low. In absence of a final federal plan and EPA-approved state plans in most states, we have assumed 10 percent of the population of facilities operating OSWI units are in compliance with the current rule.To develop baseline costs, we assumed no additional add-on control would be necessary for the 10 percent of facilities

to meet the current limit. However, we included the initial cost of testing, parametric monitoring systems, CO and oxygen CEMS because the current OSWI rule requires these systems. Annual compliance costs are comprised of annual testing of all OSWI units, parametric monitoring costs, CO and oxygen CEMS monitoring costs, and associated recordkeeping and reporting. We estimated the total capital investment for the 10 percent of facilities assumed to be in compliance with the current OSWI rule to be $5.65 million. We estimated the annual costs for the 10 percent of facilities assumed to be in compliance with the current OSWI rules to be $1.91 million.

Based on available information, we believe that all facilities will likely be in compliance with the proposed emission limits in this action and no additional control will be required to meet the OSWI standards. The costs that would be incurred, if the proposal is finalized, are for initial compliance, continuous compliance, and recordkeeping and reporting. The proposal would require facilities to conduct an initial stack test, unless they demonstrate initial compliance following a substitute means of compliance demonstration. For these sources, the costs of initial compliance would be offset to testing coordinators (for which the EPA will provide grants or contracts). All facilities would be required to demonstrate continuous compliance based on their waste characterization and to keep records of waste profiles, charge rates, and operating parameters such as temperature. For this analysis, it was assumed that larger facilities, facilities owned by corporations, and facilities operated by the federal government would incur the expense of initial testing without federal grants. These units comprise 37 percent of the known OSWI sources, or 60 units. The total initial cost of compliance (for testing and recordkeeping) for the proposed OSWI standards is estimated to be $5.85 million and the annual compliance costs (for recordkeeping) are estimated to be $1.85 million.

The resulting cost impacts of the proposed rule in comparison to the current rule is an additional $200,000 in capital investment, and a net burden reduction of $57,000 annually. The cost calculations are detailed in the memorandum, *Costs and Impacts for Other Solid Waste Incinerators,* which is available in the docket for this action.

The EPA also provides an analysis of the compliance cost in present value and equivalent annual value form in the memorandum, *Economic Impact Analysis for the Proposed Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units,* which is available in the docket for this action. The economic impact analysis also presents a sensitivity analysis of the compliance costs impacts of the proposed amendments as a function of participation in the substitute means of compliance demonstration program that is described in this proposal.

D. What are the economic impacts?

The proposed rule is burden reducing relative to the 2005 rule because it removes several requirements of the 2005 rule. Because the 2005 rule has yet to be fully implemented, many, if not most, affected OSWI owner/operators will need to perform initial compliance actions and incur compliance costs on an ongoing basis. Because of the relatively small number of affected existing units (less than 200) and because the EPA does not anticipate affected new sources in the next 3 years, the EPA expects minimal economic impacts under the proposal. As discussed in the economic impact analysis associated with the 2005 rule, OSWI owner/operators may substitute landfilling services for incineration rather than perform compliance actions associated with this rule (see Docket Item No. EPA–HQ–OAR–2003–0156–0101). However, the rate at which owner/operators of OSWI units substitute the use of landfilling services rather than incur the costs of OSWI compliance is highly uncertain. Additionally, in the substitute means of compliance demonstration program, the EPA is proposing a mechanism that would reduce compliance costs and associated economic impacts while maintaining environmental protections. More information and details of this analysis is provided in the memorandum, *Economic Impact Analysis for the Proposed Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units,* which is available in the docket for this action.

E. What are the benefits?

This action will likely lead to air quality improvements. The EPA estimates about 31 tons per year emission reductions in the CAA section 129 pollutants as a result of the proposed amendments. The proposed amendments also revise the OSWI standards such that they apply at all times, which we expect will minimize emissions during these periods and protect public health and the environment. Additionally, the proposed amendments require electronic submittal of performance tests, deviation reports, and annual compliance reports, which will streamline reporting for affected sources and increase the usefulness of the data and improve data accessibility for the public. The electronic reporting requirements will, therefore, further assist in the protection of public health and the environment and will ultimately result in less burden on the regulated community. See section II.B.6 of this preamble for more information.

IV. Request for Comments

We solicit comments on the proposed testing and compliance options, as discussed in section II.B.4 of this preamble. Specifically, we request that owners of affected or potentially affected units provide information on their unit or potential units, including waste characterization data, to characterize and categorize units for testing. The EPA is also interested in any additional information, including emissions data, that may be available, and whether facilities have completed testing. Additionally, we request comments on the proposed options for units combusting less than 10 TPD that would allow facilities to use a substitute means of compliance demonstration for initial compliance. We also request comment on the proposed annual compliance options that allow for recordkeeping of waste characterization and operating parameters in lieu of annual testing; specifically, we request any data or templates that may be used currently within industry to track the waste combusted and operations of OSWI units.

V. Statutory and Executive Orders Reviews

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

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

This action is expected to be an Executive Order 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the EPA's analysis of the potential costs and benefits associated with this action in section III of this preamble.

C. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to OMB under the PRA. The ICR documents that the EPA prepared have been assigned EPA ICR number 2163.07 for 40 CFR part 60, subpart EEEE and EPA ICR number 2164.07 for 40 CFR part 60, subpart FFFF. You can find a copy of the ICRs in the docket for this rule, and they are briefly summarized here.

The EPA is proposing to revise 40 CFR part 60, subpart EEEE and subpart FFFF to include new requirements for subcategories of VSMWC or IWI units that have capacities equal to or less than 10 TPD. For units that have capacities equal to or less than 10 TPD, the EPA is proposing revised emission limits and a substitute means of compliance demonstration in lieu of initial and annual stack testing, add-on control devices, and CEMS. Units with a capacity to combust greater than or equal to 10 TPD would continue to meet the current testing, monitoring, and recordkeeping requirements of the NSPS or EG. Additionally, the EPA is proposing to remove the reporting requirements related to periods of SSM, because the emission limits will apply at all times. The EPA is also proposing electronic reporting requirements for submittal of certain reports and performance test results. The ICRs reflect only the incremental burden associated with the requirements of the proposed rules.

Respondents/affected entities: Owners and operators of other solid waste incineration units.

Respondent's obligation to respond: Mandatory (40 CFR 60, subparts EEEE and FFFF).

Estimated number of respondents: 128.

Frequency of response: Initially and annually.

Total estimated burden: 5,817 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $2,150,000 (per year), includes $1,490,000 annualized capital or operation and maintenance costs.

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 OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *OIRA_submission@omb.eop.gov,* Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than September 30, 2020. The EPA will respond to any ICR-related comments in the final rule.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. This notice of proposed rulemaking will reduce some regulatory requirements relative to those specified in the 2005 OSWI rule. The December 2005 final OSWI rule was certified as not having a significant economic impact on a substantial number of small entities. We have, therefore, concluded that this action will have no net regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. While this action creates an enforceable duty on the private sector, the cost does not exceed $100 million or more.

F. Executive Order 13132: Federalism

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

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

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. We believe that certain small OSWI units may be owned or operated by tribal governments or communities.

However, consistent with the EPA Policy on Coordination and Consultation with Indian Tribes, the EPA will provide tribal officials the opportunity to provide meaningful and timely input early in the development of this action through multiple outreach activities such as tribal partnership calls, webinars, and offers for government-to-government consultation with potentially impacted tribes and other tribes as requested.

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

The EPA interprets Executive Order 13045 as applying to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This action involves technical standards. Two voluntary consensus standards (VCS) were identified as an acceptable alternative to the EPA test methods for the purposes of this rule.

The VCS, American National Standards Institute/American Society of Mechanical Engineers (ANSI/ASME) PTC 19.10–1981 Part 10, ''Flue and Exhaust Gas Analyses'' was identified as an acceptable alternative to EPA Methods 3B, 6, and 7 (manual portion only, not the instrumental procedures). This standard was previously incorporated into the 2005 OSWI final rule. This method determines quantitatively the gaseous constituents of exhausts resulting from stationary combustion sources. The gases covered in ANSI/ASME PTC 19.10–1981 are oxygen, carbon dioxide, CO, (N), SO_2, sulfur trioxide, nitric oxide, nitrogen dioxide, hydrogen sulfide, and hydrocarbons, however the use in this rule is only applicable to oxygen, carbon dioxide, SO_2, nitric oxide, and nitrogen

dioxide. This standard may be obtained from *https://www.asme.org/* or from the American Society of Mechanical Engineers (ASME) at Three Park Avenue, New York, New York 10016–5990.

The VCS, ASTM D7520–16, ''Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere'' was identified as an acceptable alternative to EPA Method 9, but only if these conditions are followed: (1) During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16, you or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand); (2) you must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16; (3) you must follow the recordkeeping procedures outlined in 40 CFR 63.10(b)(1) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination; and (4) you or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of any one reading and the average error must not exceed 7.5-percent opacity.

The EPA proposes to use ASTM D7520–16, ''Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere'' as an acceptable alternative to EPA Method 9. This method describes procedures to determine the opacity of a plume, using digital imagery and associated hardware and software, where opacity is caused by PM emitted from a stationary point source in the outdoor ambient environment. The opacity of emissions is determined by the application of a DCOT that consists of a digital still camera, analysis software, and the output function's content to obtain and interpret digital images to determine and report plume opacity. With the conditions identified above, we found that the technical sampling and analytical procedures are an equivalent method to EPA Method 9. This method is available for purchase from ASTM International, 100 Barr Harbor Drive, P.O. Box CB700, West Conshohocken, Pennsylvania 19428–2959, (800) 262–1373, *http://www.astm.org/.* The EPA's approval of this method as an alternative method does not provide or imply a certification or validation of any vendor's hardware or software. The onus to maintain and verify the certification and/or training of the DCOT camera, software, and operator in accordance with ASTM D7520–16 is on the facility, DCOT operator, and DCOT vendor.

While the EPA also identified 26 VCS that were potentially applicable for this rule in lieu of the EPA reference methods, the Agency is not proposing to use these standards. After reviewing the available standards, the EPA determined that the 26 candidate methods would not be practical due to lack of equivalency, documentation, validation data, and other important technical and policy considerations. For additional informaion, see the memorandum, *Voluntary Consensus Standard Results for Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units; Proposed Rule,* which is available in the docket for this action.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (58 FR 7629, February 16, 1994).

It does not affect the level of protection provided to human health or the environment. This action adds alternative approaches to existing testing and monitoring methods as described in the 2005 OSWI rule. This action incorporates regulatory flexibilities without compromising the environmental protection and, thus, ensures even a unit with rudimentary design will have several options for demonstrating compliance, thereby helping to further ensure against any disproportionately high and adverse human health or environmental effects on minority or low-income populations.

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations.

Andrew Wheeler,

Administrator.

For the reasons set forth in the preamble, the EPA is proposing to amend 40 CFR part 60 as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

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

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

Subpart A—General Provisions

■ 2. Section 60.17 is amended by:
■ a. Revising paragraph (g)(14);
■ b. Redesignating paragraphs (h)(193) through (209) as paragraphs (h)(194) through (210); and
■ c. Adding paragraph (h)(193).

The revisions and addition read as follows:

§ 60.17 Incorporations by reference.

* * * * *

(g) * * *

(14) ASME/ANSI PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], (Issued August 31, 1981), IBR approved for §§ 60.56c(b), 60.63(f), 60.106(e), 60.104a(d), (h), (i), and (j), 60.105a(b), (d), (f), and (g), 60.106a(a), 60.107a(a), (c), and (d), 60.285a(f), 60.2145(s) and (t), 60.2710(s) and (t), 60.2730(q), 60.2922(e), 60.2940(c), tables 1, 1a, 1b, and 3 to subpart EEEE, §§ 60.3027(e) and 60.3039(c), tables 2, 2b, and 4 to subpart FFFF, table 2 to subpart JJJJ, §§ 60.4415(a), 60.4900(b), tables 1 and 2 to subpart LLLL, § 60.5220(b), tables 2 and 3 to subpart MMMM, §§ 60.5406(c), 60.5406a(c), 60.5407a(g), 60.5413(b), 60.5413a(b) and (d).

* * * * *

(h) * * *

(193) ASTM D7520–16, Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere, approved April 1, 2016, IBR approved for § 60.2972(a), tables 1, 1a, and 1b to subpart EEEE, § 60.3067(a), and tables 2 and 2b to subpart FFFF.

* * * * *

■ 3. Subpart EEEE of part 60 is amended by revising the subpart heading to read as follows:

Subpart EEEE—Standards of Performance for Other Solid Waste Incineration Units

■ 4. Section 60.2881 is revised to read as follows:

§ 60.2881 When does this subpart become effective?

For all OSWI units, this subpart takes effect June 16, 2006. Some of the requirements in this subpart apply to planning the incineration unit and must be completed even before construction is initiated on the unit (*i.e.,* the preconstruction requirements in §§ 60.2894 and 60.2895). Other requirements such as the emission limitations and operating limits apply when the unit begins operation. Requirements for small OSWI units, as defined in § 60.2977, and constructed after August 31, 2020, become effective no later than [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

■ 5. Section 60.2885 is amended by revising paragraph (b) to read as follows:

§ 60.2885 Does this subpart apply to my incineration unit?

* * * * *

(b) Your incineration unit is an OSWI unit as defined in § 60.2977 or an air curtain incinerator (ACI) subject to this subpart as described in § 60.2888(b). Other solid waste incineration units are very small municipal waste combustion units and institutional waste incineration units as defined in § 60.2977, and include small OSWI units (either very small municipal waste combustion units or institutional waste incinerators).

* * * * *

■ 6. Section 60.2886 is amended by revising paragraph (a) introductory text and adding paragraphs (a)(3) through (5) to read as follows:

§ 60.2886 What is a new incineration unit?

(a) A new incineration unit is an incineration unit subject to this subpart that meets any of the criteria specified in paragraphs (a)(1) through (4) of this section, except as specified in paragraph (a)(5) of this section.

* * * * *

(3) Is a small OSWI unit as defined in § 60.2977 and commenced construction after August 31, 2020.

(4) Is a small OSWI unit as defined in § 60.2977 and commenced reconstruction or modification on or after [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**.]

(5) If your incineration unit is a small OSWI unit as defined in § 60.2977 and commenced construction, reconstruction, or modification prior to August 31, 2020, paragraphs (a)(1) and (2) of this section no longer apply. These units are considered new incineration units and remain subject to the applicable requirements of this subpart until the units become subject to the requirements of an approved state plan or federal plan that implements subpart FFFF of this part (Emission Guidelines and Compliance Times for Other Solid Waste Incineration Units).

* * * * *

■ 7. Section 60.2887 is amended by revising paragraphs (b)(1) and (b)(3) to read as follows:

§ 60.2887 What combustion units are excluded from this subpart?

* * * * *

(b) * * *

(1) The unit has a federally enforceable permit limiting the combustion of municipal solid waste to 30 percent of the total fuel input by weight.

* * * * *

(3) You provide the Administrator with a copy of the federally enforceable permit.

* * * * *

■ 8. Section 60.2888 is amended by revising paragraphs (a) and (b) introductory text to read as follows:

§ 60.2888 Are air curtain incinerators regulated under this subpart?

(a) Air curtain incinerators that burn less than 35 tons per day of municipal solid waste or air curtain incinerators located at institutional facilities burning any amount of institutional waste generated at that facility are incineration units subject to all requirements of this subpart, including the emission limitations specified in tables 1, 1a, and 1b of this subpart.

(b) Air curtain incinerators that burn less than 35 tons per day and burn only the materials listed in paragraphs (b)(1) through (4) of this section collected from the general public and from residential, commercial, institutional, and industrial sources; or, air curtain incinerators located at institutional facilities that burn only the materials listed in paragraphs (b)(1) through (4) of this section generated at that facility, are required to meet only the requirements in §§ 60.2970 through 60.2973 and are exempt from all other requirements of this subpart.

* * * * *

■ 9. Section 60.2889 is revised to read as follows:

§ 60.2889 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by the U.S. Environmental Protection Agency (EPA), or a delegated authority such as your State, local, or tribal agency. If EPA has delegated authority to your state, local, or tribal agency, then that agency (as well as EPA) has the authority to implement and enforce this subpart. You should contact your EPA Regional Office to find out if this subpart is delegated to your state, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a state, local, or tribal agency, the authorities contained in paragraphs (b)(1) through (9) of this section are retained by EPA and are not transferred to the state, local, or tribal agency.

(1) The authority to approve alternatives to the emission limitations in tables 1, 1a, and 1b of this subpart and operating limits established under § 60.2916 and table 2 of this subpart.

(2) The authority to approve petitions for specific operating limits in accordance with the requirements in § 60.2917.

(3) The authority of the Administrator to receive and grant petitions under § 60.8(b)(3) to approve major alternatives to test methods in § 60.2922.

(4) The authority to approve major alternatives to monitoring in §§ 60.2939 through 60.2945.

(5) The authority to approve major alternatives to recordkeeping and reporting in §§ 60.2949 through 60.2962.

(6) The authority to receive the required notices and to approve continued operation in connection with the status report requirements in § 60.2911(c)(2).

(7) The authority of the Administrator to receive and grant petitions under § 60.11(e)(6) through (8) to adjust opacity standards and establish opacity standards in accordance with alternative opacity emission limits in § 60.2915 and §§ 60.2971 through 60.2973.

(8) The authority of the Administrator under § 60.8(b)(4) to waive performance test requirements and § 60.8(b)(5) to approve shorter sampling times or smaller sample volumes.

(9) The authority to approve an alternative to any electronic reporting to the EPA required by this subpart.

■ 10. Section 60.2890 is amended by revising the introductory text and adding paragraphs (j) and (k) to read as follows:

§ 60.2890 How are these new source performance standards structured?

These new source performance standards contain eleven major components, as follows:

* * * * *

(j) Definitions.

(k) Tables.

■ 11. Section 60.2895 is amended by revising paragraphs (a) and (b) to read as follows:

§ 60.2895 What is a siting analysis?

