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Federal Register

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Wednesday, September 2, 2020

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0471; Project Identifier MCAI–2019–00126–E; Amendment 39–21226; AD 2020–18–05]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Canada Corp. Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Pratt & Whitney Canada Corp. (P&WC) PT6B–37A model turboshaft engines with engine serial number PCE–PU0289 and earlier. This AD was prompted by a report of contamination from galvanic corrosion between the fuel control unit (FCU) aluminum body and the steel union fitting causing the loss of engine control, resulting in an engine over-speed condition and subsequent in-flight shutdown (IFSD). This AD requires replacing the FCU with a part eligible for installation. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective October 7, 2020.

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

ADDRESSES: For service information identified in this final rule, contact Pratt & Whitney Canada Corp., 1000 Marie-Victorin, Longueuil, Quebec, Canada, J4G 1A1; phone: 800–268–8000; fax: 450–647–2888; website: *https://www.pwc.ca/en/*. You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0471.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0471; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Mehdi Lamnyi, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7743; fax: 781–238–7199; email: *Mehdi.Lamnyi@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all P&WC PT6B–37A model turboshaft engines with engine serial number PCE–PU0289 and earlier. The NPRM published in the **Federal Register** on May 14, 2020 (85 FR 28888). The NPRM was prompted by a report of contamination from galvanic corrosion between the FCU aluminum body and the steel union fitting causing the loss of engine control, resulting in an engine over-speed condition and subsequent IFSD. The NPRM proposed to require replacing the FCU with a part eligible for installation. The FAA is issuing this AD to address the unsafe condition on these products.

Transport Canada Civil Aviation (Transport Canada), which is the aviation authority for Canada, has issued Transport Canada AD CF–2019–05, dated February 19, 2019 (referred to after this as ''the MCAI''), to address the unsafe condition on these products. The MCAI states:

> There has been one reported incident on a PT6B–37A engine, where the contamination from galvanic corrosion between the FCU aluminum body and the steel union fitting has caused the loss of engine control, resulting in an engine over-speed condition and subsequently leading to an engine inflight shutdown (IFSD). This condition, if not corrected, could lead to additional cases of IFSDs, which on a single engine helicopter may result in an emergency autorotation landing. To address the subject galvanic corrosion problem in the FCU, P&WC has issued Service Bulletin (SB) 39107 to replace the affected FCUs with a modified FCU that is not susceptible to the subject galvanic corrosion problem. This [Transport Canada] AD mandates compliance with P&WC SB 39107, requiring the replacement of the affected FCUs to mitigate the potential unsafe condition.

You may obtain further information by examining the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0471.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA has considered the comment received. An individual commenter supported the NPRM.

Conclusion

The FAA reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this final rule as proposed except for minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Service Information Incorporated by Reference Under 1 CFR Part 51

The FAA reviewed P&WC Service Bulletin (SB) No. PT6B–72–39107, Revision No. 1, dated December 13, 2017. The SB describes procedures for replacing the FCU. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

Costs of Compliance

The FAA estimates that this AD affects 75 engines installed on helicopters of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace the FCU	1 work-hour × $85 per hour = $85.	$37,000	$37,085	$2,781,375

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–18–05 Pratt & Whitney Canada Corp: Amendment 39–21226; Docket No. FAA–2020–0471; Project Identifier MCAI–2019–00126–E.

(a) Effective Date

This AD is effective October 7, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Pratt & Whitney Canada Corp. (P&WC) PT6B–37A model turboshaft engines with engine serial number PCE–PU0289 and earlier, which do not have an installed fuel control unit (FCU) that incorporates a stainless steel air adapter using P&WC Service Bulletin (SB) No. PT6B–72–39107, Revision No. 1, dated December 13, 2017.

(d) Subject

Joint Aircraft System Component (JASC) Code 7321, Fuel Control/Turbine Engines.

(e) Unsafe Condition

This AD was prompted by a report of contamination from galvanic corrosion between the FCU aluminum body and the steel union fitting causing the loss of engine control, resulting in an engine over-speed condition and subsequent in-flight shutdown (IFSD). The FAA is issuing this AD to prevent failure of the FCU due to contamination from galvanic corrosion. The unsafe condition, if not addressed, could result in loss of engine control, failure of the engine, IFSD, and loss of the helicopter.

(f) Compliance

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

(g) Required Actions

Within the compliance time identified in Table 1 to paragraph (g) of this AD, replace the FCU with an FCU that incorporates the stainless steel air adapter using the Accomplishment Instruments, paragraphs 3.A. and 3.C., of P&WC SB No. PT6B–72–39107, Revision No. 1, dated December 13, 2017.

Table 1 to paragraph (g) – Compliance time requirements

Compliance Time (A or B, whichever occurs later after the effective date of this AD)	
A	Before the FCU accumulates 1,500 flight hours, or before the FCU accumulates six years since new or last overhaul, whichever occurs first.
B	Within six months.

(h) Credit for Previous Actions

You may take credit for the replacement of the FCU that is required by paragraph (g) of this AD if you replaced the FCU with an FCU that incorporates a stainless steel air adapter before the effective date of this AD using P&WC SB No. PT6B–72–39107, Original Issue, dated December 15, 2016.

(i) Alternative Methods of Compliance (AMOCs)

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

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

(j) Related Information

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

(2) Refer to Transport Canada Civil Aviation (Transport Canada) AD CF–2019–05, dated February 19, 2019, for more information. You may examine the Transport Canada AD in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0471.

(k) Material Incorporated by Reference

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

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

(i) Pratt & Whitney Canada Corp. (P&WC) Service Bulletin No. PT6B–72–39107, Revision No. 1, dated December 13, 2017.

(ii) [Reserved]

(3) For P&WC service information identified in this AD, contact Pratt & Whitney Canada Corp., 1000 Marie-Victorin, Longueuil, Quebec, Canada, J4G 1A1; phone: 800–268–8000; fax: 450–647–2888; website: *https://www.pwc.ca/en/.*

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759.

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

Issued on August 20, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–19299 Filed 9–1–20; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 227 and 239

[Release No. 33–10829]

Temporary Amendments to Regulation Crowdfunding; Extension

AGENCY: Securities and Exchange Commission.

ACTION: Temporary final rule; extension.

SUMMARY: The Securities and Exchange Commission (''Commission'') is extending the effective date and applicability dates of our temporary final rules under Regulation Crowdfunding to facilitate capital formation for small businesses impacted by coronavirus disease 2019 (COVID–19). The temporary final rules are intended to expedite the offering process for smaller, previously established companies directly or indirectly affected by COVID–19 that are seeking to meet their funding needs through the offer and sale of securities pursuant to Regulation Crowdfunding. The temporary final rules are designed to facilitate this offering process by providing tailored, conditional relief from certain requirements of Regulation Crowdfunding relating to the timing of the offering and the availability of financial statements required to be included in issuers' offering materials while retaining appropriate investor protections.

DATES: *Effective date:* The amendments in this rule are effective from August 31, 2020, through September 1, 2021. The expiration date for the temporary final rules published May 7, 2020 (85 FR 27116) is extended from March 1, 2021, to September 1, 2021.

Applicability date: The temporary final rules apply to securities offerings initiated under Regulation Crowdfunding between May 4, 2020, and February 28, 2021.

FOR FURTHER INFORMATION CONTACT: Jennifer Zepralka, Office of Small Business Policy, Division of Corporation Finance, at (202) 551–3460; U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: We are adopting amendments to 17 CFR 227.100 (''Rule 100''), 17 CFR 227.201 (''Rule 201''), 17 CFR 227.301 (''Rule 301''), 17 CFR 227.303 (''Rule 303'') and 17 CFR 227.304 (''Rule 304'') of 17 CFR part 227 (''Regulation Crowdfunding'') under 15 U.S.C. 77a *et seq.* (the ''Securities Act'') and to 17 CFR 239.900 (''Form C'') as temporary final rules.