(a) The siting analysis must consider air pollution control alternatives that minimize, on a site-specific basis, to the maximum extent practicable, potential risks to public health or the environment. In considering such alternatives, you may consider costs, energy impacts, non-air environmental impacts, or any other factors related to the practicability of the alternatives.

(b) Analyses of your OSWI unit's impacts that are prepared to comply with state, local, or other federal regulatory requirements may be used to satisfy the requirements of this section, provided they include the consideration of air pollution control alternatives specified in paragraph (a) of this section.

* * * * *

■ 12. Section 60.2905 is amended by revising paragraphs (b), (c) introductory text, (c)(1)(iv), (c)(1)(viii), and (c)(1)(x) to read as follows:

§ 60.2905 What are the operator training and qualification requirements?

* * * * *

(b) Operator training and qualification must be obtained through a state-approved program or by completing the requirements included in paragraph (c) of this section.

(c) Training must be obtained by completing an incinerator operator training course that includes, at a minimum, the three elements described in paragraphs (c)(1) through (3) of this section:

(1) * * *

(iv) Combustion controls and monitoring, including good combustion practices and waste characterization procedures.

* * * * *

(viii) Actions to prevent and correct malfunctions or to prevent and correct conditions that may lead to malfunction.

* * * * *

(x) Applicable federal, state, and local regulations, including Occupational Safety and Health Administration workplace standards.

* * * * *

■ 13. Section 60.2906 is amended by:
■ a. Revising the introductory text and paragraph (a);
■ b. Redesignating paragraph (c) as paragraph (d); and
■ c. Adding paragraph (c).

The revisions and addition read as follows:

§ 60.2906 When must the operator training course be completed?

The operator training course must be completed by the latest of the dates specified in paragraphs (a) through (d) of this section.

(a) Six months after your OSWI unit startup date.

* * * * *

(c) [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] for small OSWI units that commenced construction after August 31, 2020.

* * * * *

■ 14. Section 60.2908 is amended by revising paragraph (d) to read as follows:

§ 60.2908 How do I maintain my operator qualification?

* * * * *

(d) Prevention and correction of malfunctions or conditions that may lead to malfunction.

* * * * *

■ 15. Section 60.2910 is amended by:
■ a. Revising paragraphs (a) introductory text and (a)(4);
■ b. Adding paragraph (a)(10); and
■ c. Revising paragraphs (b)(1) and (c)(2).

The revisions and addition read as follows:

§ 60.2910 What site-specific documentation is required?

(a) Documentation must be available at the facility and readily accessible for all OSWI unit operators that addresses the ten topics described in paragraphs (a)(1) through (10) of this section. You must maintain this information and the training records required by paragraph (c) of this section in a manner that they can be readily accessed and are suitable for inspection upon request.

* * * * *

(4) Procedures for maintaining good combustion practices, including proper combustion air supply levels.

* * * * *

(10) Procedures for establishing initial and continuous compliance, including but not limited to, procedures to determine waste characterization.

* * * * *

(b) * * *

(1) The initial review of the information listed in paragraph (a) of this section must be conducted by December 18, 2006, or prior to an employee's assumption of responsibilities for operation of the OSWI unit, whichever date is later.

* * * * *

(c) * * *

(2) Records showing the names of the OSWI unit operators who have completed the operator training requirements under § 60.2905, met the criteria for qualification under § 60.2907, and maintained or renewed their qualification under §§ 60.2908 or 60.2909. Records must include documentation of training, the dates of the initial and refresher training, and the dates of their qualification and all subsequent renewals of such qualifications.

* * * * *

■ 16. Section 60.2911 is amended by revising the introductory paragraph to read as follows:

§ 60.2911 What if all the qualified operators are temporarily not accessible?

For each batch OSWI unit, a qualified operator must be accessible at all times when the unit is operating. For each continuous OSWI unit or intermittent OSWI unit, if all qualified operators are temporarily not accessible (*i.e.,* not at the facility and not able to be at the facility within 1 hour), you must meet one of the three criteria specified in paragraphs (a) through (c) of this section, depending on the length of time that a qualified operator is not accessible.

* * * * *

■ 17. Section 60.2915 is revised to read as follows:

§ 60.2915 What emission limitations must I meet and by when?

For OSWI units with initial startup before [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], you must meet the emission limitations specified in table 1 of this subpart 60 days after your OSWI unit reaches the charge rate at which it will operate, but no later than 180 days after its initial startup. For OSWI units with capacities greater than 10 tons per day and with initial startup on or after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], you must meet the emissions limitations specified in table 1a of this subpart 60 days after your OSWI unit reaches the charge rate at which it will operate, but no later than 180 days after its initial startup. For small OSWI units with initial startup on or after [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], you must meet the emission limitations specified in table 1b of this subpart 60 days after your OSWI unit reaches the charge rate at which it will operate, but no later than 180 days after its initial startup.

■ 18. Section 60.2916 is revised to read as follows:

§ 60.2916 What operating limits must I meet and by when?

You must comply with the requirements in paragraphs (a) through

(h) of this section, as applicable. If you own or operate a small OSWI unit using the substitute means of compliance demonstration under § 60.2929, the references in this section to the most recent performance test demonstrating compliance are not applicable and instead, refer to the limits established during the representative performance test identified in the information submitted as specified in § 60.2929(b).

(a) You must establish a maximum charge rate, calculated using the procedures in paragraph (a)(1) or (2) of this section, as appropriate.

(1) For continuous and intermittent units, maximum charge rate is the average charge rate measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(2) For batch units, maximum charge rate is the charge rate measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(b) You must establish a minimum combustion chamber operating temperature, equal to the lowest 1-hour average combustion chamber operating temperature measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(c) If you use a wet scrubber to comply with the emission limitations, you must establish operating limits for the operating parameters as described in paragraphs (c)(1) through (3) of this section.

(1) Minimum pressure drop across the wet scrubber, which is calculated as the lowest 1-hour average pressure drop across the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations; or minimum amperage to the wet scrubber, which is calculated as the average amperage to the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(2) Minimum scrubber liquor flow rate, which is calculated as the lowest 1-hour average liquor flow rate at the inlet to the wet scrubber measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(3) Minimum scrubber liquor pH, which is calculated as the lowest 1-hour average liquor pH at the outlet to the wet scrubber measured during the most recent performance test demonstrating compliance with the hydrogen chloride and sulfur dioxide emission limitations.

(d) If you use a dry scrubber to comply with the emission limitations, you must measure the injection rate of each sorbent during the performance test. The minimum operating limit for the injection rate of each sorbent is calculated as the lowest 1-hour average injection rate for each sorbent measured during the most recent performance test demonstrating compliance with the hydrogen chloride emission limitations.

(e) If you use an electrostatic precipitator to comply with the emission limitations, you must measure the (secondary) voltage and amperage of the electrostatic precipitator collection plates during the particulate matter performance test. Calculate the average electric power value (secondary voltage × secondary current = secondary electric power) for each test run. The minimum operating limit for the electrostatic precipitator is calculated as the lowest 1-hour average secondary electric power measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(f) If you use a fabric filter to comply with the emission limitations, you must operate each fabric filter system such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during a 6-month period. Calculate the alarm time (*i.e.,* time that the alarm sounds) as specified in paragraphs (f)(1) and (2) of this section.

(1) If inspection of the fabric filter demonstrates that no corrective action is required, the alarm duration is not counted in the alarm time calculation.

(2) If corrective action is required and you take less than an hour to initiate corrective action, the alarm time is counted as 1 hour. If you take longer than 1 hour to initiate corrective action, the alarm time is counted as the actual amount of time taken to initiate corrective action.

(g) If you own or operate a small OSWI unit and you demonstrate continuous compliance according to § 60.2932(d), you must establish the amount of waste burned in each waste category as a percentage of total waste burned on a mass basis. These percentages are your waste profile and must be based on the categories of waste fed to the incinerator (*e.g.,* food waste, paper waste, wood waste) during the most recent performance test.

(h) You must meet the operating limits specified in paragraphs (a) through (g) of this section no later than the date specified in paragraph (h)(1) or (2) of this section, as applicable.

(1) For each OSWI unit with a capacity greater than 10 tons per day or for each small OSWI unit for which you conduct an initial performance test under § 60.2927(a), within 60 days after your OSWI unit reaches the charge rate at which it will operate, but no later than 180 days after its initial startup.

(2) For each small OSWI unit for which you use the substitute means of compliance demonstration under § 60.2929, by the date you submit to the Administrator the information required in § 60.2929(b).

■ 19. Section 60.2917 is amended by revising the section heading and the introductory text to read as follows:

§ 60.2917 What if I do not use a wet scrubber, dry scrubber, or fabric filter to comply with the emission limitations?

If you use an air pollution control device other than a wet scrubber, dry scrubber, electrostatic precipitator, or fabric filter to comply with the emission limitations under § 60.2915, you must petition EPA for specific operating limits, the values of which are to be established during the performance test and then continuously monitored thereafter. Additionally, unless you demonstrate continuous compliance using the requirements in § 60.2932(d), if you limit emissions in some other manner, including material balances, to comply with the emission limitations under § 60.2915, then you must submit a petition. You must submit the petition at least 60 days before the performance test is scheduled to begin and not conduct the initial performance test until after the petition has been approved by EPA. Your petition must include the five items listed in paragraphs (a) through (e) of this section.

* * * * *

§ 60.2918 [Removed]

■ 20. Remove § 60.2918.

■ 21. Section 60.2922 is amended by revising paragraphs (b) through (f), (g) introductory text, (g)(1)(i), and (g)(3)(i) and (ii) to read as follows:

§ 60.2922 How do I conduct the initial and annual performance test?

* * * * *

(b) All performance tests must be conducted using the methods in tables 1, 1a, and 1b of this subpart.

(c) All performance tests must be conducted using the minimum run duration specified in tables 1, 1a, and 1b of this subpart.

(d) EPA Method 1 of appendix A of this part must be used to select the sampling location and number of traverse points.

(e) EPA Method 3A or 3B of appendix A of this part or ANSI/ASME PTC

19.10–1981 (incorporated by reference, see § 60.17), in lieu of EPA Method 3B, must be used for gas composition analysis, including measurement of oxygen concentration. EPA Method 3A or 3B of appendix A of this part or ANSI/ASME PTC 19.10–1981 must be used simultaneously with each method.

(f) All pollutant concentrations, except for opacity, must be adjusted to 7 percent oxygen using Equation 1 in § 60.2975.

(g) EPA Method 26A of appendix A of this part must be used for hydrogen chloride concentration analysis, with the additional requirements specified in paragraphs (g)(1) through (3) of this section.

(1) * * *

(i) Assemble the sampling train(s) and conduct a conditioning run by collecting between 14 liters per minute (0.5 cubic feet per minute) and 30 liters per minute (1.0 cubic feet per minute) of gas over a one-hour period. Follow the sampling procedures outlined in section 8.1.5 of EPA Method 26A of appendix A of this part. For the conditioning run, water can be used as the impinger solution.

* * * * *

(3) * * *

(i) The cyclone described in section 6.1.4 of EPA Method 26A of appendix A of this part must be used.

(ii) The post-test moisture removal procedure described in section 8.1.6 of EPA Method 26A of appendix A of this part must be used.

■ 22. Section 60.2923 is revised to read as follows:

§ 60.2923 How are the performance test data used?

You use results of performance tests to demonstrate compliance with the emission limitations in tables 1, 1a, and 1b of this subpart.

■ 23. Section 60.2927 is revised to read as follows:

§ 60.2927 How do I demonstrate initial compliance with the emission limitations and establish the operating limits?

(a) Except as provided in paragraph (b) of this section, you must conduct an initial performance test, as required under § 60.8, to determine compliance with the emission limitations in table 1, 1a, or 1b of this subpart and to establish operating limits using the procedures in § 60.2916 or § 60.2917. The initial performance test must be conducted using the test methods listed in table 1, 1a, or 1b of this subpart and the procedures in § 60.2922. In the event of any conflict between § 60.8 and the provisions of this subpart, the provisions of this subpart shall apply.

(b) For small OSWI units, as defined in § 60.2977, you must demonstrate initial compliance according to paragraph (a) of this section, unless you comply with the requirements for the substitute means of compliance demonstration in § 60.2929.

(c) As an alternative to conducting a performance test under paragraph (a) of this section for carbon monoxide, you may use a 12-hour rolling average of the 1-hour arithmetic average CEMS data to determine compliance with the emission limitations in tables 1, 1a, and 1b of this subpart. The initial performance evaluation required by § 60.2940(b) must be conducted prior to collecting CEMS data that will be used for the initial compliance demonstration.

■ 24. Section 60.2928 is revised to read as follows:

§ 60.2928 By what date must I conduct the initial performance test?

The initial performance test must be conducted within 60 days after your OSWI unit reaches the charge rate at which it will operate, but no later than 180 days after its initial startup. For units which start-up between August 31, 2020 and [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], the initial performance test must be conducted within 60 days after your OSWI unit reaches the charge rate at which it will operate, but no later than 180 days after its initial startup, or by [DATE 240 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], whichever date is later.

■ 25. Section 60.2929 is added to read as follows:

§ 60.2929 What are the substitute means of compliance demonstration requirements for small OSWI units?

Instead of conducting the initial performance test in § 60.2927(a), small OSWI units, as defined in § 60.2977, may demonstrate initial compliance according to the requirements in paragraphs (a) through (d) of this section.

(a) You must submit the information specified in paragraph (a)(1) of this section and comply with the requirements of paragraph (a)(2) of this section for each OSWI unit for which you are using a substitute means of compliance demonstration.

(1) On or before [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] or within 60 days of startup, whichever is later, you must submit a written notification to the Administrator that you intend to use the substitute means of compliance demonstration. Your submittal must include information on the design and operation of the OSWI unit, including the information in paragraphs (a)(1)(i) through (iii) of this section.

(i) Manufacturer, make, and model of the unit.

(ii) Type of unit (*e.g.,* burn barrel, incinerator with secondary chamber, etc.).

(iii) Capacity of the unit.

(2) Beginning on [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] or upon initial startup, whichever is later, you must collect the data in paragraphs (a)(2)(i) through (vii) of this section. You must continue to collect the data in paragraphs (a)(2)(i) through (vii) of this section until you meet the requirements of paragraph (b) of this section.

(i) Identity and weight of each waste type (*e.g.,* lbs of paper waste, food waste, wood or yard waste) on a weekly total basis for the date range the information is collected.

(ii) Identity and quantities (*e.g.,* flow rate or percentage of operating time) of supplemental fuels burned on a weekly total basis for the date range the information is collected.

(iii) Percentage of total waste burned for each waste type on a weekly average basis for the date range the information is collected.

(iv) Temperature indicative of the combustion chamber and description of where temperature is measured. Record this information on a 3-hour rolling average basis for the date range the information is collected.

(v) Hours operated per day for the date range the information is collected.

(vi) Charge rate each day in tons per day for the date range the information is collected.

(vii) Operating parameter data for any air pollution control devices. For wet scrubbers, include pressure drop across the scrubber or amperage to the scrubber, scrubber liquor inlet flow rate, and scrubber liquor pH at the outlet of the scrubber. For dry scrubbers, include injection rate of each sorbent used. For electrostatic precipitators, include the secondary voltage, secondary amperage, and secondary power. Record this information on a 3-hour rolling average basis for the date range the information is collected.

(b) On or before the latest of [DATE 21 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]; 60 days after the OSWI unit reaches the charge rate at which it will operate; or 180 days after initial startup, you must identify the results of

a performance test in the EPA's WebFIRE database that is representative for your OSWI unit using the criteria in paragraphs (b)(2)(i) through (viii) of this section and submit the information in paragraphs (b)(1) and (2) of this section. You must submit the information following the procedure in paragraph (b)(3) of this section. The performance test may be any test that meets the requirements in paragraph (c) of this section, regardless of location, that is representative of your OSWI unit.

(1) Identify the representative performance test used to demonstrate initial compliance with each OSWI unit by submitting the information in paragraphs (b)(1)(i) through (vi) of this section as provided in the EPA's WebFIRE database for the performance test:

(i) Organization.

(ii) Facility.

(iii) City.

(iv) State.

(v) County.

(vi) Submission date.

(2) A description of how the test is representative for your OSWI unit, based on the following criteria, using the data submitted as specified in paragraph (a)(1) of this section and collected as specified in paragraph (a)(2) of this section:

(i) Unit design, including type of unit and any associated air pollution control devices.

(ii) Charge rate.

(iii) Type of operation (batch, continuous, intermittent).

(iv) Combustion temperature and location of temperature measurement.

(v) Types of waste burned.

(vi) The waste profile, as defined in § 60.2977.

(vii) Type and amount of supplemental fuels.

(viii) Similarity of air pollution control devices and operation of the air pollution control devices, if the performance test was conducted on a unit with an air pollution control device.

(3) You must submit the information required in paragraphs (b)(1) and (2) of this section via CEDRI, which can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as confidential business information (CBI). Anything submitted using CEDRI cannot later be claimed CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim, submit the information, including information claimed to be CBI, to the EPA on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Other Solid Waste Incineration Units Sector Lead, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted via the EPA's CDX as described earlier in this paragraph (b)(3). Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(c) Any performance test used as a representative test in a substitute means of compliance demonstration under paragraph (b) of this section must be conducted following the initial testing requirements of § 60.2922 and demonstrate compliance with the emission limits in table 1b of this subpart. In addition to the results of the performance test and the information required by § 60.8(f)(2), the performance test report must contain the information in paragraphs (c)(1) through (8) of this section.

(1) Unit design, including type of unit and any associated air pollution control devices.

(2) Charge rate during the test.

(3) Type of operation (batch, continuous, intermittent).

(4) Combustion temperature and location of temperature measurement. The temperature must be recorded continuously for each run of the performance test. The performance test report must also identify the lowest 1-hour average combustion chamber operating temperature.

(5) Types of waste burned during the test.

(6) The waste profile, as defined in § 60.2977, established during the test.

(7) Type and amount of supplemental fuels burned during the test and the timeframe that each supplemental fuel was burned during the test.