I. Background

The outbreak of COVID–19 has had far-reaching effects, with small businesses being particularly affected by the closures and safety measures designed to slow the spread of COVID–19.[1] Recognizing that, as a result, many

[1] *See, e.g.,* MetLife & U.S. Chamber of Commerce Special Report on Coronavirus and Small Business (April 3, 2020), *available at https://www.uschamber.com/sites/default/files/metlife_uscc_coronavirus_and_small_business_report_april_3.pdf* (''With high levels of concern about COVID–19 reported in every sector and region of the country, one in four small businesses (24 percent) report having already temporarily shut down. Among those who haven't shut down yet, 40

Continued

small businesses were facing challenges accessing urgently needed capital in a timely and cost-effective manner, on May 4, 2020, the Commission adopted temporary final rules intended to address feedback received from its Small Business Capital Formation Advisory Committee and others.[2] That feedback noted that certain Regulation Crowdfunding requirements may have been making it difficult for an issuer affected by COVID–19 to launch an offering and see it to completion within a time frame that would meet its urgent capital needs.[3] The temporary final rules provide flexibility for eligible issuers[4] to assess interest in a Regulation Crowdfunding offering prior to preparation of full offering materials,[5] and then once launched, to close such an offering and have access to funds sooner than would be possible in the absence of the temporary relief.[6] The temporary rules also provide an exemption from certain financial statement review requirements for issuers offering $250,000 or less of securities in reliance on Regulation Crowdfunding within a 12-month period.[7] In addition, a condition to each aspect of the temporary relief is a requirement to provide clear disclosure to investors with respect to the issuer's reliance on such relief.[8] The following table summarizes the amendments. For a detailed description of the temporary final rules, see the Temporary Amendments Adopting Release.

Requirement	Existing regulation crowdfunding	Temporary amendment
Eligibility	The exemption is *not* available to: • Non-U.S. issuers; • Issuers that are required to file reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934; • Investment companies; • Blank check companies; • Issuers that are disqualified under Regulation Crowdfunding's disqualification rules; and • Issuers that have failed to file the annual reports required under Regulation Crowdfunding during the two years immediately preceding the filing of the offering statement.	To rely on the temporary rules, issuers must meet the *existing* eligibility criteria PLUS: • The issuer cannot have been organized and cannot have been operating for less than six months prior to the commencement of the offering; and • An issuer that has sold securities in a Regulation Crowdfunding offering in the past, must have complied with the requirements in 15 U.S.C. 77d–1(b) ("Section 4A(b)") of the Securities Act and the related rules.
Offers permitted	After filing of offering statement (including financial statements)	After filing of offering statement, but financial statements may be initially omitted (if not otherwise available).
Investment commitments accepted.	After filing of offering statement (including financial statements)	After filing of offering statement that includes financial statements or amended offering statement that includes financial statements.
Financial statements required when issuer is offering more than $107,000 and not more than $250,000 in a 12-month period.	Financial statements of the issuer reviewed by a public accountant that is independent of the issuer	Financial statements of the issuer and certain information from the issuer's Federal income tax returns, both certified by the principal executive officer.
Sales permitted	After the information in an offering statement is publicly available for at least 21 days	As soon as an issuer has received binding investment commitments covering the target offering amount (note: Commitments are not binding until 48 hours after they are given)
Early closing permitted	Once target amount is reached if: • The offering remains open for a minimum of 21 days;	As soon as binding commitments are received reaching target amount if:

percent report it is likely they will shut temporarily within the next two weeks. Forty-three percent believe they have less than six months until a permanent shutdown is unavoidable.''). *See also* MetLife & U.S. Chamber of Commerce Small Business Coronavirus Impact Poll (July 29, 2020), *available at https://www.uschamber.com/sites/default/files/metlife_uscc_sbi_coronavirus_impact_poll_july.pdf* (reporting that in July 2020, 86% of small businesses surveyed report they are either fully (52%) or partially (34%) open, but ''most small businesses are concerned about financial hardship due to prolonged closures (70%) and more than half worry about having to permanently close (58%).'').

[2] *See* Transcript of SEC Small Business Capital Formation Advisory Committee (April 2, 2020), *available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-040220.pdf,* at 30–32 (expressing the view that Regulation Crowdfunding is ''the only mechanism'' for private businesses to access ''non-accredited investors, really the community members'' and suggesting relief from the financial statement requirements of Regulation Crowdfunding) and 39–41 (suggesting financial statement relief and relief from the requirement to wait 21 days before disbursement of funds raised in a Regulation Crowdfunding offering). *See also* Transcript for Online Investment Capital Raising Virtual Coffee Break (April 3, 2020), *available at https://www.sec.gov/files/OS-018-20-403-full.pdf.*

[3] *See* Temporary Amendments to Regulation Crowdfunding, Release No. 33–10781 (May 4, 2020) [85 FR 27116 (May 7, 2020)] (''Temporary Amendments Adopting Release'').