(8) If the performance test was conducted on a unit with an air pollution control device, the operating parameter data for the control device must be recorded continuously for each run of the performance test. The performance test report must also identify the lowest or highest, as applicable, 1-hour average for the operating parameter.

(i) For wet scrubbers, the performance test report must include data for pressure drop across the scrubber or amperage to the scrubber, scrubber liquor inlet flow rate, and scrubber liquor pH at the outlet of the scrubber.

(ii) For dry scrubbers, the performance test report must include data for the injection rate of each sorbent used.

(iii) For electrostatic precipitators, the performance test report must include data for the secondary voltage, secondary amperage, and secondary power.

(d) If there are no results from a performance test that meet the requirements of paragraph (c) of this section that are representative of your OSWI unit, you must demonstrate initial compliance according to the requirements of § 60.2927(a).

■ 26. Section 60.2932 is revised to read as follows:

§ 60.2932 How do I demonstrate continuous compliance with the emission limitations and the operating limits?

You must demonstrate continuous compliance according to the requirements in paragraphs (a) through (c) of this section, unless you own or operate a small OSWI unit, as defined in § 60.2977. If you own or operate a small OSWI unit, you must either comply with the requirements in paragraphs (a) and (c) of this section or the requirements in paragraph (d) of this section.

(a) You must conduct an annual performance test for all of the pollutants in table 1, 1a, or 1b of this subpart for each OSWI unit to determine compliance with the emission limitations, except if you own or operate an OSWI unit with a capacity greater than 10 tons per day, you are not required to conduct an annual performance test for carbon monoxide. The annual performance test must be conducted using the test methods listed in table 1, 1a, or 1b of this subpart and the procedures in § 60.2922.

(b) You must continuously monitor carbon monoxide emissions to determine compliance with the carbon monoxide emissions limitation. Twelve-hour rolling average values, including CEMS data during startup and shutdown as defined in this subpart, are used to determine compliance. A 12-hour rolling average value above the carbon monoxide emission limit in table 1, 1a, or 1b of this subpart constitutes a deviation from the emission limitation.

(c) You must continuously monitor the operating parameters specified in § 60.2916(a) through (f) or established under § 60.2917. Three-hour rolling average values are used to determine compliance with the operating limits,

with the exception of bag leak detection system alarm time, unless a different averaging period is established under § 60.2917. A 3-hour rolling average value (unless a different averaging period is established under § 60.2917) above the established maximum or below the established minimum operating limits constitutes a deviation from the established operating limits. For bag leak detection systems, an alarm time of more than 5 percent of the operating time during a 6-month period constitutes a deviation from the operating limit. Operating limits do not apply during performance tests.

(d) For each small OSWI unit, you must comply with the requirements in paragraphs (d)(1) through (3) of this section.

(1) You must record the mass rate of each category of waste burned and on a weekly average basis and you must maintain the percentage of waste burned for each waste category within +/- 15 percent of the percentage established for that waste category according to the waste profile established under § 60.2916(g) and maintain records as required in § 60.2949(p). Failure to maintain the percentage of waste burned for each waste category within +/- 15 percent of the percentage established for that waste category constitutes a deviation.

(2) If your waste profile will not meet the requirement in paragraph (d)(1) of this section, before combusting the modified waste stream, you must either conduct a performance test of the unit using the test methods listed in table 1b of this subpart and the procedures in § 60.2922 with a waste stream representative of the new waste profile or identify a representative performance test for the new waste profile. If you use a representative performance test, the performance test must meet the requirements in § 60.2929(c), and you must submit the information in § 60.2929(b)(1) and (2) to the Administrator. Failure to conduct a performance test or identify a representative test constitutes a deviation.

(3) You must continuously monitor the operating parameters specified in § 60.2916(b) through (f), as applicable. The total daily charge rate is used to determine compliance with the charge rate limit in § 60.2916(a). For the operating parameters in § 60.2916(b) through (f), determine compliance as described in paragraphs (d)(3)(i) or (ii) of this section. Failure to meet the operating parameters specified in § 60.2916(a) through (f) is a deviation.

(i) Three-hour rolling average values are used to determine compliance with the operating parameter limits, unless your small OSWI unit operates on a batch basis and it is operated for less than three hours.

(ii) If your small OSWI unit operates on a batch basis, and you operate for less than three hours, compliance with the operating parameter limits are determined by averaging the operating parameter over the length of the batch operation.

■ 27. Section 60.2933 is revised to read as follows:

§ 60.2933 By what date must I conduct the annual performance test?

For each OSWI unit that is subject to the annual performance test requirement in § 60.2932(a), you must conduct annual performance tests within 12 months following the initial performance test. Conduct subsequent annual performance tests within 12 months following the previous one.

■ 28. Section 60.2934 is amended by adding paragraph (d) to read as follows:

§ 60.2934 May I conduct performance testing less often?

* * * * *

(d) For small OSWI units demonstrating initial compliance following the substitute means of compliance demonstration requirements in § 60.2929, the requirements in paragraphs (a) through (c) of this section do not apply.

■ 29. Section 60.2935 is revised to read as follows:

§ 60.2935 May I conduct a repeat performance test to establish new operating limits?

(a) Yes, you may conduct a repeat performance test at any time to establish new values for the operating limits. The Administrator may request a repeat performance test at any time.

(b) For each small OSWI unit, as defined in § 60.2977, for which you opt to demonstrate continuous compliance following the requirements in § 60.2932(d), if you want to establish new operating parameter limits or establish a different waste profile, you must comply with either paragraph (b)(1) or (2) of this section.

(1) You must conduct a new performance test of the unit using the test methods listed in table 1b of this subpart and the procedures in § 60.2922 with a waste stream representative of the new waste profile or under the new operating parameter limits.

(2) You must identify a representative performance test that meets the requirements in § 60.2929(c). You must submit the information in § 60.2929(b)(1) and (2) to the Administrator.

■ 30. Section 60.2939 is amended by revising paragraph (a) to read as follows:

§ 60.2939 What continuous emission monitoring systems must I install?

(a) For each OSWI unit with a capacity greater than 10 tons per day, you must install, calibrate, maintain, and operate continuous emission monitoring systems for carbon monoxide and for oxygen. You must monitor the oxygen concentration at each location where you monitor carbon monoxide.

* * * * *

■ 31. Section 60.2940 is amended by revising paragraphs (b) and (c) to read as follows:

§ 60.2940 How do I make sure my continuous emission monitoring systems are operating correctly?

* * * * *

(b) Complete your initial performance evaluation of the continuous emission monitoring systems within 60 days after your OSWI unit reaches the maximum load level at which it will operate, but no later than 180 days after its initial startup.

(c) For initial and annual performance evaluations, collect data concurrently (or within 30 to 60 minutes) using your carbon monoxide and oxygen continuous emission monitoring systems. To validate carbon monoxide concentration levels, use EPA Method 10, 10A, or 10B of appendix A of this part. Use EPA Method 3A or 3B of appendix A to this part or ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17), in lieu of Method 3B, to measure oxygen. Collect the data during each initial and annual evaluation of your continuous emission monitoring systems following the applicable performance specifications in appendix B of this part. Table 3 of this subpart shows the required span values and performance specifications that apply to each continuous emission monitoring system.

* * * * *

■ 32. Section 60.2942 is amended by revising the section heading and paragraphs (a) and (f) to read as follows:

§ 60.2942 What is the minimum amount of monitoring data I must collect with my continuous emission monitoring systems?

(a) Where continuous emission monitoring systems are required, obtain 1-hour arithmetic averages. Except for CEMS data during startup and shutdown, as defined in this subpart, the 1-hour arithmetic averages for carbon monoxide must be expressed in parts per million by dry volume corrected to 7 percent oxygen. The

CEMS data during startup and shutdown are not corrected to 7 percent oxygen and are measured at stack oxygen content. Use the 1-hour averages of oxygen data from your CEMS to determine the actual oxygen level and to calculate emissions at 7 percent oxygen. Use Equation 2 in § 60.2975 to calculate the 12-hour rolling averages from the 1-hour arithmetic averages.

* * * * *

(f) If continuous emission monitoring systems are temporarily unavailable to meet the data collection requirements, refer to table 3 of this subpart. It shows alternate methods for collecting data when systems malfunction or when repairs, calibration checks, or zero and span checks keep you from collecting the minimum amount of data. Failure to collect required data is a deviation of the monitoring requirements.

■ 33. Section 60.2944 is amended by revising the section heading and paragraphs (a) and (c), and adding paragraph (d) to read as follows:

§ 60.2944 What operating parameter monitoring equipment must I install, or what operating parameters must I monitor?

(a) You must install, calibrate (to manufacturers' specifications at the frequency recommended by the manufacturer), maintain, and operate devices (or establish methods) for monitoring the value of the operating parameters used to determine compliance with the operating limits listed in table 2 of this subpart, as applicable. These devices (or methods) must measure and record the values for these operating parameters at the frequencies indicated in table 2 of this subpart at all times. The devices must be positioned to provide a representative measurement of the parameter monitored.

* * * * *

(c) If you are using a fabric filter to comply with the requirements of this subpart, you must install, calibrate, maintain, and continuously operate a bag leak detection system as specified in paragraphs (c)(1) through (8) of this section:

(1) You must install and operate a bag leak detection system for each exhaust stack of the fabric filter. The bag leak sensor(s) must be installed in a position(s) that will be representative of the relative or absolute particulate matter loadings for each exhaust stack, roof vent, or compartment of the fabric filter;

(2) Each bag leak detection system must be installed, operated, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations; and in accordance with the guidance provided in EPA–454/R–98–015 (incorporated by reference, see § 60.17(j));

(3) The bag leak detection system must be certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 1 milligrams per actual cubic meter or less;

(4) The bag leak detection system sensor must provide output of relative or absolute particulate matter loadings;

(5) The bag leak detection system must be equipped with a device to continuously record the output signal from the sensor;

(6) The bag leak detection system must be equipped with an alarm system that will automatically alert an operator when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is observed easily by plant operating personnel;

(7) For positive pressure fabric filter systems, a bag leak detection system must be installed in each baghouse compartment or cell. For negative pressure or induced air fabric filters, the bag leak detector must be installed downstream of the fabric filter; and

(8) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(d) If you are required to petition the EPA for operating limits under § 60.2917, you must install, calibrate (to the manufacturers' specifications), maintain, and operate the equipment necessary to monitor compliance with the site-specific operating limits established using the procedures in § 60.2917.

■ 34. Section 60.2949 is amended by revising the introductory text and paragraphs (b) through (e) and (g), and adding paragraphs (p), (q), and (r) to read as follows:

§ 60.2949 What records must I keep?

You must maintain the information specified in paragraphs (a) through (r) of this section, as applicable, for a period of at least 5 years.

* * * * *

(b) Records of the data described in paragraphs (b)(1) through (10) of this section.

(1) The OSWI unit charge dates, times, weights, and total daily charge rates.

(2) The combustion chamber operating temperature every 15 minutes of operation.

(3) For each OSWI unit with a wet scrubber, the liquor flow rate to the wet scrubber inlet, pressure drop across the wet scrubber system or amperage to the wet scrubber, and liquor pH at the outlet of the wet scrubber, every 15 minutes of operation.

(4) For each OSWI unit with a dry scrubber, the injection rate of each sorbent, every 15 minutes of operation.

(5) For each OSWI unit with an electrostatic precipitator, the secondary voltage, secondary current, and secondary electric power, every 15 minutes of operation.

(6) For each OSWI unit with a fabric filter, the date, time, and duration of each alarm; the times corrective action was initiated and completed; and a brief description of the cause of the alarm and the corrective action taken. You must also record the percent of the operating time during each 6-month period that the alarm sounds, calculated as specified in § 60.2916(f).

(7) For OSWI units that establish operating limits for controls under § 60.2917, you must maintain data collected for all operating parameters used to determine compliance with the operating limits.

(8) For OSWI units that use a carbon monoxide CEMS, all 1-hour average concentrations of carbon monoxide and oxygen.

(9) All 12-hour rolling average values of carbon monoxide emissions, corrected to 7 percent oxygen (except during periods of startup and shutdown), all 3-hour rolling average values of continuously monitored operating parameters, and total daily charge rates, as applicable.

(10) Records of the dates, times, and durations of any bypass of the control device.

(c) Records of the start date and time and duration in hours of each malfunction of operation (*i.e.,* process equipment) or the air pollution control and monitoring equipment, and description of the malfunction.

(d) Records of actions taken during periods of malfunction to minimize emissions in accordance with § 60.11(d), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

(e) Start date, start time, end date and end time for each period for which monitoring data show a deviation from the carbon monoxide emissions limit in table 1, 1a, or 1b of this subpart or a deviation from the operating limits in table 2 of this subpart or a deviation from other operating limits established under § 60.2917 with a description of the deviations, reasons for such deviations, and a description of corrective actions taken. You must

record the start date, start time, end date and end time for each period when all qualified operators were not accessible in accordance with § 60.2911.

* * * * *

(g) For carbon monoxide continuous emissions monitoring systems, document the results of your annual performance evaluations, daily drift tests and quarterly accuracy determinations according to Procedure 1 of appendix F of this part.

* * * * *

(p) If you comply with the substitute means of compliance demonstration requirements in § 60.2929 for your small OSWI unit, you must keep the records specified in paragraphs (p)(1) through (4) of this section.

(1) Copy of the notification submitted to the Administrator that you intend to use the substitute means of compliance demonstration as required in § 60.2929(a)(1).

(2) Records of the data collected as required in § 60.2929(a)(2).

(3) Copy of the representative performance test used to demonstrate initial compliance; and

(4) Documentation of how the test in paragraph (p)(3) of this section is representative of the unit as required in § 60.2929(b)(2).

(q) If you comply with the continuous compliance requirements of § 60.2932(d), you must keep records of the following elements reported on a weekly basis at the frequency they are monitored in accordance with table 2 of this subpart (*e.g.,* each 3-hr average recorded temperature), as specified in paragraphs (q)(1) through (7) of this section.

(1) Start and end times the unit is operated when waste is being combusted.

(2) Identity and weight of each waste category (*e.g.,* lbs of solid waste, food waste, wood or yard waste).

(3) Identities and quantities of supplemental fuel burned (*e.g.* flow rate or percentage of operating time).

(4) The waste profile, as defined in § 60.2977.

(5) Temperature of unit combustion chamber and description of where temperature is measured, as a three-hour average for each batch operation.

(6) Charge rate (in tons per day) of each operation.

(7) For each OSWI unit using a wet scrubber, dry scrubber, electrostatic precipitator, or fabric filter, the records specified in paragraph (b)(3) through (10) of this section, as applicable.

(r) Copies of any notifications submitted pursuant to §§ 60.2887 and 60.2969.

■ 35. Section 60.2954 is amended by revising the introductory text and adding paragraph (c) to read as follows:

§ 60.2954 What information must I submit following my initial performance test?

Unless you choose to comply with the substitute means of compliance demonstration requirements in § 60.2929, you must submit the information specified in paragraphs (a) and (b) of this section no later than 60 days following the initial performance test. All reports must be signed by the facilities manager.

* * * * *

(c) The waste management plan, as specified in §§ 60.2899 through 60.2901.

■ 36. Section 60.2955 is revised to read as follows:

§ 60.2955 When must I submit my annual report?

You must submit an annual report no later than 12 months following the submission of the information in § 60.2954, unless you choose to comply with the substitute means of compliance demonstration requirements in § 60.2929. If you choose to comply with the substitute means of compliance demonstration requirements in § 60.2929, you must submit an annual report no later than 12 months following the submission of the information in § 60.2929(b). You must submit subsequent reports no more than 12 months following the previous report. The permit will address the submittal of annual reports for a unit with an operating permit required under title V of the Clean Air Act.

■ 37. Section 60.2956 is amended by:

■ a. Revising the introductory text and paragraphs (b) through (f);

■ b. Removing and reserving paragraph (g);

■ c. Revising paragraphs (h) and (j); and

■ d. Adding paragaph (k).

The revisions and addition read as follows:

§ 60.2956 What information must I include in my annual report?

The annual report required under § 60.2955 must include the items listed in paragraphs (a) through (k) of this section. If you have a deviation from the operating limits or the emission limitations, you must also submit deviation reports as specified in §§ 60.2957 through 60.2959.

* * * * *

(b) Statement by the owner or operator, with their name, title, and signature, certifying the truth, accuracy, and completeness of the report. Such certifications must also comply with the requirements of 40 CFR 70.5(d) or 40 CFR 71.5(d). If your report is submitted via CEDRI, the certifier's electronic signature during the submission process replaces this requirement.

(c) Date of report and beginning and ending dates of the reporting period. You are no longer required to provide the date of report when the report is submitted via CEDRI.

(d) Identification of each OSWI unit, and for each OSWI unit, the parameters monitored and values for the operating limits established pursuant to § 60.2916 or § 60.2917.

(e) If no deviations from any emission limitation or operating limit that applies to you has occurred during the annual reporting period, a statement that there were no deviations from the emission limitations or operating limits during the reporting period. If you use a CMS to monitor emissions or operating parameters and there were no periods during which any CMS was inoperative, inactive, malfunctioning or out of control, a statement that no monitoring system used to determine compliance with the emission limitations or operating limits was inoperative, inactive, malfunctioning or out of control.

(f) The highest recorded 12-hour average and the lowest recorded 12-hour average, as applicable, for carbon monoxide emissions if you are using a CEMS to demonstrate continuous compliance and the highest recorded 3-hour average and the lowest recorded 3-hour average, as applicable, for each operating parameter recorded for the calendar year being reported.

(g) [Reserved]

(h) If a performance test was conducted during the reporting period, identification of the OSWI unit tested, the pollutant(s) tested, and the date of the performance test. Submit, following the procedure specified in § 60.2961(b), the performance test report no later than the date that you submit the annual report.

* * * * *

(j) The start date, start time, and duration in hours for each period when all qualified OSWI unit operators were unavailable for more than 12 hours, but less than 2 weeks.

(k) If you are complying with the continuous compliance requirements for small OSWI units in § 60.2932(d) and have had no deviations from the weekly waste profile requirements or deviations from the operating limits, a statement that there were no deviations from the weekly waste profile requirements, and the OSWI unit has been operated within the operating parameter limits established during the representative

performance test identified in the information submitted as required in § 60.2929(b) or the initial performance test conducted by the source as required in § 60.2929(d).

■ 38. Section 60.2957 is amended by revising the section heading and paragraph (a) to read as follows:

§ 60.2957 What other reports must I submit if I have a deviation?

(a) You must submit a deviation report as specified in paragraphs (a)(1) through (3) of this section:

(1) If your OSWI unit fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limitation, operating limit, or operator qualification and accessibility requirements.

(2) If your OSWI unit fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any unit that meets the requirements in § 60.2885 and is required to obtain such a permit.

(3) If you deviate from the requirements to have a qualified operator accessible as specified in § 60.2911, you must meet the requirements of § 60.2959.

* * * * *

■ 39. Section 60.2958 is revised to read as follows:

§ 60.2958 What must I include in the deviation report?

In each report required under § 60.2957, you must include the company name and address and the beginning and ending dates for the reporting period. For any pollutant or operating parameter that deviated from the emission limitations, operating limits or other requirement specified in this subpart, or for each CMS that experienced downtime or was out of control, include the items described in paragraphs (a) through (g) of this section, as applicable. If you are complying with the continuous compliance requirements for small OSWI units in § 60.2932(d), you must also include the items described in paragraphs (h) and (i) of this section. You must identify the OSWI unit associated with the information required in paragraphs (a) through (i) in your deviation report.

(a) Identification of the emission limit, operating parameter or other requirement from which there was a deviation and the start date, start time, and duration in hours of each deviation.

(b) The averaged and recorded data for those dates, including, when applicable, the information recorded under § 60.2949(b)(9) and (c) through (e) for the calendar period being reported.

(c) The cause of each deviation from the emission limitations, operating limits or other requirement and your corrective actions.

(d) For each CMS, the start date, start time, duration in hours, and cause for each instance of monitor downtime (other than downtime associated with zero, span, and other routine calibration checks).

(e) For each CMS, the start date, start time, duration in hours, and corrective action taken for each instance that the monitor is out of control.

(f) The dates, times, and duration in hours of any bypass of the control device and your corrective actions.

(g) For batch OSWI units, the dates, times, and duration in hours of any deviation from the requirements to have a qualified operator accessible as required in § 60.2911.

(h) If you are complying with the continuous compliance requirements for small OSWI units in § 60.2932(d), the dates, times, duration in weeks and cause for each deviation from the waste profile required in § 60.2932(d)(1).

(i) The dates, times, duration in hours, and cause for each deviation from the operating parameter limits established during the representative performance test identified in the information submitted as required in § 60.2929(b) or the initial performance test conducted by the source as required in § 60.2927(a).

■ 40. Section 60.2961 is revised to read as follows:

§ 60.2961 In what form can I submit my reports?

(a) Before [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], you must submit annual and deviation reports electronically or in paper format, postmarked on or before the submittal due dates. Beginning on [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], or once the report template for this subpart has been available on the Compliance and Emissions Data Reporting Interface (CEDRI) website for one year, whichever date is later, you must submit all subsequent annual compliance reports and deviation reports to the EPA via CEDRI, which can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as confidential business information (CBI). Anything submitted using CEDRI cannot later be claimed CBI. You must use the appropriate electronic report template on the CEDRI website (*https://www.epa.gov/electronic-reporting-air-emissions/cedri*) for this subpart. The date report templates become available will be listed on the CEDRI website. The report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim, submit a complete report, including information claimed to be CBI, to the EPA. The report must be generated using the appropriate form on the CEDRI website or an alternate electronic file consistent with the extensible markup language (XML) schema listed on the CEDRI website. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Other Solid Waste Incineration Units Sector Lead, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(b) Beginning on [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], within 60 days after the date of completing each performance test required by this subpart, you must submit the results of the performance test following the procedures specified in paragraphs (b)(1) through (3) of this section.

(1) *Data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert) at the time of the test.* Submit the results of the performance test to the EPA via CEDRI, which can be accessed through the EPA's CDX (*https://cdx.epa.gov/*). The data must be submitted in a file format generated through the use of the EPA's ERT. Alternatively, you may submit an electronic file consistent with the XML schema listed on the EPA's ERT website.

(2) *Data collected using test methods that are not supported by the EPA's ERT*

as listed on the EPA's ERT website at the time of the test. The results of the performance test must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the ERT generated package or alternative file to the EPA via CEDRI.

(3) *CBI.* Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim for some of the information required under paragraph (b)(1) or (2) of this section, you must submit a complete file, including information claimed to be CBI, to the EPA. The file must be generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described in paragraphs (b)(1) and (2) of this section. All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(c) Beginning on [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], within 60 days after the date of completing each continuous emissions monitoring system (CEMS) performance evaluation, you must submit the results of the performance evaluation following the procedures specified in paragraphs (c)(1) through (3) of this section.

(1) *Performance evaluations of CEMS measuring relative accuracy test audit (RATA) pollutants that are supported by the EPA's ERT as listed on the EPA's ERT website at the time of the evaluation.* Submit the results of the performance evaluation to the EPA via CEDRI, which can be accessed through the EPA's CDX. The data must be submitted in a file format generated through the use of the EPA's ERT. Alternatively, you may submit an electronic file consistent with the XML schema listed on the EPA's ERT website.

(2) *Performance evaluations of CEMS measuring RATA pollutants that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the evaluation.* The results of the performance evaluation must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the ERT generated package or alternative file to the EPA via CEDRI.

(3) *CBI.* Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim for some of the information required under paragraph (c)(1) or (2) of this section, you must submit a complete file, including information claimed to be CBI, to the EPA. The file must be generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described in paragraphs (c)(1) and (2) of this section. All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(d) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with the reporting requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (d)(1) through (7) of this section.

(1) You must have been or will be precluded from accessing CEDRI and submitting a required report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(2) The outage must have occurred within the period of time beginning five business days prior to the date that the submission is due.

(3) The outage may be planned or unplanned.

(4) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(5) You must provide to the Administrator a written description identifying:

(i) The date(s) and time(s) when CDX or CEDRI was accessed and the system was unavailable;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to EPA system outage;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(6) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(7) In any circumstance, the report must be submitted electronically as soon as possible after the outage is resolved.

(e) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of *force majeure* for failure to timely comply with the reporting requirement. To assert a claim of *force majeure,* you must meet the requirements outlined in paragraphs (e)(1) through (5) of this section.

(1) You may submit a claim if a *force majeure* event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning five business days prior to the date the submission is due. For the purposes of this section, a *force majeure* event is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a report electronically within the time period prescribed. Examples of such events are acts of nature (*e.g.,* hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (*e.g.,* large scale power outage).

(2) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(3) You must provide to the Administrator:

(i) A written description of the *force majeure* event;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to the *force majeure* event;

(iii) A description of measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(4) The decision to accept the claim of *force majeure* and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(5) In any circumstance, the reporting must occur as soon as possible after the *force majeure* event occurs.

■ 41. Section 60.2966 is revised to read as follows:

§ 60.2966 Am I required to apply for and obtain a title V operating permit for my unit?

(a) Yes, if your OSWI unit meets the applicability criteria in § 60.2885 and thus is subject to this subpart, you are required to obtain a title V operating permit for your OSWI unit.

(b) Air curtain incinerators as specified in § 60.2888(b) and subject only to the requirements in §§ 60.2970 through 60.2973 are exempted from title V permitting requirements per these regulations.

■ 42. Section 60.2967 is revised to read as follows:

§ 60.2967 When must I submit a title V permit application for my new unit?

(a) If your new unit subject to this subpart is applying for a permit for the first time, a complete title V permit application must be submitted timely either 12 months after the date the unit commences operation as a new source or before one of the dates specified in paragraph (b) of this section, as applicable. See section 503(c) of the Clean Air Act and 40 CFR 70.5(a)(1)(i) and 40 CFR 71.5(a)(1)(i).

(b) For a unit that commenced operation as a new source as of December 16, 2005, then a complete title V permit application must be submitted not later than December 18, 2006. For a small OSWI unit that commenced operation as a new source as of [DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], a complete title V permit application must be submitted not later than [DATE 1 YEAR AND 1 DAY AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**].

§ 60.2970 [Amended]

■ 43. Section 60.2970 is amended by removing and reserving paragraph (b).

■ 44. Section 60.2972 is amended by revising paragraph (a) to read as follows:

§ 60.2972 How must I monitor opacity for air curtain incinerators that burn only wood waste, clean lumber, and yard waste?

(a) Use EPA Method 9 of appendix A of this part or ASTM D7520–16 (incorporated by reference (IBR), see § 60.17), to determine compliance with the opacity limitation.

* * * * *

■ 45. Section 60.2973 is amended by revising paragraph (e) to read as follows:

§ 60.2973 What are the recordkeeping and reporting requirements for air curtain incinerators that burn only wood waste, clean lumber, and yard waste?

* * * * *

(e) Before [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], submit initial and annual opacity test reports as electronic or paper copy on or before the applicable submittal date. On and after [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], within 60 days after the date of completing the initial opacity test and each annual opacity test required by this subpart, you must submit the results of the opacity test following the procedures specified in § 60.2961(b)(1) through (3).

* * * * *

§ 60.2974 [Removed]

■ 46. Remove § 60.2974.

■ 47. Section 60.2975 is amended by revising parameters ''E_a'' and ''E_{hj}'' of Equation 2 in paragraph (d) to read as follows:

§ 60.2975 What equations must I use?

* * * * *

(d) * * *

E_a = Average carbon monoxide pollutant rate for the 12-hour period, ppm corrected to 7 percent O_2. Note that a 12-hour period may include CEMS data during startup and shutdown, as defined in the subpart, in which case the period will not consist entirely of data that have been corrected to 7 percent O_2.

E_{hj} = Hourly arithmetic average pollutant rate for hour ''j,'' ppm corrected to 7 percent O_2. CEMS data during startup and shutdown, as defined in the subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content.

■ 48. Section 60.2977 is amended by:

■ a. Revising the definition for ''Administrator'';

■ b. Adding in alphabetical order a definition for ''CEMS data during startup and shutdown'';

■ c. Removing the definition for ''Collected from'';

■ d. Revising the definitions for ''Deviation,'' ''Low-level radioactive waste,'' ''Municipal waste combustion unit,'' and ''Particulate matter''; and

■ e. Adding in alphabetical order definitions for ''Small OSWI unit'' and ''Waste profile.''

The revisions and additions read as follows:

§ 60.2977 What definitions must I know?

* * * * *

Administrator means:

(1) For approved and effective state section 111(d)/129 plans, the Director of the state air pollution control agency, or his or her delegatee;

(2) For Federal section 111(d)/129 plans, the Administrator of the EPA, an employee of the EPA, the Director of the state air pollution control agency, or employee of the state air pollution control agency to whom the authority has been delegated by the Administrator of the EPA to perform the specified task; and

(3) For NSPS, the Administrator of the EPA, an employee of the EPA, the Director of the state air pollution control agency, or employee of the state air pollution control agency to whom the authority has been delegated by the Administrator of the EPA to perform the specified task.

* * * * *

CEMS data during startup and shutdown means CEMS data collected during the first hours of a OSWI startup from a cold start until waste is fed to the unit and the hours of operation following the cessation of waste material being fed to the OSWI during a unit shutdown. For each startup event, the length of time that CEMS data may be claimed as being CEMS data during startup must be 48 operating hours or less. For each shutdown event, the length of time that CEMS data may be claimed as being CEMS data during shutdown must be 24 operating hours or less.

* * * * *

Deviation means any instance in which a unit that meets the requirements in § 60.2885, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limitation, operating limit, or operator qualification and accessibility requirements; and

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating

permit for any unit that meets the requirements in § 60.2885 and is required to obtain such a permit.

* * * * *

Low-level radioactive waste means waste material that contains radioactive nuclides emitting primarily beta or gamma radiation, or both, in concentrations or quantities that exceed applicable federal or state standards for unrestricted release. Low-level radioactive waste is not high-level radioactive waste, spent nuclear fuel, or byproduct material as defined by the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(2)).

* * * * *

Municipal waste combustion unit means, for the purpose of this subpart and subpart FFFF of this part, any setting or equipment that combusts municipal solid waste (as defined in this subpart) including, but not limited to, field-erected, modular, cyclonic burn barrel, and custom built incineration units (with or without energy recovery) operating with starved or excess air, boilers, furnaces, and air curtain incinerators (except those air curtain incinerators listed in § 60.2888(b)).

* * * * *

Particulate matter means total particulate matter emitted from OSWI units as measured by EPA Method 5 or EPA Method 29 of appendix A of this part.

* * * * *

Small OSWI unit means OSWI units with capacities less than or equal to 10 tons per day.

* * * * *

Waste profile means for a small OSWI unit the amount of each waste category burned as a percentage of total waste burned on a mass basis.

* * * * *

■ 49. Table 1 to subpart EEEE of part 60 is amended by revising the heading, rows 7, 8, and 10, and footnote ''a'' to read as follows:

Table 1 to Subpart EEEE of Part 60—Emission Limitations for OSWI Units With Initial Startup Before [DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]

* * * * *

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
*	*	*	*
7. Opacity	10 percent	6-minute average (observe over three 1-hour test runs; *i.e.,* thirty 6-minute averages).	Method 9 of appendix A of this part, or ASTM D7520–16 (incorporated by reference (IBR) see § 60.17), if the following conditions are met: 1. During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16, you or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand). 2. You must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16. 3. You must follow the record-keeping procedures outlined in § 63.10(b)(1) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination. 4. You or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of any one reading and the average error must not exceed 7.5 percent opacity.

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
8. Oxides of nitrogen	103 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 7, 7A, 7C, 7D, or 7E of appendix A of this part, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Methods 7 and 7C only.
* *	* *	* *	* *
10. Sulfur dioxide	3.1 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 6 or 6C of appendix A of this part, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Method 6 only.

[a] All emission limitations (except for opacity and CEMS data during startup and shutdown) are measured at 7 percent oxygen, dry basis at standard conditions. CEMS data during startup and shutdown are measured at stack oxygen content.

* * * * *

■ 50. Tables 1a and 1b to subpart EEEE of part 60 are added to read as follows:

Table 1a to Subpart EEEE of Part 60—Emission Limitations for OSWI Units With Capacities Greater Than 10 Tons Per Day and With Initial Startup On or After [DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]

As stated in § 60.2915, you must comply with the following:

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
1. Cadmium	18 micrograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 29 of appendix A of this part.
2. Carbon monoxide	40 parts per million by dry volume	3-run average (1 hour minimum sample time per run during performance test), and 12-hour rolling averages measured using CEMS [b].	Method 10, 10A, or 10B of appendix A of this part and CEMS.
3. Dioxins/furans (total basis)	33 nanograms per dry standard cubic meter.	3-run average (1 hour minimum sample meter time per run).	Method 23 of appendix A of this part.
4. Hydrogen chloride	15 parts per million by dry volume	3-run average (1 hour minimum sample time per run).	Method 26A of appendix A of this part.
5. Lead	226 micrograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 29 of appendix A of this part.
6. Mercury	74 micrograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 29 of appendix A of this part.
7. Opacity	10 percent	6-minute average (observe over three 1-hour test runs; i.e., thirty 6-minute averages).	Method 9 of appendix A of this part, or ASTM D7520–16 (IBR, see § 60.17), if the following conditions are met: 1. During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16, you or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand). 2. You must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16.

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
			3. You must follow the record-keeping procedures outlined in § 63.10(b)(1) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination. 4. You or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of any one reading and the average error must not exceed 7.5 percent opacity.
8. Oxides of nitrogen	103 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 7, 7A, 7C, 7D, or 7E of appendix A of this part, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Methods 7 and 7C only.
9. Particulate matter	0.013 grains per dry standard cubic foot.	3-run average (1 hour minimum sample time per run).	Method 5 or 29 of appendix A of this part.
10. Sulfur dioxide	3.1 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 6 or 6C of appendix A of this part, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Method 6 only.

[a] All emission limitations (except for opacity and CEMS data during startup and shutdown) are measured at 7 percent oxygen, dry basis at standard conditions. CEMS data during startup and shutdown are measured at stack oxygen content.
[b] Calculated each hour as the average of the previous 12 operating hours.

Table 1b to Subpart EEEE of Part 60—Emission Limitations for Small OSWI With Initial Startup On or After [DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER]

As stated in § 60.2915, you must comply with the following:

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
1. Cadmium	400 micrograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 29 of appendix A of this part.
2. Carbon monoxide	69 parts per million by dry volume	3-run average (1 hour minimum sample time per run during performance test), and 12-hour rolling averages measured using CEMS [b].	Method 10, 10A, or 10B of appendix A of this part
3a. Dioxins/furans (total mass basis) [c].	3,100 nanograms per dry standard cubic meter.	3-run average (1 hour minimum sample meter time per run).	Method 23 of appendix A of this part.
3b. Dioxins/furans (toxic equivalency basis) [c].	40 nanograms per dry standard cubic meter.	3-run average (1 hour minimum sample meter time per run).	Method 23 of appendix A of this part.
4. Hydrogen chloride	210 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 26A of appendix A of this part.
5. Lead	26,000 micrograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 29 of appendix A of this part.
6. Mercury	12 micrograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 29 of appendix A of this part.

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
7. Opacity	10 percent	6-minute average (observe over three 1-hour test runs; *i.e.,* thirty 6-minute averages).	Method 9 of appendix A of this part, or ASTM D7520–16 (IBR, see § 60.17), if the following conditions are met: 1. During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16, you or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand). 2. You must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16. 3. You must follow the record-keeping procedures outlined in § 63.10(b)(1) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination. 4. You or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of any one reading and the average error must not exceed 7.5 percent opacity.
8. Oxides of nitrogen	180 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 7, 7A, 7C, 7D, or 7E of appendix A of this part, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Methods 7 and 7C only.
9. Particulate matter	210 micrograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 5 or 29 of appendix A of this part.
10. Sulfur dioxide	38 parts per million by dry volume	3-run average (1 hour minimum sample time per run).	Method 6 or 6C of appendix A of this part, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Method 6 only.