[4] *See* temporary 17 CFR 227.100(b)(7) (''Rule 100(b)(7)''). To rely on the temporary rules, an issuer must meet the requirements of temporary Rule 100(b)(7) in addition to the current eligibility requirements of 17 CFR 227.100(b)(1) through (6).

[5] *See* temporary 17 CFR 227.201(z)(2) (''Rule 201(z)(2)'').

[6] *See* temporary 17 CFR 227.303(g) (''Rule 303(g)'') and temporary 17 CFR 227.304(e) (''Rule 304(e)'').

[7] *See* temporary 17 CFR 227.201(z)(3) (''Rule 201(z)(3)''). Note that Instruction 1 to paragraph (t) continues to apply in connection with the determination of the offering amount.

[8] See temporary 17 CFR 227.201(z)(1) (''Rule 201(z)(1)'').

Requirement	Existing regulation crowdfunding	Temporary amendment
	• The intermediary provides notice about the new offering deadline at least five business days prior to the new offering deadline; • The issuer has complied with the disclosure requirements in temporary Rule 201(z); • The intermediary provides notice that the target offering amount has been met; and • At the time of the closing of the offering, the issuer continues to meet or exceed the target offering amount. • Investors are given the opportunity to reconsider their investment decision and to cancel their investment commitment until 48 hours prior to the new offering deadline; and • At the time of the new offering deadline, the issuer continues to meet or exceed the target offering amount.	
Cancellations of investment commitments permitted.	For any reason until 48 hours prior to the deadline identified in the issuer's offering materials. Thereafter, an investor is not able to cancel any investment commitments made within the final 48 hours of the offering (except in the event of a material change to the offering).	For any reason for 48 hours from the time of the investor's investment commitment (or such later period as the issuer may designate). After such 48 hour period, an investment commitment may not be cancelled unless there is a material change to the offering.

The temporary rules as adopted applied to offerings initiated under Regulation Crowdfunding between May 4, 2020, and August 31, 2020. However, the Commission indicated in the Temporary Amendments Adopting Release that it intended to monitor the situation and might, if necessary, extend the time period during which this relief applies, with any additional conditions the Commission deems appropriate, and/or issue other relief. In light of the continuing challenges facing small businesses, and for the reasons detailed below, the Commission has determined that it is necessary and appropriate to extend the applicability and effectiveness dates of the temporary final rules.

II. Amendment of Applicability and Expiration Dates of the Temporary Final Rules

As noted above, the temporary final rules currently apply to offerings initiated under Regulation Crowdfunding between May 4, 2020, and August 31, 2020. The Commission has continued to monitor the COVID–19 outbreak and its impact on small businesses. At this time, COVID–19 still presents significant challenges for small businesses and is likely to continue to do so for some time.[9] We continue to believe that a securities offering under Regulation Crowdfunding may be an attractive fundraising option for some small businesses at this time, particularly as a means of allowing an issuer to make use of the internet to reach out to its customers or members of its local community as potential investors as well as to existing investors. Overall, as discussed below, the temporary final rules have been well received by the market and have proven effective for some issuers to raise capital under the current conditions. We believe it is important to maintain the flexibility provided by the temporary final rules for small businesses that continue to face difficulties as a result of COVID–19.

Based on feedback that the Commission has received through comment letters on our proposing release, *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*[10] and other outreach conducted by Commission staff, the Commission understands that the temporary amendments generally have been helpful not only to those issuers that have initiated a Regulation Crowdfunding offering under the rules thus far, but also to those issuers that continue to consider their financing options during the pandemic.[11] Members of the Small Business Capital Formation Advisory Committee also expressed positive views of the temporary amendments after they were adopted.[12] As of July 31, 2020, the latest

[9] *See infra* note 25. *See also* McKinsey & Co., *Tracking US small and medium-sized business sentiment during COVID–19* (May 29, 2020), *available at https://www.mckinsey.com/industries/financial-services/our-insights/tracking-us-small-and-medium-sized-business-sentiment-during-covid-19;* MetLife & U.S. Chamber of Commerce Small Business Coronavirus Impact Poll, *supra* note 1 (''Over the long term, small businesses show signs of guarded optimism, but feel it will be some time before things return to normal. More than half of small businesses believe it will take six months to a year before the small business climate returns to normal . . .''). Minority-owned businesses are considered to be particularly at risk of closing their businesses. *See* MetLife & U.S. Chamber of Commerce, Special Report on Race and Inequality on Main Street (Aug. 4, 2020), *available at https://www.uschamber.com/sites/default/files/sbi_inequality_on_main_street_8.4.pdf* (finding that two in three (66%) minority-owned small businesses are concerned about having to permanently close their business versus 57% for non-minority small businesses).