[a] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions.
[b] Calculated each hour as the average of the previous 12 operating hours.
[c] For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

■ 51. Table 2 to subpart EEEE of part 60 is revised to read as follows:

Table 2 to Subpart EEEE of Part 60—Operating Limits for Incinerators

As stated in § 60.2916, you must comply with the following:

For these operating parameters	You must establish these operating limits	And monitoring using these minimum frequencies		
		Data measurement	Data recording	Averaging time
1. Charge rate	Maximum charge rate	Periodic	For batch, each batch. For continuous or intermittent every hour.	Daily for batch units or small OSWI units complying with § 60.2932(d). 3-hour rolling for continuous and intermittent units.[a]
2. Combustion temperature	Minimum combustion chamber operating temperature.	Continuous	Every 15 minutes	3-hour rolling.[a]
3. Pressure drop across the wet scrubber or amperage to wet scrubber.	Minimum pressure drop or amperage.	Continuous	Every 15 minutes	3-hour rolling.[a]
4. Wet scrubber liquor flow rate.	Minimum flow rate at inlet to the scrubber.	Continuous	Every 15 minutes	3-hour rolling.[a]
5. Wet scrubber liquor pH	Minimum pH at scrubber outlet.	Continuous	Every 15 minutes	3-hour rolling.[a]
6. Dry scrubber sorbent injection.	Minimum injection rate of each sorbent.	Continuous	Every 15 minutes	3-hour rolling.[a]
7. Electrostatic precipitator secondary electric power.	Minimum secondary electric power, calculated from the secondary voltage and secondary current.	Continuous	Every 15 minutes	3-hour rolling.[a]
8. Bag leak detection system alarm time.	Alarm time <5 percent of the operating time during a 6-month period.	Continuous	Each date and time of alarm start and stop.	Calculate alarm time as specified in § 60.2916(f).
9. Waste profile	The amount of each waste category burned as a percentage of total waste burned on a mass basis.	Periodic	For batch, each batch. For continuous or intermittent every hour.	Weekly.

[a] Calculated each hour as the average of the previous 3 operating hours.

■ 52. Table 3 to subpart EEEE of part 60 is amended by revising row 2 to read as follows:

Table 3 to Subpart EEEE of Part 60—Requirements for Continuous Emission Monitoring Systems (CEMS)

* * * * *

For the following pollutants	Use the following span values for your CEMS	Use the following performance specifications (P.S.) in appendix B of this part for your CEMS	If needed to meet minimum data requirements, use the following alternate methods in appendix A of this part to collect data
* *	* *	* *	* *
2. Oxygen	25 percent oxygen	P.S.3	Method 3A or 3B, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Method 3B only.

■ 53. Table 4 to subpart EEEE of part 60 is amended by revising row 1 and 4 to read as follows:

Table 4 to Subpart EEEE of Part 60—Summary of Reporting Requirements

* * * * *

Report	Due date	Contents	Reference
1. Preconstruction report	a. Prior to commencing construction.	i. Statement of intent to construct;	§ 60.2952.
		ii. Anticipated date of commencement of construction;	§ 60.2952.

Report	Due date	Contents	Reference
*	* *	* * *	*
4. Annual report	a. No later than 12 months following the submission of the initial test report. Subsequent reports are to be submitted no more than 12 months following the previous report.	i. Company Name and address;	§§ 60.2955 and 60.2956.
		ii. Statement and signature by the owner or operator; ..	§§ 60.2955 and 60.2956.
		iii. Date of report;	§§ 60.2955 and 60.2956.
		iv. Values for the operating limits;	§§ 60.2955 and 60.2956.
		v. If no deviations or malfunctions were reported, a statement that no deviations occurred during the reporting period;.	§§ 60.2955 and 60.2956.
*	* *	* * *	*
		xi. For each small OSWI unit for which you demonstrate continuous compliance according to § 60.2932(d), if no deviations from the percentages established for each waste category according to the waste profile required in § 60.2932(d)(1) and the OSWI unit has been operated within the operating parameter limits, a statement that there were no deviations from the weekly waste profile requirements and the OSWI unit has been operated within the operating parameter limits.	§§ 60.2955 and 60.2956.
*	* *	* * *	*

* * * * *

■ 54. Subpart FFFF of part 60 is amended by revising the subpart heading to read as follows:

Subpart FFFF—Emission Guidelines and Compliance Times for Other Solid Waste Incineration Units

■ 55. Section 60.2980 is revised to read as follows:

§ 60.2980 What is the purpose of this subpart?

This subpart establishes emission guidelines and compliance schedules for the control of emissions from other solid waste incineration (OSWI) units. The pollutants addressed by these emission guidelines are listed in tables 2 and 2b of this subpart. These emission guidelines are developed in accordance with sections 111(d) and 129 of the Clean Air Act and subpart B of this part.

■ 56. Section 60.2981 is revised to read as follows:

§ 60.2981 Am I affected by this subpart?

(a) If you are the Administrator of an air quality program in a State or United States protectorate with one or more existing incineration units as defined in § 60.2992, you must submit a State plan to the U.S. Environmental Protection Agency (EPA) that implements the emission guidelines contained in this subpart.

(b) You must submit the State plan to EPA by the dates specified in paragraph (b)(1) or (2) of this section.

(1) By December 18, 2006, for OSWI units that commenced construction prior to December 9, 2004 or commenced reconstruction or modification on or before June 16, 2006.

(2) By [DATE 1 YEAR AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] for OSWI units that commenced construction after December 9, 2004 or reconstruction or modification after June 16, 2006 but prior to August 31, 2020.

■ 57. Section 60.2982 is revised to read as follows:

§ 60.2982 Is a State plan required for all States?

No, you are not required to submit a State plan if there are no existing incineration units that are an OSWI unit as defined in §§ 60.2992 and 60.3078 or air curtain incinerators subject to this subpart as described in § 60.2994 in your State and you submit a negative declaration letter in place of the State plan.

■ 58. Section 60.2983 is amended by revising paragraph (b) to read as follows:

§ 60.2983 What must I include in my State plan?

* * * * *

(b) Your State plan may deviate from the format and content of the emission guidelines contained in this subpart. However, if your State plan does deviate, you must demonstrate that your State plan is at least as protective as the emission guidelines contained in this subpart. Your State plan must address regulatory applicability, compliance schedule, operator training and qualification, a waste management plan, emission limitations, stack testing or substitute means of compliance, operating parameter requirements, monitoring, recordkeeping and reporting, and air curtain incinerator requirements.

* * * * *

■ 59. Section 60.2985 is revised to read as follows:

§ 60.2985 What if my State plan is not approvable?

(a) If you do not submit an approvable State plan (or a negative declaration letter) by December 17, 2007, EPA will develop a Federal plan according to § 60.27 to implement the emission guidelines contained in this subpart.

(b) If you do not submit an approvable State plan that meets the requirements of this subpart and contains the emission limits in table 2b of this subpart by [DATE 1 YEAR AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], for OSWI units that commenced construction after December 9, 2004 but no later than August 31, 2020 or commenced reconstruction or modification after June 16, 2006 but no later than [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], the EPA will develop a Federal plan according to § 60.27, to implement the emission guidelines contained in this subpart.

(c) Owners and operators of incineration units not covered by an approved State plan must comply with the Federal plan. The Federal plan is an interim action and applies to units until a State plan covering those units is approved and becomes effective.

■ 60. Section 60.2986 is revised to read as follows:

§ 60.2986 Is there an approval process for a negative declaration letter?

No, EPA has no formal review process for negative declaration letters. Once we receive your negative declaration letter, we will place a copy in the public docket and publish a notice in the **Federal Register**. If, at a later date, an existing incineration unit as defined in § 60.2992 is found in your State, the Federal plan implementing the emission guidelines contained in this subpart would automatically apply to that unit until your State plan is approved.

■ 61. Section 60.2987 is amended by:

■ a. Revising the introductory text and paragraph (a);

■ b. Redesignating paragraph (b) as paragraph (c); and

■ c. Adding paragraph (b).

The revisions and addition read as follows:

§ 60.2987 What compliance schedule must I include in my State plan?

Your State plan must include compliance schedules that require existing incineration units as defined in § 60.2992 to achieve final compliance as expeditiously as practicable after approval of the State plan but not later than the earlier of the following dates:

(a) December 16, 2010 for existing incineration units specified in § 60.2992(a)(1).

(b) [DATE 5 YEARS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] for existing incineration units specified in § 60.2992(a)(2).

* * * * *

■ 62. Section 60.2988 is amended by revising paragraph (a) to read as follows:

§ 60.2988 Are there any State plan requirements for this subpart that apply instead of the requirements specified in subpart B of this part?

* * * * *

(a) State plans developed to implement this subpart must be as protective as the emission guidelines contained in this subpart. State plans must require all existing incineration units as defined in § 60.2992(a)(1) to comply by December 16, 2010 or 3 years after the effective date of State plan approval, whichever is sooner. State plans must require all existing incineration units as defined in § 60.2992(a)(2) to comply by [DATE 5 YEARS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] or 3 years after the effective date of State plan approval, whichever is sooner. This applies instead of the option for case-by-case less stringent emission standards and longer compliance schedules in § 60.24(f).

* * * * *

■ 63. Section 60.2989 is revised to read as follows:

§ 60.2989 Does this subpart directly affect incineration unit owners and operators in my state?

(a) No, this subpart does not directly affect incineration unit owners and operators in your state. However, unit owners and operators must comply with the State plan you develop to implement the emission guidelines contained in this subpart.

(b) You must submit an approvable plan as required in paragraphs (b)(1) and (2) of this section.

(1) For OSWI units with capacities greater than 10 tons per day, if you do not submit an approvable plan to implement and enforce the guidelines contained in this subpart by December 17, 2007, EPA will implement and enforce a Federal plan, as provided in § 60.2985, to ensure that each unit within your State reaches compliance with all the provisions of this subpart by December 16, 2010.

(2) For small OSWI units, if you do not submit an approvable State plan to implement and enforce the guidelines contained in this subpart by [DATE 2 YEARS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], for OSWI units that commenced construction, reconstruction, or modification on or before August 31, 2020, the EPA will implement and enforce a federal plan, as provided in § 60.2985, to ensure that each unit within your state that commenced construction, reconstruction, or modification on or before August 31, 2020, reaches compliance with all the provisions of this subpart by [DATE 5 YEARS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

■ 64. Section 60.2990 is revised to read as follows:

§ 60.2990 What Authorities are withheld by EPA?

The following authorities are withheld by EPA and not transferred to the State, local or tribal agency:

(1) The authority to approve alternatives to the emission limitations in tables 2 and 2b of this subpart and operating limits established under § 60.3023 and table 3 of this subpart.

(2) The authority to approve petitions for specific operating limits in accordance with the requirements in § 60.3024.

(3) The authority of the Administrator to receive and grant petitions under § 60.8(b)(3) to approve of major alternatives to test methods in § 60.3027.

(4) The authority to approve major alternatives to monitoring in §§ 60.3038 through 60.3044.

(5) The authority to approve major alternatives to recordkeeping and reporting in §§ 60.3046 through 60.3057.

(6) The authority to receive the required notices and to approve continued operation in connection with the status report requirements in § 60.3020(c)(2).

(7) The authority of the Administrator to receive and grant petitions under § 60.11(e)(6) through (8) to adjust opacity standards and establish opacity standards in accordance with § 60.3022 and §§ 60.3066 through 60.3068.

(8) The authority of the Administrator under § 60.8(b)(4) to waive performance test and § 60.8(b)(5) to approve shorter sampling times or smaller sample volumes.

(9) The authority to approve an alternative to any electronic reporting to the EPA required by this subpart.

■ 65. Section 60.2991 is amended by revising paragraph (b) to read as follows:

§ 60.2991 What incineration units must I address in my State plan?

* * * * *

(b) The incineration unit is an OSWI unit as defined in § 60.3078 or an air curtain incinerator (ACI) subject to this subpart as described in § 60.2994(b). OSWI units are very small municipal waste combustion units and institutional waste incineration units as defined in § 60.3078, and include small OSWI units (either very small municipal waste combustion units or institutional waste incinerators).

* * * * *

■ 66. Section 60.2992 is revised to read as follows:

§ 60.2992 What is an existing incineration unit?

(a) An existing incineration unit covered by state plan regulations under this subpart is an OSWI unit as defined in § 60.3078 or air curtain incinerator as specified in § 60.2994, which meets the criteria in paragraph (a)(1) or (3) of this section except as provided in paragraph (b) of this section.

(1) The OSWI unit or air curtain incinerator subject to this subpart

commenced construction on or before December 9, 2004.

(2) The OSWI unit or air curtain incinerator subject to this subpart is a small OSWI unit as defined in § 60.3078 and commenced construction on or before August 31, 2020.

(3) If the OSWI unit or air curtain incinerator subject to this subpart is a small OSWI unit as defined in § 60.3078 that commenced construction after December 9, 2004 and prior to August 31, 2020, the unit remains subject to the applicable requirements of subpart EEEE of this part (New Source Performance Standards for Other Solid Waste Incineration Units) until the unit becomes subject to a state plan or federal plan that implements this subpart.

(b) If the owner or operator of an incineration unit that commenced construction on or before December 9, 2005 makes changes that meet the definition of modification or reconstruction on or after June 16, 2006, the unit becomes subject to subpart EEEE of this part (New Source Performance Standards for Other Solid Waste Incineration Units) and the State plan no longer applies to that unit. If the incineration unit is a small OSWI unit as defined in § 60.3078 that meets the definition of modification or reconstruction on and after June 16, 2006 and prior to [DATE 6 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], the unit remains subject to the applicable requirements of subpart EEEE of this part (New Source Performance Standards for Other Solid Waste Incineration Units) until the unit becomes subject to a state plan or federal plan that implements this subpart.

(c) If the owner or operator of an existing incineration unit makes physical or operational changes to the unit primarily to comply with the State plan, then subpart EEEE of this part does not apply to that unit. Such changes do not qualify as modifications or reconstructions under subpart EEEE of this part.

■ 67. Section 60.2993 is amended by revising paragraphs (b)(1) and (b)(3) to read as follows:

§ 60.2993 Are any combustion units excluded from my State plan?

* * * * *

(b) * * *

(1) Has a federally enforceable permit limiting the combustion of municipal solid waste to 30 percent of the total fuel input by weight.

* * * * *

(3) Provides the Administrator with a copy of the federally enforceable permit.

* * * * *

■ 68. Section 60.2994 is amended by revising paragraphs (a) and (b) introductory text to read as follows:

§ 60.2994 Are air curtain incinerators regulated under this subpart?

(a) Air curtain incinerators that burn less than 35 tons per day of municipal solid waste or air curtain incinerators located at institutional facilities burning any amount of institutional waste generated at that facility are incineration units subject to all requirements of this subpart, including the emission limitations specified in tables 2 and 2b of this subpart.

(b) Air curtain incinerators that burn less than 35 tons per day and burn only the materials listed in paragraphs (b)(1) through (4) of this section collected from the general public and from residential, commercial, institutional, and industrial sources; or, air curtain incinerators located at institutional facilities that burn only the materials listed in paragraphs (b)(1) through (4) of this section generated at that facility, are required to meet only the requirements in §§ 60.3062 through 60.3068 and are exempt from all other requirements of this subpart.

* * * * *

■ 69. Section 60.2998 is amended by revising the introductory text and adding paragraphs (j) and (k) to read as follows:

§ 60.2998 What are the principal components of the model rule?

The model rule contains eleven major components, as follows:

* * * * *

(j) Definitions.

(k) Tables.

■ 70. Section 60.3003 is added to read as follows:

§ 60.3003 What else must I do prior to the compliance date if I meet the substitute means of compliance demonstration?

If you intend to meet the requirements for the substitute means of compliance demonstration requirements in § 60.3032, the requirements in § 60.3032(a) and (b) must be completed prior to the compliance date in table 1 of this subpart.

■ 71. Section 60.3014 is amended by revising paragraphs (b), (c) introductory text, (c)(1)(iv), (c)(1)(viii) and (c)(1)(x) to read as follows:

§ 60.3014 What are the operator training and qualification requirements?

* * * * *

(b) Operator training and qualification must be obtained through a state-approved program or by completing the requirements included in paragraph (c) of this section.

(c) Training must be obtained by completing an incinerator operator training course that includes, at a minimum, the three elements described in paragraphs (c)(1) through (3) of this section:

(1) * * *

(iv) Combustion controls and monitoring, including good combustion practices and waste characterization procedures.

* * * * *

(viii) Actions to prevent and correct malfunctions or to prevent conditions that may lead to malfunction.

* * * * *

(x) Applicable federal, state, and local regulations, including Occupational Safety and Health Administration workplace standards.

* * * * *

■ 72. Section 60.3015 is amended by revising the introductory text and paragraph (b) to read as follows:

§ 60.3015 When must the operator training course be completed?

The operator training course must be completed by the latest of the dates specified in paragraphs (a) through (c) of this section.

* * * * *

(b) Six months after your OSWI unit startup date.

* * * * *

■ 73. Section 60.3017 is amended by revising paragraph (d) to read as follows:

§ 60.3017 How do I maintain my operator qualification?

* * * * *

(d) Prevention and correction of malfunctions or conditions that may lead to malfunction.

* * * * *

■ 74. Section 60.3019 is amended by:

■ a. Revising paragraphs (a) introductory text and (a)(4);

■ b. Adding paragraph (a)(10); and

■ c. Revising paragraph (c)(2).

The revisions and addition read as follows:

§ 60.3019 What site-specific documentation is required?

(a) Documentation must be available at the facility and readily accessible for all OSWI unit operators that addresses the ten topics described in paragraphs (a)(1) through (10) of this section. You must maintain this information and the training records required by paragraph (c) of this section in a manner that they

can be readily accessed and are suitable for inspection upon request.