[10] Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release Nos. 33–10763; 34–88321 (Mar. 4, 2020) [85 FR 17956 (Mar. 31, 2020)] (''Access to Capital Proposing Release'').

[11] *See, e.g.,* letters from NextSeed dated July 19, 2020 (''NextSeed letter''), *available at https://www.sec.gov/comments/s7-05-20/s70520-7449553-220993.pdf;* and Republic dated June 1, 2020 (''Republic-1 letter''), *available at https://www.sec.gov/comments/s7-05-20/s70520-7258471-217640.pdf.* Market participants in discussions with Commission staff also have noted that the flexibility provided by the temporary final rules may make a Regulation Crowdfunding offering a more realistic choice for an issuer seeking financing in the current market environment. One commenter stated that it had not yet listed an offering under the temporary final rules, but noted its ''shared enthusiasm with dozens of small businesses in [its] network actively evaluating the possibility of availing the Temporary Relief to fundraise.'' *See* letter from Republic dated August 22, 2020 (''Republic-2 letter''), *available at https://www.sec.gov/comments/s7-05-20/s70520-7677531-222676.pdf.* This commenter urged the Commission to expand the relief to allow small businesses to ''test the waters'' prior to filing the offering statement ''so that they can determine where it is worthwhile to undertake the effort of preparing an offering statement.'' *But see* letter from Better Markets dated June 1, 2020 (''Better Markets letter''), *available at https://www.sec.gov/comments/s7-05-20/s70520-7261530-217652.pdf* (stating its view that the temporary amendments would expose investors to greater risks and less information).

[12] See, *e.g.,* Transcript of SEC Small Business Capital Formation Advisory Committee (May 8, 2020), *available at https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf,* at 17–19 (noting positive feedback from small businesses intending to take advantage of the relief).

available full month of data, we find that, of the 248 new offerings on Form C by eligible issuers (out of 292 total offerings), 94, or 38% (32%), relied on one or more of the provisions of the temporary relief.[13] The commenters who found the temporary amendments helpful also have urged the Commission to extend the relief to offerings initiated after August 31, 2020.[14]

In light of the continuing challenges facing small businesses and the feedback received on the temporary final rules, the Commission has determined that it is necessary and appropriate to extend the applicability and effectiveness dates of the temporary final rules. The temporary final rules, as extended, will apply to offerings initiated under Regulation Crowdfunding through February 28, 2021 and will be effective until September 1, 2021. This extension will continue to provide issuers with the opportunity to access capital on an expedited basis while maintaining appropriate investor protections.

III. Economic Analysis

As discussed above, in light of the continued, considerable financing constraints and challenges facing small businesses as a result of the COVID–19 crisis, the Commission is extending temporary relief from certain requirements of Regulation Crowdfunding to issuers seeking funding on an expedited basis due to circumstances relating to COVID–19. Several commenters have expressed support for the temporary rules.[15]

The temporary rules were originally adopted in response to the unprecedented adverse impact of the COVID–19 crisis on small businesses. Since the adoption of the temporary rules, small businesses have continued to experience significant disruption, across a wide range of individual industries as well as the broader economy.[16] In light of ongoing adverse financing conditions for small businesses as a result of the COVID–19 crisis, we believe that the relief remains necessary and appropriate. Preliminary evidence from the period of the temporary rules' effectiveness indicates that a significant proportion of eligible issuers conducting offerings in reliance on Regulation Crowdfunding have relied on one or more provisions of the relief in their capital raising.[17]