* * * * *

(4) Procedures for maintaining good combustion practices, including proper combustion air supply levels.

* * * * *

(10) Procedures for establishing initial and continuous compliance, including but not limited to, procedures to determine waste characterization.

* * * * *

(c) * * *

(2) Records showing the names of the OSWI unit operators who have completed the operator training requirements under § 60.3014, met the criteria for qualification under § 60.3016, and maintained or renewed their qualification under §§ 60.3017 or 60.3018. Records must include documentation of training, the dates of the initial and refresher training, and the dates of their qualification and all subsequent renewals of such qualifications.

* * * * *

■ 75. Section 60.3020 is amended by revising the introductory text to read as follows:

§ 60.3020 What if all the qualified operators are temporarily not accessible?

For each batch OSWI unit, a qualified operator must be accessible at all times when the unit is operating. For each continuous OSWI unit or intermittent OSWI unit, if all qualified operators are temporarily not accessible (*i.e.,* not at the facility and not able to be at the facility within 1 hour), you must meet one of the three criteria specified in paragraphs (a) through (c) of this section, depending on the length of time that a qualified operator is not accessible.

* * * * *

■ 76. Section 60.3022 is revised to read as follows:

§ 60.3022 What emission limitations must I meet and by when?

For OSWI units as defined in § 60.2992(a)(1), you must meet the emission limitations specified in table 2 of this subpart. For small OSWI units as defined in § 60.2992(a)(2), you must meet the emission limitations specified in table 2b of this subpart, except as provided in § 60.2992(a)(3). You must meet the emissions limitations on the date the initial performance test is required or completed (whichever is earlier). Section 60.3031 specifies the date by which you are required to conduct your performance test.

■ 77. Section 60.3023 is revised to read as follows:

§ 60.3023 What operating limits must I meet and by when?

You must comply with the requirements in paragraphs (a) through (h) of this section, as applicable. If you own or operate a small OSWI unit using the substitute means of compliance demonstration under § 60.3032, the references in this section to the most recent performance test demonstrating compliance are not applicable and instead, refer to the limits established during the representative performance test identified in the information submitted as specified in § 60.3032(b).

(a) You must establish a maximum charge rate, calculated using the procedures in paragraph (a)(1) or (2) of this section, as appropriate.

(1) For continuous and intermittent units, maximum charge rate is the average charge rate measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(2) For batch units, maximum charge rate is the charge rate measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(b) You must establish a minimum combustion chamber operating temperature, equal to the lowest 1-hour average combustion chamber operating temperature measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(c) If you use a wet scrubber to comply with the emission limitations, you must establish operating limits for the operating parameters as described in paragraphs (c)(1) through (3) of this section.

(1) Minimum pressure drop across the wet scrubber, which is calculated as the lowest 1-hour average pressure drop across the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations; or minimum amperage to the wet scrubber, which is calculated as the average amperage to the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(2) Minimum scrubber liquor flow rate, which is calculated as the lowest 1-hour average liquor flow rate at the inlet to the wet scrubber measured during the most recent performance test demonstrating compliance with all applicable emission limitations.

(3) Minimum scrubber liquor pH, which is calculated as the lowest 1-hr average liquor pH at the outlet to the wet scrubber measured during the most recent performance test demonstrating compliance with the hydrogen chloride and sulfur dioxide emission limitations.

(d) If you use a dry scrubber to comply with the emission limitations, you must measure the injection rate of each sorbent during the performance test. The minimum operating limit for the injection rate of each sorbent is calculated as the lowest 1-hour average injection rate for each sorbent measured during the most recent performance test demonstrating compliance with the hydrogen chloride emission limitations.

(e) If you use an electrostatic precipitator to comply with the emission limitations, you must measure the (secondary) voltage and amperage of the electrostatic precipitator collection plates during the particulate matter performance test. Calculate the average electric power value (secondary voltage × secondary current = secondary electric power) for each test run. The minimum operating limit for the electrostatic precipitator is calculated as the lowest 1-hour average secondary electric power measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations.

(f) If you use a fabric filter to comply with the emission limitations, you must operate each fabric filter system such that the bag leak detection system alarm does not sound more than 5 percent of the operating time during a 6-month period. Calculate the alarm time (*i.e.,* time that the alarm sounds) as specified in paragraphs (f)(1) and (2) of this section.

(1) If inspection of the fabric filter demonstrates that no corrective action is required, the alarm duration is not counted in the alarm time calculation.

(2) If corrective action is required and you take less than an hour to initiate corrective action, the alarm time is counted as 1 hour. If you take longer than 1 hour to initiate corrective action, the alarm time is counted as the actual amount of time taken to initiate corrective action.

(g) If you own or operate a small OSWI unit and you demonstrate continuous compliance according to § 60.3033(d), you must establish the amount of waste burned in each waste category as a percentage of total waste burned on a mass basis. These percentages are your waste profile and must be based on the categories of waste fed to the incinerator (*e.g.,* food waste, paper waste, wood waste) during the most recent performance test.

(h) You must meet the operating limits specified in paragraphs (a) through (g) of this section no later than

the date specified in paragraph (h)(1) or (2) of this section, as applicable.

(1) For each OSWI unit with a capacity greater than 10 tons per day or for each small OSWI unit for which you conduct an initial performance test under § 60.3030(a), beginning on the date 180 days after your final compliance date in table 1 of this subpart.

(2) For each small OSWI unit for which you use the substitute means of compliance demonstration under § 60.3032, by the date you submit to the Administrator the information required in § 60.3032(b).

■ 78. Section 60.3024 is amended by revising the section heading and the introductory text to read as follows:

§ 60.3024 What if I do not use a wet scrubber, dry scrubber, or fabric filter to comply with the emission limitations?

If you use an air pollution control device other than a wet scrubber, dry scrubber, electrostatic precipitator, or fabric filter to comply with the emission limitations under § 60.3022, you must petition EPA for specific operating limits, the values of which are to be established during the performance test and then continuously monitored thereafter. Additionally, unless you demonstrate continuous compliance using the requirements in § 60.3032(d), if you limit emissions in some other manner, including material balances, to comply with the emission limitations under § 60.3022, then you must submit a petition. You must submit the petition at least 60 days before the performance test is scheduled to begin and not conduct the initial performance test until after the petition has been approved by EPA. Your petition must include the five items listed in paragraphs (a) through (e) of this section.

* * * * *

§ 60.3025 [Removed]

■ 79. Remove § 60.3025.

■ 80. Section 60.3027 is amended by revising paragraphs (b) through (e), (g) introductory text, (g)(1)(i), and (g)(3)(i) and (ii) to read as follows:

§ 60.3027 How do I conduct the initial and annual performance test?

* * * * *

(b) All performance tests must be conducted using the methods in tables 2 and 2b of this subpart.

(c) All performance tests must be conducted using the minimum run duration specified in tables 2 and 2b of this subpart.

(d) EPA Method 1 of appendix A of this part must be used to select the sampling location and number of traverse points.

(e) EPA Method 3A or 3B of appendix A of this part or ANSI/ASME PTC 19.10–1981 (incorporated by reference, see § 60.17), in lieu of EPA Method 3B, must be used for gas composition analysis, including measurement of oxygen concentration. EPA Method 3A or 3B of appendix A of this part or ANSI/ASME PTC 19.10–1981 must be used simultaneously with each method.

* * * * *

(g) EPA Method 26A of appendix A of this part must be used for hydrogen chloride concentration analysis, with the additional requirements specified in paragraphs (g)(1) through (3) of this section.

(1) * * *

(i) Assemble the sampling train(s) and conduct a conditioning run by collecting between 14 liters per minute (0.5 cubic feet per minute) and 30 liters per minute (1.0 cubic feet per minute) of gas over a 1-hour period. Follow the sampling procedures outlined in section 8.1.5 of EPA Method 26A of appendix A of this part. For the conditioning run, water can be used as the impinger solution.

* * * * *

(3) * * *

(i) The cyclone described in section 6.1.4 of EPA Method 26A of appendix A of this part must be used.

(ii) The post-test moisture removal procedure described in section 8.1.6 of EPA Method 26A of appendix A of this part must be used.

■ 81. Section 60.3028 is revised to read as follows:

§ 60.3028 How are the performance test data used?

You use results of performance tests to demonstrate compliance with the emission limitations in tables 2 and 2b of this subpart.

■ 82. Section 60.3030 is revised to read as follows:

§ 60.3030 How do I demonstrate initial compliance with the emission limitations and establish the operating limits?

(a) Except as provided in paragraph (b) of this section, you must conduct an initial performance test, as required under § 60.8, to determine compliance with the emission limitations in table 2 or 2b of this subpart and to establish operating limits using the procedures in § 60.3023 or § 60.3024. The initial performance test must be conducted using the test methods listed in table 2 or 2b of this subpart and the procedures in § 60.3027. In the event of any conflict between § 60.8 and the provisions of this subpart, the provisions of this subpart shall apply.

(b) For small OSWI units as defined in § 60.3078, you must demonstrate initial compliance according to paragraph (a) of this section, unless you comply with the requirements for the substitute means of compliance demonstration requirements in § 60.3032.

(c) As an alternative to conducting a performance test under paragraph (a) of this section for carbon monoxide, you may use a 12-hour rolling average of the 1-hour arithmetic average CEMS data to determine compliance with the emission limitations in tables 2 and 2b of this subpart. The initial performance evaluation required by § 60.3039(b) must be conducted prior to collecting CEMS data that will be used for the initial compliance demonstration.

■ 83. Section 60.3031 is revised to read as follows:

§ 60.3031 By what date must I conduct the initial performance test?

The initial performance test must be conducted no later than 180 days after your final compliance date. Your final compliance date is specified in table 1 of this subpart.

■ 84. Section 60.3032 is added to read as follows:

§ 60.3032 What are the substitute means of compliance demonstration requirements for small OSWI units?

Instead of conducting the initial performance test in § 60.3030(a), small OSWI units, as defined in § 60.3078, may demonstrate initial compliance according to the requirements in paragraphs (a) through (d) of this section.

(a) For each OSWI unit for which you are using the substitute means of compliance demonstration, beginning on the effective date of your State plan approval, or [DATE 5 YEARS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], whichever date is earlier, you must collect the data in paragraphs (1) through (7) of this section until you meet the requirements in paragraph (b) of this section.

(1) Identity and weight of each waste type (*e.g.,* lbs of paper waste, food waste, wood or yard waste) on a weekly total basis for the date range the information is collected.

(2) Identity and quantities (*e.g.,* flow rate or percentage of operating time) of supplemental fuels burned on a weekly total basis for the date range the information is collected.

(3) Percentage of total waste burned for each waste type on a weekly average

basis for the date range the information is collected.

(4) Temperature indicative of the combustion chamber and description of where temperature is measured. Record this information on a 3-hour rolling average basis for the date range the information is collected.

(5) Hours operated per day for the date range the information is collected.

(6) Charge rate each day in tons per day for the date range the information is collected.

(7) Operating parameter data for any air pollution control devices. For wet scrubbers, include pressure drop across the scrubber or amperage to the scrubber, scrubber liquor inlet flow rate, and scrubber liquor pH at the outlet of the scrubber. For dry scrubbers, include injection rate of each sorbent used. For electrostatic precipitators, include the secondary voltage, secondary amperage, and secondary power. Record this information on a 3-hour rolling average basis for the date range the information is collected.

(b) On or before 3 years after the effective date of State plan approval, or [DATE 5 YEARS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], whichever is earlier, you must identify the results of a performance test in the EPA's WebFIRE database that is representative for your OSWI unit using the criteria in paragraphs (b)(2)(i) through (viii) of this section and submit the information in paragraphs (b)(1) and (2) of this section. You must submit the information following the procedure in paragraph (b)(3) of this section. The performance test may be any test that meets the requirements in paragraph (c) of this section, regardless of location, that is representative of your OSWI unit.

(1) Identify the representative performance test used to demonstrate initial compliance with each OSWI unit by submitting the information in paragraphs (b)(1)(i) through (vi) of this section as provided in the EPA's WebFIRE database for the performance test.

(i) Organization.

(ii) Facility.

(iii) City.

(iv) State.

(v) County.

(vi) Submission date.

(2) A description of how the test is representative for your OSWI unit, based on the following criteria, using the data collected as specified in paragraph (a) of this section:

(i) Unit design, including type of unit and any associated air pollution control devices.

(ii) Charge rate.

(iii) Type of operation (batch, continuous, intermittent).

(iv) Combustion temperature and location of temperature measurement.

(v) Types of waste burned.

(vi) The waste profile, as defined in § 60.3078.

(vii) Type and amount of supplemental fuels.

(viii) Similarity of air pollution control devices and operation of the air pollution control devices, if the performance test was conducted on a unit with an air pollution control device.

(3) You must submit the information required in paragraphs (b)(1) and (2) of this section via CEDRI, which can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as confidential business information (CBI). Anything submitted using CEDRI cannot later be claimed CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim, submit the information, including information claimed to be CBI, to the EPA on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Other Solid Waste Incineration Units Sector Lead, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted via the EPA's CDX as described earlier in this paragraph (b)(3). Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(c) Any performance test used as a representative test in a substitute means of compliance demonstration under paragraph (b) of this section must be conducted according to the initial testing requirements of § 60.3027 and demonstrate initial compliance with the emissions limits in table 2b of this subpart. In addition to the results of the performance test and the information required by § 60.8(f)(2), the performance test report must contain the information in paragraphs (c)(1) through (8) of this section.

(1) Unit design, including type of unit and any associated air pollution control devices.

(2) Charge rate during the test.

(3) Type of operation (batch, continuous, intermittent).

(4) Combustion temperature and location of temperature measurement. The temperature must be recorded continuously for each run of the performance test. The performance test report must also identify the lowest 1-hour average combustion chamber operating temperature.

(5) Types of waste burned during the test.

(6) The waste profile, as defined in § 60.3078, established during the test.

(7) Type and amount of supplemental fuels burned during the test and the timeframe that each supplemental fuel was burned during the test.

(8) If the performance test was conducted on a unit with an air pollution control device, the operating parameter data for the control device must be recorded continuously for each run of the performance test. The performance test report must also identify the lowest or highest, as applicable, 1-hour average for the operating parameter.

(i) For wet scrubbers, the performance test report must include data for pressure drop across the scrubber or amperage to the scrubber, scrubber liquor inlet flow rate, and scrubber liquor pH at the outlet of the scrubber.

(ii) For dry scrubbers, the performance test report must include data for the injection rate of each sorbent used.

(iii) For electrostatic precipitators, the performance test report must include data for the secondary voltage, secondary amperage, and secondary power.

(d) If there are no results from a performance test that meet the requirements of paragraph (c) of this section that are representative of your OSWI unit, you must demonstrate initial compliance according to the requirements of § 60.3030(a).

■ 85. Section 60.3033 is revised to read as follows:

§ 60.3033 How do I demonstrate continuous compliance with the emission limitations and the operating limits?

You must demonstrate continuous compliance according to the requirements in paragraphs (a) through (c) of this section, unless you own or operate a small OSWI unit, as defined in § 60.3078. If you own or operate a small OSWI unit, you must either comply with the requirements in paragraphs (a) and (c) of this section or the requirements in paragraph (d) of this section.

(a) You must conduct an annual performance test for all of the pollutants

in table 2 or 2b of this subpart for each OSWI unit to determine compliance with the emission limitations, except if you own or operate an OSWI unit with a capacity greater than 10 tons per day, you are not required to conduct an annual performance test for carbon monoxide. The annual performance test must be conducted using the test methods listed in table 2 or 2b of this subpart and the procedures in § 60.3027.

(b) You must continuously monitor carbon monoxide emissions to determine compliance with the carbon monoxide emissions limitation. Twelve-hour rolling average values, including CEMS data during startup and shutdown as defined in this subpart, are used to determine compliance. A 12-hour rolling average value above the carbon monoxide emission limit in table 2 or 2b of this subpart constitutes a deviation from the emission limitation.

(c) You must continuously monitor the operating parameters specified in § 60.3023(a) through (f) or established under § 60.3024. Three-hour rolling average values are used to determine compliance with the operating limits, with the exception of bag leak detection system alarm time, unless a different averaging period is established under § 60.3024. A 3-hour rolling average value (unless a different averaging period is established under § 60.3024) above the established maximum or below the established minimum operating limits constitutes a deviation from the established operating limits. For bag leak detection systems, an alarm time of more than 5 percent of the operating time during a 6-month period constitutes a deviation from the operating limit. Operating limits do not apply during performance tests.

(d) For each small OSWI unit, you must comply with the requirements in paragraphs (d)(1) through (3) of this section.

(1) You must record the mass rate of each category of waste burned and on a weekly average basis and you must maintain the percentage of waste burned for each waste category within ±15 percent of the percentage established for that waste category according to the waste profile established under § 60.3023(g) and maintain records as required in § 60.3046(o). Failure to maintain the percentage of waste burned for each waste category within ±15 percent of the percentage established for that waste category constitutes a deviation.

(2) If your waste profile will not meet the requirement in paragraph (d)(1) of this section, before combusting the modified waste stream, you must either conduct a performance test of the unit using the test methods listed in table 2b of this subpart and the procedures in § 60.3027 with a waste stream representative of the new waste profile, or identify a representative performance test for the new waste profile. If you use a representative performance test, the performance test must meet the requirements in § 60.3032(c), and you must submit the information in § 60.3032(b)(1) and (2) to the Administrator. Failure to conduct a performance test or identify a representative test constitutes a deviation.

(3) You must continuously monitor the operating parameters specified in § 60.3023(b) through (f), as applicable. The total daily charge rate is used to determine compliance with the charge rate limit in § 60.3023(a). For the operating parameters in § 60.3023(b) through (f), determine compliance as described in paragraphs (d)(3)(i) or (ii) of this section. Failure to meet the operating parameters specified in § 60.3023(a) through (f) is a deviation.

(i) Three-hour rolling average values are used to determine compliance with the operating parameter limits, unless your small OSWI unit operates on a batch basis and it is operated for less than three hours.