We have considered the costs and benefits of the temporary rules.[18] After examining recent evidence on the state of the crowdfunding market and the ongoing effects of the COVID–19 crisis summarized in Section III.A., we believe that the general economic considerations related to the benefits, costs, and effects on efficiency, competition, and capital formation of the individual provisions discussed in the May 4, 2020 Temporary Amendments Adopting Release continue to apply. In particular, we continue to believe that issuers eligible under the temporary rules continue to face adverse economic conditions and significant difficulties with raising external financing as a result of COVID–19. Extending the temporary relief will avoid a loss of targeted relief from certain requirements of Regulation Crowdfunding and enable eligible issuers affected by the COVID–19 crisis to continue to avail themselves of a more flexible and efficient offering process. Extending the temporary relief also will prevent competitive disadvantages for issuers that initiate their offerings after the expiration of the existing temporary relief.

Except as specified below, we incorporate the earlier economic analysis by reference.[19] However, the adoption of the temporary relief on May 4, 2020 has also resulted in some economic effects that are discussed in Section III.A below. These effects are now part of the current baseline from which we evaluate the economic effects of the extension of these temporary rules.

A. Baseline

The baseline for this extension includes existing Regulation Crowdfunding regulations and industry practices[20] and the existing temporary relief adopted on May 4, 2020.

Given the exemption's offering limit, since Regulation Crowdfunding became effective in 2016, it has been utilized primarily by small businesses (which typically lack significant internal cash flows or access to other securities market financing options). Table 1 below presents data on the characteristics of issuers in Regulation Crowdfunding offerings as of July 31, 2020 (the most recent available full month of data).

TABLE 1—CHARACTERISTICS OF ISSUERS IN REGULATION CROWDFUNDING OFFERINGS: MAY 16, 2016—JULY 31, 2020[21]

	Average	Median
Age in years	3.0	1.9
Number of employees	5.3	3.0
Total assets	$430,400	$37,194
Total revenues	$347,124	$226

The median crowdfunding offering was by an issuer that was incorporated approximately two years earlier and that employed about three people. The median issuer had total assets of approximately $37,000 and close to zero revenues (approximately 49% of offerings were by issuers with no revenues). Approximately 11% of

[13] For this estimate, eligibility was estimated based on the issuer having been formed at least six months prior to the filing date of the offering and having had (1) either positive assets, revenues, net income, debt, accounts receivable, cost of goods sold, taxes paid, or employees in the most recent fiscal year reported on Form C, or (2) a prior Regulation Crowdfunding offering. *See also infra* notes 31 and 36.

[14] *See, e.g.,* NextSeed letter; Republic-1 letter (noting the relief relating to financial statement requirements and encouraging the Commission to extend the relief, ''as the economic harm caused by the COVID–19 Pandemic is likely to be far reaching''); Republic-2 letter (encouraging the Commission to consider incorporating the temporary relief into Access to Capital Proposing Release or extending the relief for at least 12 months).

[15] *See supra* note 11 and accompanying text. *See also https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050820.pdf. But see* Better Markets letter (opposing the temporary rules).

[16] *See infra* note 25.

[17] *See infra* note 36.

[18] Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] requires 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.

[19] *See* Temporary Amendments Adopting Release, at 27121–31.

[20] For a more detailed discussion of the crowdfunding market, *see* Access to Capital Proposing Release; Report to the Commission: Regulation Crowdfunding (Jun. 18, 2019), *available at https://www.sec.gov/files/regulation-crowdfunding-2019_0.pdf* (''2019 Regulation Crowdfunding Report'').

[21] The estimates are based on data from Form C or the latest amendment to it and exclude withdrawn offerings.

offerings were by issuers that had attained profitability in the most recent fiscal year prior to the offering.

Table 2 summarizes EDGAR filings data on amounts sought and capital reported raised in offerings under Regulation Crowdfunding since its inception (May 16, 2016) through July 31, 2020.

	Number	Average	Median	Aggregate (million)
Target amount sought in initiated offerings	2,525	$60,089	$25,000	$150.9
Maximum amount sought in initiated offerings	2,525	607,503	535,000	1,494.2
Amounts reported as raised in completed offerings [22]	1,005	230,219	107,000	231.4

The baseline also includes the recent and ongoing effects of the disruption to the U.S. and global economy related to COVID–19, interventions aimed at mitigating its effects, and adverse changes in macroeconomic and financial market conditions (collectively referred to as ''the COVID–19 crisis''). Small businesses often face significant financing constraints.[23] Financing constraints make small firms more vulnerable to economic downturns and other negative shocks.[24] The COVID–19 crisis has resulted in a substantial deterioration in financing and business conditions for small businesses.[25] Small businesses eligible under the existing rules have been facing and are expected to continue to face significant adverse effects of the crisis, including, but not limited to, declines in consumer demand and revenues, particularly in consumer-facing industries, such as restaurants, recreation/lifestyle, and retail [26] (*e.g.,* as a result of changes in consumer confidence, commuting and travel patterns, declines in purchasing power, and explicit restrictions on the operation of certain businesses); disruptions to workforce and supply chains; and declines in investor sentiment that affect the availability of financing, valuations, and potential for exits.[27] Some small issuers eligible under the temporary rules may also qualify for emergency relief under other economic assistance programs, which may mitigate some of the adverse impacts described above and the financing constraints stemming from the crisis.[28] However, a recent report indicates that ''[b]ased on the number of firms that reference COVID–19, many companies are coming online to search for capital where they can't get it from banks or government programs like the Payroll Protection Program (PPP).'' [29]

We expect the temporary rules to affect issuers, intermediaries, and investors in Regulation Crowdfunding offerings. As of July 31, 2020, we estimate that 2,276 issuers had initiated 2,525 Regulation Crowdfunding offerings, excluding withdrawn offerings.[30] As discussed below, eligibility criteria of the temporary rules exclude (1) issuers that were organized or had operations for less than six months prior to the commencement of the offering and (2) issuers that were not compliant with Regulation Crowdfunding requirements with regard

[22] Issuers that have not raised the target amount or not filed a report on Form C–U are not included in the estimate of proceeds. *See also* 2019 Regulation Crowdfunding Report, at 15, footnote 40.

[23] Small businesses often lack access to securities markets and rely on personal savings, business profits, personal and business credit, and friends and family as sources of capital. *See* U.S. Department of Treasury (2017) A Financial System That Creates Economic Opportunities: Banks and Credit Unions, *available at https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf.* According to one study relying on the data from the 2014 Annual Survey of Entrepreneurs, approximately 64% of small businesses relied on personal or family savings, compared to 0.6% receiving VC capital. About one-third of businesses used banks and other financial institutions as a source of capital for financing business operations in 2014. A significant share of businesses that established new funding relationships continued to have unmet credit needs. *See* Alicia Robb (2018) Financing Patterns and Credit Market Experiences: A Comparison by Race and Ethnicity for U.S. Employer Firms, *Working Paper. See also* Alicia M. Robb and David Robinson (2014) The Capital Structure Decisions of New Firms, *Review of Financial Studies* 27(1), 153–179 (showing that, while entrepreneurial firms frequently rely on outside loans, outside equity use is uncommon); Rebel Cole and Tatyana Sokolyk (2013) How Do Start-Up Firms Finance Their Assets? Evidence from the Kauffman Firm Surveys, *Working Paper* (showing, based on the 2004 Kauffman Firm Survey, that at start-up stage 76% of firms relied on credit, including 24% that used trade credit, 44% that used business credit, and 55% that used personal credit (percentages do not add up to 100% because firms may use multiple types of credit)). As a general caveat, working papers have not undergone peer review and may be subject to revision at a future date.