(ii) If your small OSWI unit operates on a batch basis, and you operate for less than three hours, compliance with the operating parameter limits are determined by averaging the operating parameter over the length of the batch operation.

■ 86. Section 60.3034 is revised to read as follows:

§ 60.3034 By what date must I conduct the annual performance test?

For each OSWI unit that is subject to the annual performance test requirement in § 60.3033(a), you must conduct annual performance tests within 12 months following the initial performance test. Conduct subsequent annual performance tests within 12 months following the previous one.

■ 87. Section 60.3035 is amended by adding paragraph (d) to read as follows:

§ 60.3035 May I conduct performance testing less often?

* * * * *

(d) For small OSWI units demonstrating initial compliance according to the substitute means of compliance demonstration requirements in § 60.3032, the requirements in paragraphs (a) through (c) of this section do not apply.

■ 88. Section 60.3036 is revised to read as follows:

§ 60.3036 May I conduct a repeat performance test to establish new operating limits?

(a) Yes, you may conduct a repeat performance test at any time to establish new values for the operating limits. The Administrator may request a repeat performance test at any time.

(b) For each small OSWI unit, as defined in § 60.3078, for which you opt to demonstrate continuous compliance according to the requirements in § 60.3033(d), if you want to establish new operating parameter limits or establish a different waste profile, you must comply with either paragraph (b)(1) or (2) of this section.

(1) You must conduct a new performance test of the unit using the test methods listed in table 2b of this subpart and the procedures in § 60.3027 with a waste stream representative of the new waste profile or under the new operating limits.

(2) You must identify a representative performance test that meets the requirements in § 60.3032(c). You must submit the information in § 60.3032(b)(1) and (2) to the Administrator.

■ 89. Section 60.3038 is amended by revising paragraph (a) to read as follows:

§ 60.3038 What continuous emission monitoring systems must I install?

(a) For each OSWI unit with a capacity greater than 10 tons per day, you must install, calibrate, maintain, and operate continuous emission monitoring systems for carbon monoxide and for oxygen. You must monitor the oxygen concentration at each location where you monitor carbon monoxide.

* * * * *

■ 90. Section 60.3039 is amended by revising paragraphs (b) and (c) to read as follows:

§ 60.3039 How do I make sure my continuous emission monitoring systems are operating correctly?

* * * * *

(b) Complete your initial performance evaluation of the continuous emission monitoring systems within 180 days after your final compliance date in table 1 of this subpart.

(c) For initial and annual performance evaluations, collect data concurrently (or within 30 to 60 minutes) using your carbon monoxide and oxygen continuous emission monitoring systems. To validate carbon monoxide concentration levels, use EPA Method 10, 10A, or 10B of appendix A of this part. Use EPA Method 3A or 3B of appendix A to this part or ANSI/ASME PTC 19.10–198 (incorporated by

reference, see § 60.17), in lieu of Method 3B, to measure oxygen. Collect the data during each initial and annual evaluation of your continuous emission monitoring systems following the applicable performance specifications in appendix B of this part. Table 4 of this subpart shows the required span values and performance specifications that apply to each continuous emission monitoring system.

* * * * *

■ 91. Section 60.3041 is amended by revising the section heading and paragraphs (a) and (f) to read as follows:

§ 60.3041 What is the minimum amount of monitoring data I must collect with my continuous emission monitoring systems?

(a) Where continuous emission monitoring systems are required, obtain 1-hour arithmetic averages. Except for CEMS data during startup and shutdown as defined in this subpart, the 1-hr arithmetic averages for carbon monoxide must be expressed in parts per million by dry volume corrected to 7 percent oxygen. The CEMS data during startup and shutdown are not corrected to 7 percent oxygen and are measured at stack oxygen content. Use the 1-hour averages of oxygen data from your CEMS to determine the actual oxygen level and to calculate emissions at 7 percent oxygen. Use Equation 2 in § 60.3076 to calculate the 12-hour rolling averages from the 1-hour arithmetic averages.

* * * * *

(f) If continuous emission monitoring systems are temporarily unavailable to meet the data collection requirements, refer to table 4 of this subpart. It shows alternate methods for collecting data when systems malfunction or when repairs, calibration checks, or zero and span checks keep you from collecting the minimum amount of data. Failure to collect required data is a deviation of the monitoring requirements.

■ 92. Section 60.3043 is amended by revising the section heading and paragraphs (a) and (c), and adding paragraph (d) to read as follows:

§ 60.3043 What operating parameter monitoring equipment must I install, or what operating parameters must I monitor?

(a) You must install, calibrate (to manufacturers' specifications at the frequency recommended by the manufacturer), maintain, and operate devices (or establish methods) for monitoring the value of the operating parameters used to determine compliance with the operating limits listed in table 3 of this subpart, as applicable. These devices (or methods) must measure and record the values for these operating parameters at the frequencies indicated in table 3 of this subpart at all times. The devices must be positioned to provide a representative measurement of the parameter monitored.

* * * * *

(c) If you are using a fabric filter to comply with the requirements of this subpart, you must install, calibrate, maintain, and continuously operate a bag leak detection system as specified in paragraphs (c)(1) through (8) of this section:

(1) You must install and operate a bag leak detection system for each exhaust stack of the fabric filter. The bag leak sensor(s) must be installed in a position(s) that will be representative of the relative or absolute particulate matter loadings for each exhaust stack, roof vent, or compartment of the fabric filter;

(2) Each bag leak detection system must be installed, operated, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations; and in accordance with the guidance provided in EPA–454/R–98–015 (incorporated by reference, see § 60.17(j));

(3) The bag leak detection system must be certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 1 milligrams per actual cubic meter or less;

(4) The bag leak detection system sensor must provide output of relative or absolute particulate matter loadings;

(5) The bag leak detection system must be equipped with a device to continuously record the output signal from the sensor;

(6) The bag leak detection system must be equipped with an alarm system that will alert automatically an operator when an increase in relative particulate matter emissions over a preset level is detected. The alarm must be located where it is observed easily by plant operating personnel;

(7) For positive pressure fabric filter systems, a bag leak detection system must be installed in each baghouse compartment or cell. For negative pressure or induced air fabric filters, the bag leak detector must be installed downstream of the fabric filter; and

(8) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(d) If you are required to petition the EPA for operating limits under § 60.3024, you must install, calibrate (to the manufacturers' specifications), maintain, and operate the equipment necessary to monitor compliance with the site-specific operating limits established using the procedures in § 60.3024.

■ 93. Section 60.3046 is amended by revising the introductory text and paragraphs (b) through (e) and (g), and adding paragraphs (o) through (q) to read as follows:

§ 60.3046 What records must I keep?

You must maintain the information specified in paragraphs (a) through (q) of this section, as applicable, for a period of at least 5 years.

* * * * *

(b) Records of the data described in paragraphs (b)(1) through (10) of this section.

(1) The OSWI unit charge dates, times, weights, and total daily charge rates.

(2) The combustion chamber operating temperature every 15 minutes of operation.

(3) For each OSWI unit with a wet scrubber, the liquor flow rate to the wet scrubber inlet; pressure drop across the wet scrubber system or amperage to the wet scrubber; and liquor pH at the outlet of the wet scrubber, every 15 minutes of operation.

(4) For each OSWI unit with a dry scrubber, the injection rate of each sorbent, every 15 minutes of operation.

(5) For each OSWI unit with an electrostatic precipitator, the secondary voltage, secondary current, and secondary electric power, every 15 minutes of operation.

(6) For each OSWI unit with a fabric filter, the date, time, and duration of each alarm; the times corrective action was initiated and completed; and a brief description of the cause of the alarm and the corrective action taken. You must also record the percent of the operating time during each 6-month period that the alarm sounds, calculated as specified in § 60.3023(f).

(7) For OSWI units that establish operating limits for controls under § 60.3024, you must maintain data collected for all operating parameters used to determine compliance with the operating limits.

(8) For OSWI units that use a carbon monoxide CEMS, all 1-hour average concentrations of carbon monoxide and oxygen.

(9) All 12-hour rolling average values of carbon monoxide emissions, corrected to 7 percent oxygen (except during periods of startup and shutdown), and all 3-hour rolling average values of continuously monitored operating parameters, and total daily charge rates, as applicable.

(10) Records of the dates, times, and durations of any bypass of the control device.

(c) Records of the start date and time and duration in hours of each malfunction of operation (*i.e.,* process equipment) or the air pollution control and monitoring equipment and description of the malfunction.

(d) Records of actions taken during periods of malfunction to minimize emissions in accordance with § 60.11(d), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

(e) Start date, start time, end date and end time for each period for which monitoring data show a deviation from the carbon monoxide emissions limit in table 2 or 2b of this subpart or a deviation from the operating limits in table 3 of this subpart or a deviation from other operating limits established under § 60.3024 with a description of the deviations, reasons for such deviations, and a description of corrective actions taken. You must record the start date, start time, end date and end time for each period when all qualified operators were not accessible in accordance with § 60.3020.

* * * * *

(g) For carbon monoxide continuous emissions monitoring systems, document the results of your annual performance evaluations, daily drift tests and quarterly accuracy determinations according to Procedure 1 of appendix F of this part.

* * * * *

(o) If you comply with the substitute means of compliance demonstration requirements in § 60.3032 for your small OSWI unit, you must keep the records specified in paragraphs (o)(1) through (3) of this section.

(1) Records of data collected as required in § 60.3032(a)(2).

(2) Copy of the representative performance test used to demonstrate initial compliance; and

(3) Documentation of how the test in paragraph (o)(2) of this section is representative of the unit as required in § 60.3032(b)(2).

(p) If you comply with the continuous compliance requirements in § 60.3033(d), you must keep records of the following elements reported on a weekly basis at the frequency they are monitored in accordance with table 3 of this subpart (*e.g.,* each 3-hr average recorded temperature), as specified in paragraphs (p)(1) through (7) of this section.

(1) Start and end times the unit is operated when waste is being combusted.

(2) Identity and weight of each waste category (*e.g.,* lbs of solid waste, food waste, wood or yard waste).

(3) Identities and quantities of supplemental fuel burned (*e.g.* flow rate or percentage of operating time).

(4) The waste profile, as defined in § 60.3078.

(5) Temperature of unit combustion chamber and description of where temperature is measured, as a three-hour average for each batch operation.

(6) Charge rate (in tons per day) of each operation,

(7) For each OSWI unit using a wet scrubber, dry scrubber, electrostatic precipitator, or fabric filter, the records specified in paragraph (b)(3) through (10) of this section, as applicable.

(q) Copies of any notifications submitted pursuant to §§ 60.2993 and 60.3061.

■ 94. Section 60.3049 is amended by revising the introductory text to read as follows:

§ 60.3049 What information must I submit following my initial performance test?

Unless you choose to comply with the substitute means of compliance demonstration requirements in § 60.3032, you must submit the information specified in paragraphs (a) through (c) of this section no later than 60 days following the initial performance test. All reports must be signed by the facilities manager.

* * * * *

■ 95. Section 60.3050 is revised to read as follows:

§ 60.3050 When must I submit my annual report?

You must submit an annual report no later than 12 months following the submission of the information in § 60.3049, unless you choose to comply with the substitute means of compliance demonstration requirements in § 60.3032. If you choose to comply with the substitute means of compliance demonstration requirements in § 60.3032, you must submit an annual report no later than 12 months following the submission of the information in § 60.3032(b). You must submit subsequent reports no more than 12 months following the previous report. The permit will address the submittal of annual reports for a unit with an operating permit required under title V of the Clean Air Act.

■ 96. Section 60.3051 is amended by:

■ a. Revising the introductory text and paragraphs (b) through (f);

■ b. Removing and reserving paragraph (g);

■ c. Revising paragraph (h) and (j); and

■ d. Adding paragaph (k).

The revisions and addition read as follows:

§ 60.3051 What information must I include in my annual report?

The annual report required under § 60.3050 must include the items listed in paragraphs (a) through (k) of this section. If you have a deviation from the operating limits or the emission limitations, you must also submit deviation reports as specified in §§ 60.3052 through 60.3054.

* * * * *

(b) Statement by the owner or operator, with their name, title, and signature, certifying the truth, accuracy, and completeness of the report. Such certifications must also comply with the requirements of 40 CFR 70.5(d) or 40 CFR 71.5(d). If your report is submitted via CEDRI, the certifier's electronic signature during the submission process replaces this requirement.

(c) Date of report and beginning and ending dates of the reporting period. You are no longer required to provide the date of report when the report is submitted via CEDRI.

(d) Identification of each OSWI unit, and for each OSWI unit, the parameters monitored and values for the operating limits established pursuant to § 60.3023 or § 60.3024.

(e) If no deviations from any emission limitation or operating limit that applies to you has occurred during the annual reporting period, a statement that there were no deviations from the emission limitations or operating limits during the reporting period. If you use a CMS to monitor emissions or operating parameters and there were no periods during which any CMS was inoperative, inactive, malfunctioning or out of control, a statement that no monitoring system used to determine compliance with the emission limitations or operating limits was inoperative, inactive, malfunctioning or out of control.

(f) The highest recorded 12-hour average and the lowest recorded 12-hour average, as applicable, for carbon monoxide emissions if you are using a CEMS to demonstrate continuous compliance and the highest recorded 3-hour average and the lowest recorded 3-hour average, as applicable, for each operating parameter recorded for the calendar year being reported.

(g) [Reserved]

(h) If a performance test was conducted during the reporting period, identification of the OSWI unit tested, the pollutant(s) tested, and the date of the performance test. Submit, following

the procedure specified in § 60.3056(b), the performance test report no later than the date that you submit the annual report.

* * * * *

(j) The start date, start time, and duration in hours for each period when all qualified OSWI unit operators were unavailable for more than 12 hours, but less than 2 weeks.

(k) If you are complying with the continuous compliance requirements for small OSWI units in § 60.3033(d) and have had no deviations from the weekly waste profile requirements or deviations from the operating limits, a statement that there were no deviations from the weekly waste profile requirements, and the OSWI unit has been operated within the operating parameter limits established during the representative performance test identified in the information submitted as required in § 60.3032(b) or the initial performance test conducted by the source, as required in § 60.3032(d).

■ 97. Section 60.3052 is amended by revising the section heading and paragraph (a) to read as follows:

§ 60.3052 What other reports must I submit if I have a deviation?

(a) You must submit a deviation report as specified in paragraphs (a)(1) through (3) of this section:

(1) If your OSWI unit fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limitation, operating limit, or operator qualification and accessibility requirements.

(2) If your OSWI unit fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any unit that meets the requirements in § 60.2991 and is required to obtain such a permit.

(3) If you deviate from the requirements to have a qualified operator accessible as specified in § 60.3020, you must meet the requirements of § 60.3054.

* * * * *

■ 98. Section 60.3053 is revised to read as follows:

§ 60.3053 What must I include in the deviation report?

In each report required under § 60.3052, you must include the company name and address and the beginning and ending dates for the reporting period. For any pollutant or operating parameter that deviated from the emission limitations, operating limits or other requirement specified in this subpart, or for each CMS that experienced downtime or was out of control, include the items described in paragraphs (a) through (g) of this section, as applicable. If you are complying with the continuous compliance requirements for small OSWI units in § 60.3033(d), you must also include the items described in paragraphs (h) and (i) of this section. You must identify the OSWI unit associated with the information required in paragraphs (a) through (i) of this section in your deviation report.

(a) Identification of the emission limit, operating parameter or other requirement from which there was a deviation and the start date, start time, and duration in hours of each deviation.

(b) The averaged and recorded data for those dates, including, when applicable, the information recorded under § 60.3046(b)(9) and (c) through (e) for the calendar period being reported.

(c) The cause of each deviation from the emission limitations, operating limits or other requirement and your corrective actions.

(d) For each CMS, the start date, start time, duration in hours, and cause for each instance of monitor downtime (other than downtime associated with zero, span, and other routine calibration checks).

(e) For each CMS, the start date, start time, duration in hours, and corrective action taken for each instance that the monitor is out of control.

(f) The dates, times, and durations in hours of any bypass of the control device and your corrective actions.

(g) For batch OSWI units, the dates, times, and duration in hours of any deviation from the requirements to have a qualified operator accessible as required in § 60.3014.

(h) If you are complying with the continuous compliance requirements for small OSWI units in § 60.3033(d), the dates, times, duration in weeks, and cause for each deviation from the waste profile required in § 60.3033(d)(1).

(i) The dates, times, duration in hours, and cause for each deviation from the operating parameter limits established during the representative performance test identified in the information submitted as required in § 60.3032(b) or the initial performance test conducted by the source as required in § 60.3030(d).

■ 99. Section 60.3056 is revised to read as follows:

§ 60.3056 In what form can I submit my reports?

(a) Before [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], you must submit annual and deviation reports electronically or in paper format, postmarked on or before the submittal due dates. Beginning on [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], or once the reporting template for this subpart has been available on the Compliance and Emissions Data Reporting Interface (CEDRI) website for one year, whichever date is later, you must submit all subsequent annual compliance reports and deviation reports to the EPA via CEDRI, which can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as confidential business information (CBI). Anything submitted using CEDRI cannot later be claimed CBI. You must use the appropriate electronic report template on the CEDRI website (*https://www.epa.gov/electronic-reporting-airemissions/cedri*) for this subpart. The date report templates become available will be listed on the CEDRI website. The report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim, submit a complete report, including information claimed to be CBI, to the EPA. The report must be generated using the appropriate form on the CEDRI website or an alternate electronic file consistent with the extensible markup language (XML) schema listed on the CEDRI website. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Other Solid Waste Incineration Units Sector Lead, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(b) Beginning on [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], within 60 days after the date of completing each performance test required by this subpart, you must submit the results of the performance

test following the procedures specified in paragraphs (b)(1) through (3) of this section.

(1) *Data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (https://www.epa.gov/electronic-reporting-airemissions/electronic-reporting-tool-ert) at the time of the test.* Submit the results of the performance test to the EPA via CEDRI, which can be accessed through the EPA's CDX (*https://cdx.epa.gov/*). The data must be submitted in a file format generated through the use of the EPA's ERT. Alternatively, you may submit an electronic file consistent with the XML schema listed on the EPA's ERT website.

(2) *Data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test.* The results of the performance test must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the ERT generated package or alternative file to the EPA via CEDRI.

(3) *CBI.* Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim for some of the information required under paragraph (b)(1) or (2) of this section CBI, you must submit a complete file, including information claimed to be CBI, to the EPA. The file must be generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on EPA's ERT website. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via EPA's CDX as described in paragraphs (b)(1) and (2) of this section. All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(c) Beginning on [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], within 60 days after the date of completing each continuous emissions monitoring system (CEMS) performance evaluation, you must submit the results of the performance evaluation following the procedures specified in paragraphs (c)(1) through (3) of this section.

(1) *Performance evaluations of CEMS measuring relative accuracy test audit (RATA) pollutants that are supported by the EPA's ERT as listed on the EPA's ERT website at the time of the evaluation.* Submit the results of the performance evaluation to the EPA via CEDRI, which can be accessed through the EPA's CDX. The data must be submitted in a file format generated through the use of the EPA's ERT. Alternatively, you may submit an electronic file consistent with the XML schema listed on the EPA's ERT website.

(2) *Performance evaluations of CEMS measuring RATA pollutants that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the evaluation.* The results of the performance evaluation must be included as an attachment in the ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the ERT generated package or alternative file to the EPA via CEDRI.

(3*) CBI.* Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim for some of the information required under paragraph (c)(1) or (2) of this section, you must submit a complete file, including information claimed to be CBI, to the EPA. The file must be generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described in paragraphs (c)(1) and (2) of this section. All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(d) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with the reporting requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (d)(1) through (7) of this section.

(1) You must have been or will be precluded from accessing CEDRI and submitting a required report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(2) The outage must have occurred within the period of time beginning five business days prior to the date that the submission is due.

(3) The outage may be planned or unplanned.

(4) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(5) You must provide to the Administrator a written description identifying:

(i) The date(s) and time(s) when CDX or CEDRI was accessed and the system was unavailable;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to EPA system outage;

(iii) A description of the measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(6) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(7) In any circumstance, the report must be submitted electronically as soon as possible after the outage is resolved.

(e) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of *force majeure* for failure to timely comply with the reporting requirement. To assert a claim of *force majeure,* you must meet the requirements outlined in paragraphs (e)(1) through (5) of this section.

(1) You may submit a claim if a *force majeure* event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning five business days prior to the date the submission is due. For the purposes of this section, a *force majeure* event is defined as an event that will be or has been caused by

circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a report electronically within the time period prescribed. Examples of such events are acts of nature (*e.g.,* hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (*e.g.,* large scale power outage).

(2) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in reporting.

(3) You must provide to the Administrator:

(i) A written description of the *force majeure* event;

(ii) A rationale for attributing the delay in reporting beyond the regulatory deadline to the *force majeure* event;

(iii) A description of the measures taken or to be taken to minimize the delay in reporting; and

(iv) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(4) The decision to accept the claim of *force majeure* and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(5) In any circumstance, the reporting must occur as soon as possible after the *force majeure* event occurs.

■ 100. Section 60.3059 is revised to read as follows:

§ 60.3059 Am I required to apply for and obtain a title V operating permit for my unit?

(a) Yes, if your OSWI unit is an existing incineration unit subject to an applicable EPA-approved and effective Clean Air Act section 111(d)/129 State or Tribal plan or an applicable and effective Federal plan, you are required to obtain a title V operating permit for your OSWI unit. 40 CFR 70.5(a)(1) and 40 CFR 71.5(a)(1) addresses the title V application deadlines.

(b) Air curtain incinerators as specified in § 60.2994(b) and subject only to the requirements in §§ 60.3062 through 60.3068 are exempted from title V permitting requirements per these regulations.

§ 60.3060 [Removed]

■ 101. Remov § 60.3060.

§ 60.3062 [Amended]

■ 102. Section 60.3062 is amended by removing and reserving paragraph (b).

■ 103. Section 60.3067 is amended by revising paragraph (a) to read as follows:

§ 60.3067 How must I monitor opacity for air curtain incinerators that burn only wood waste, clean lumber, and yard waste?

(a) Use EPA Method 9 of appendix A of this part or ASTM D7520–16 (incorporated by reference (IBR), see § 60.17), to determine compliance with the opacity limitation.

* * * * *

■ 104. Section 60.3068 is amended by revising paragraph (d) to read as follows:

§ 60.3068 What are the recordkeeping and reporting requirements for air curtain incinerators that burn only wood waste, clean lumber, and yard waste?

* * * * *

(d) Before [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], submit initial and annual opacity test reports as electronic or paper copy on or before the applicable submittal date. On and after [DATE 180 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], within 60 days after the date of completing the initial opacity test and each annual opacity test required by this subpart, you must submit the results of the opacity test following the procedures specified in § 60.3056(b)(1) through (3).

* * * * *

§ 60.3069 [Removed]

■ 105. Remove § 60.3069.

■ 106. Section 60.3076 is amended by revising parameters ''E_a'' and ''E_{hj}'' of Equation 2 in paragraph (d) to read as follows:

§ 60.3076 What equations must I use?

* * * * *

(d) * * *

E_a = Average carbon monoxide pollutant rate for the 12-hour period, ppm corrected to 7 percent O_2. Note that a 12-hour period may include CEMS data during startup and shutdown, as defined in the subpart, in which case the period will not consist entirely of data that have been corrected to 7 percent O_2.

E_{hj} = Hourly arithmetic average pollutant rate for hour ''j,'' ppm corrected to 7 percent O_2. CEMS data during startup and shutdown, as defined in the subpart, are not corrected to 7 percent oxygen, and are measured at stack oxygen content.

■ 107. Section 60.3078 is amended by:

■ a. Revising the definition for ''Administrator'';

■ b. Adding in alphabetical order a definition for ''CEMS data during startup and shutdown'';

■ c. Removing the definition for ''Collected from'';

■ d. Revising the definitions for ''Deviation,'' ''Low-level radioactive waste,'' ''Municipal waste combustion unit,'' and ''Particulate Matter''; and

■ e. Adding in alphabetical order a definition for ''Small OSWI unit'' and ''Waste profile.''

The revisions and additions read as follows:

§ 60.3078 What definitions must I know?

Administrator means:

(1) For approved and effective state section 111(d)/129 plans, the Director of the state air pollution control agency, or his or her delegatee;

(2) For Federal section 111(d)/129 plans, the Administrator of the EPA, an employee of the EPA, the Director of the state air pollution control agency, or employee of the state air pollution control agency to whom the authority has been delegated by the Administrator of the EPA to perform the specified task; and

(3) For NSPS, the Administrator of the EPA, an employee of the EPA, the Director of the state air pollution control agency, or employee of the state air pollution control agency to whom the authority has been delegated by the Administrator of the EPA to perform the specified task.

* * * * *

CEMS data during startup and shutdown means CEMS data collected during the first hours of a OSWI startup from a cold start until waste is fed to the unit and the hours of operation following the cessation of waste material being fed to the OSWI during a unit shutdown. For each startup event, the length of time that CEMS data may be claimed as being CEMS data during startup must be 48 operating hours or less. For each shutdown event, the length of time that CEMS data may be claimed as being CEMS data during shutdown must be 24 operating hours or less.

* * * * *

Deviation means any instance in which a unit that meets the requirements in § 60.2991, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limitation, operating limit, or operator qualification and accessibility requirements; and

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any unit that meets requirements in § 60.2991 and is required to obtain such a permit.

* * * * *

Low-level radioactive waste means waste material that contains radioactive nuclides emitting primarily beta or gamma radiation, or both, in concentrations or quantities that exceed applicable federal or state standards for unrestricted release. Low-level radioactive waste is not high-level radioactive waste, spent nuclear fuel, or byproduct material as defined by the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(2)).

* * * * *

Municipal waste combustion unit means, for the purpose of this subpart and subpart EEEE, any setting or equipment that combusts municipal solid waste (as defined in this subpart) including, but not limited to, field-erected, modular, cyclonic burn barrel, and custom built incineration units (with or without energy recovery) operating with starved or excess air, boilers, furnaces, and air curtain incinerators (except those air curtain incinerators listed in § 60.2994(b)).

* * * * *

Particulate matter means total particulate matter emitted from OSWI units as measured by EPA Method 5 or EPA Method 29 of appendix A of this part.

* * * * *

Small OSWI unit means OSWI units with capacities less than or equal to 10 tons per day.

* * * * *

Waste profile means for a small OSWI unit the amount of each waste category burned as a percentage of total waste burned on a mass basis.

* * * * *

■ 108. Table 1 to subpart FFFF of part 60 is revised to read as follows:

Table 1 to Subpart FFFF of Part 60—Model Rule—Compliance Schedule

As stated in § 60.3000, you must comply with the following:

For units as defined in . . .	Complete this action	By this date [a]
§ 60.2992(a)(1)	Final compliance [b]	(Dates to be specified in State plan) [c].
§ 60.2992(a)(2) and (a)(3), as applicable	Final compliance [b]	(Dates to be specified in State plan) [d].

[a] Site-specific schedules can be used at the discretion of the state.

[b] Final compliance means that you complete all process changes and retrofit of control devices so that, when the incineration unit is brought on line, all process changes and air pollution control devices necessary to meet the emission limitations operate as designed.

[c] The date can be no later than 3 years after the effective date of State plan approval or December 16, 2010, whichever is earlier.

[d] The date can be no later than 3 years after the effective date of State plan approval or [DATE 5 YEARS AFTER PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], whichever is earlier.

■ 109. Table 2 to subpart FFFF of part 60 is amended by revising the heading, rows 7, 8, and 10, and footnote ''a'' to read as follows:

Table 2 to Subpart FFFF of Part 60—Model Rule—Emission Limitations for OSWI Units

* * * * *

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
*	*	*	*
7. Opacity	10 percent	6-minute average (observe over three 1-hour test runs; i.e., thirty 6-minute averages).	Method 9 of appendix A of this part, or ASTM D7520–16 (incorporated by reference (IBR), see § 60.17), if the following conditions are met: 1. During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16, you or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand). 2. You must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16.

For the air pollutant	You must meet this emission limitation [a]	Using this averaging time	And determining compliance using this method
			3. You must follow the record-keeping procedures outlined in § 63.10(b)(1) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination. 4. You or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of anyone reading and the average error must not exceed 7.5 percent opacity.
8. Oxides of nitrogen	103 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 7, 7A, 7C, 7D, or 7E of appendix A of this part, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Methods 7 and 7C only.
* *	* *	* *	* *
10. Sulfur dioxide	3.1 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 6 or 6C of appendix A of this part, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Method 6 only.

[a] All emission limitations (except for opacity and CEMS data during startup and shutdown) are measured at 7 percent oxygen, dry basis at standard conditions. CEMS data during startup and shutdown are measured at stack oxygen content.

* * * * *

■ 110. Table 2b to subpart FFFF of part 60 is added to read as follows:

Table 2b to Subpart FFFF of Part 60—Model Rule—Emission Limitations That Apply to Small OSWI Units On or After [DATE TO BE SPECIFIED IN STATE PLAN] [a]

As stated in § 60.3022, you must comply with the following:

For the air pollutant	You must meet this emission limitation [b]	Using this averaging time	And determining compliance using this method
1. Cadmium	2,000 micrograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 29 of appendix A of this part.
2. Carbon monoxide	220 parts per million by dry volume.	3-run average (1 hour minimum sample time per run during performance test), and 12-hour rolling averages measured using CEMS [c].	Method 10, 10A, or 10B of appendix A of this part and CEMS.
3a. Dioxins/furans (total mass basis) [d].	4,700 nanograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 23 of appendix A of this part.
3b. Dioxins/furans (toxic equivalency basis) [d].	86 nanograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 23 of appendix A of this part.
4. Hydrogen chloride	500 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 26A of appendix A of this part.
5. Lead	32,000 micrograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 29 of appendix A of this part.
6. Mercury	69 micrograms per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 29 of appendix A of this part.

For the air pollutant	You must meet this emission limitation [b]	Using this averaging time	And determining compliance using this method
7. Opacity	10 percent	6-minute average (observe over three 1-hour test runs; *i.e.,* thirty 6-minute averages).	Method 9 of appendix A of this part, or ASTM D7520–16 (IBR, see § 60.17), if the following conditions are met: 1. During the digital camera opacity technique (DCOT) certification procedure outlined in Section 9.2 of ASTM D7520–16, you or the DCOT vendor must present the plumes in front of various backgrounds of color and contrast representing conditions anticipated during field use such as blue sky, trees, and mixed backgrounds (clouds and/or a sparse tree stand). 2. You must also have standard operating procedures in place including daily or other frequency quality checks to ensure the equipment is within manufacturing specifications as outlined in Section 8.1 of ASTM D7520–16. 3. You must follow the record-keeping procedures outlined in § 63.10(b)(1) for the DCOT certification, compliance report, data sheets, and all raw unaltered JPEGs used for opacity and certification determination. 4. You or the DCOT vendor must have a minimum of four independent technology users apply the software to determine the visible opacity of the 300 certification plumes. For each set of 25 plumes, the user may not exceed 15 percent opacity of any one reading and the average error must not exceed 7.5 percent opacity.
8. Oxides of nitrogen	210 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 7, 7A, 7C, 7D, or 7E of appendix A of this part, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Methods 7 and 7C only.
9. Particulate matter	280 milligrams per dry standard cubic meter.	3-run average (1 hour minimum sample time per run).	Method 5 or 29 of appendix A of this part.
10. Sulfur dioxide	130 parts per million by dry volume.	3-run average (1 hour minimum sample time per run).	Method 6 or 6C of appendix A of this part, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Method 6 only.

[a] The date can be no later than 3 years after the effective date of State plan approval or [DATE 5 YEARS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], whichever is earlier.

[b] All emission limitations (except for opacity) are measured at 7 percent oxygen, dry basis at standard conditions. CEMS data during startup and shutdown are measured at stack oxygen content.

[c] Calculated each hour as the average of the previous 12 operating hours.

[d] For dioxins/furans, you must meet either the total mass basis limit or the toxic equivalency basis limit.

■ 111. Table 3 to subpart FFFF of part 60 is revised to read as follows:

Table 3 to Subpart FFFF of Part 60—Model Rule—Operating Limits for Incinerators

As stated in § 60.3023, you must comply with the following:

For these operating parameters	You must establish operating limits	And monitoring using these minimum frequencies		
		Data measurement	Data recording	Averaging time
1. Charge rate	Maximum charge rate	Periodic	For batch, each batch. For continuous or intermittent, every hour.	Daily for batch units or small OSWI units complying with § 60.3033(d). 3-hour rolling for continuous and intermittent units.[a]
2. Combustion temperature	Minimum combustion chamber operating temperature.	Continuous	Every 15 minutes	3-hour rolling.[a]
3. Pressure drop across the wet scrubber or amperage to wet scrubber.	Minimum pressure drop or amperage.	Continuous	Every 15 minutes	3-hour rolling.[a]
4. Wet scrubber liquor flow rate.	Minimum flow rate at inlet to the scrubber.	Continuous	Every 15 minutes	3-hour rolling.[a]
5. Wet scrubber liquor pH	Minimum pH at scrubber outlet.	Continuous	Every 15 minutes	3-hour rolling.[a]
6. Dry scrubber sorbent injection.	Minimum injection rate of each sorbent.	Continuous	Every 15 minutes	3-hour rolling.[a]
7. Electrostatic precipitator secondary electric power.	Minimum secondary electric power, calculated from the secondary voltage and secondary current.	Continuous	Every 15 minutes	3-hour rolling.[a]
8. Bag leak detection system alarm time.	Alarm time < 5 percent of the operating time during a 6-month period.	Continuous	Each date and time of alarm start and stop.	Calculate alarm time as specified in § 60.3023(f).
9. Waste profile	The amount of each waste category burned as a percentage of total waste burned on a mass basis.	Periodic	For batch, each batch. For continuous or intermittent, every hour.	Weekly.

[a] Calculated each hour as the average of the previous 3 operating hours.

■ 112. Table 4 to subpart FFFF of part 60 is amended by revising row 2 to read as follows:

Table 4 to Subpart FFFF of Part 60—Model Rule—Requirements for Continuous Emission Monitoring Systems (CEMS)

* * * * *

For the following pollutants	Use the following span values for your CEMS	Use the following performance specifications (P.S.) in appendix B of this part for your CEMS	If needed to meet minimum data requirements, use the following alternate methods in appendix A of this part to collect data
* *	* *	* *	* *
2. Oxygen	25 percent oxygen	P.S.3	Method 3A or 3B, or ANSI/ASME PTC 19.10–1981 (IBR, see § 60.17) in lieu of Method 3B only.

■ 113. Table 5 to subpart FFFF of part 60 is amended by revising row 3. to read as follows:

Table 5 to Subpart FFFF of Part 60—Model Rule—Summary of Reporting Requirements

* * * * *

Report	Due date	Contents	Reference
3. Annual Report	a. No later than 12 months following the submission of the initial test report. Subsequent reports are to be submitted no more than 12 months following the previous report.	i. Company Name and address; ...	§§ 60.3050 and 60.3051.

Report	Due date	Contents	Reference
* * *	* *	* *	* *
		vii. Information for deviations or malfunctions recorded under § 60.3046(b)(6) and (c) through (e);.	§§ 60.3050 and 60.3051.
* * *	* *	* *	* *
		ix. If a performance test was not conducted during the reporting period, a statement that the requirements of § 60.3035(a) or (b) were met; and.	§§ 60.3050 and 60.3051.
* * *	* *	* *	* *
		xi. For each small OSWI unit for which you demonstrate continuous compliance according to § 60.3033(d), if no deviations from the percentages established for each waste category according to the waste profile required in § 60.3033(d)(1) and the OSWI unit has been operated within the operating parameter limits, a statement that there were no deviations from the weekly waste profile requirements and the OSWI unit has been operated within the operating parameter limits.	§§ 60.3050 and 60.3051.
* * *	* *	* *	* *

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