[24] Studies of the 2008–2009 financial crisis have documented disproportionate impacts of the crisis on the outcomes and employment of financially constrained small businesses. *See, e.g.,* Michael Siemer (2019) Employment Effects of Financial Constraints during the Great Recession, *Review of Economics and Statistics* 101(1), 16–29; Arthur Kennickell, Myron Kwast, and Jonathan Pogach (2017) Small Businesses and Small Business Finance during the Financial Crisis and the Great Recession: New Evidence from the Survey of Consumer Finances, In: J. Haltiwanger, E. Hurst, J. Miranda, and A. Schoar (Eds.), *Measuring Entrepreneurial Businesses: Current Knowledge and Challenges,* University of Chicago Press, 291–349; Burcu Duygan-Bump, Alexey Levkov, and Judit Montoriol-Garriga (2015) Financing Constraints and Unemployment: Evidence from the Great Recession, *Journal of Monetary Economics* 75, 89–105. Various studies of traded small-cap companies show that small firms, which tend to be most financially constrained, are disproportionately affected by downturns or tightening credit conditions. *See, e.g.,* Gabriel Perez-Quiros and Allan Timmermann (2000) Firm Size and Cyclical Variations in Stock Returns, *Journal of Finance* 55(3), 1229–1262 (showing that ''small firms display the highest degree of asymmetry in their risk across recession and expansion states, which translates into a higher sensitivity of their expected stock returns with respect to variables that measure credit market conditions''); Murillo Campello and Long Chen (2010) Are Financial Constraints Priced? Evidence from Firm Fundamentals and Stock Returns, *Journal of Money, Credit, and Banking* 42(6), 1185–1198 (finding that financially constrained firms' business fundamentals are significantly more sensitive to macroeconomic movements than unconstrained firms' fundamentals). *See also* Eugene Fama and Kenneth French (1993) Common Risk Factors in the Returns on Stocks and Bonds, *Journal of Financial Economics* 3, 3–56.

[25] *See supra* notes 1, 2, and 9. *See also, e.g.,* several recent working papers examining impacts of the COVID–19 crisis on small businesses: Alexander W. Bartik, Marianne Bertrand, Zoë B. Cullen, Edward L. Glaeser, Michael Luca, and Christopher T. Stanton (2020) How Are Small Businesses Adjusting to COVID–19? Early Evidence from a Survey, *NBER Working Paper* No. 26989; Jose Maria Barrero, Nicholas Bloom, and Steven J. Davis (2020) COVID–19 Is Also a Reallocation Shock, *NBER Working Paper* No. 27137; John Eric Humphries, Christopher Neilson, and Gabriel Ulyssea (2020) The Evolving Impacts of COVID–19 on Small Businesses Since the CARES Act, *Cowles Foundation Discussion Paper* No. 2230; Robert W. Fairlie (2020) The Impact of COVID–19 on Small Business Owners: The First Three Months after Social-Distancing Restrictions, *NBER Working Paper* No. 27462.

[26] *See, e.g.,* Devin Thorpe, Startup Restauranteurs Find Willing Investors via Crowdfunding, Forbes (Sept. 28, 2019) and 2019 US Equity Crowdfunding Stats—Year in Review, *available at https://crowdwise.org/funding-portals/2019-equity-crowdfunding-stats-data/.*

[27] *See supra* notes 1–2.

[28] *See* COVID–19 Resources for Small Businesses, *https://www.sec.gov/page/covid-19-resources-small-businesses.*

[29] *See* Crowdfund Capital Advisors, *https://mailchi.mp/3f278c568278/crowdfunding-update-2019-state-of-regulation-crowdfunding-2638840.*

[30] These figures reflect data from the approximately 4.2 years since inception of Regulation Crowdfunding, with offering activity accelerating in the second half of the sample period. It is difficult to predict how many of the past issuers will conduct a follow-on offering in reliance on the relief as well as how existing market conditions, which affect both supply and demand of capital, will affect the flow of new crowdfunding offerings relative to historical data. Thus it is difficult to extrapolate from these numbers the flow of new crowdfunding offerings projected during the time frame during which temporary relief will be extended.

to any prior offerings in which they sold securities.

Historical data provides an indication of the potential share of offerings eligible for temporary relief among all offerings. From inception of Regulation Crowdfunding through July 31, 2020, we estimate that 2,074 (approximately 82%) offerings were initiated by 1,867 issuers that were eligible or would have been eligible for the temporary relief.[31] With respect to the eligibility requirements related to follow-on offerings under Regulation Crowdfunding, *i.e.,* that the issuer complied with Regulation Crowdfunding with respect to any prior offering in which they sold securities, it is difficult to estimate the percentage of prior Regulation Crowdfunding issuers that were not compliant with one or more of the requirements of Regulation Crowdfunding in a prior offering. From inception through July 31, 2020, we estimate that there were 209 repeat Regulation Crowdfunding issuers, including 160 such issuers that had reported successful completion of at least one Regulation Crowdfunding offering on Form C–U.[32]

We estimate that there are 57 registered funding portals, excluding funding portals that have withdrawn their registration.[33] Information on the number of investors per offering is not available for the full sample of Regulation Crowdfunding offerings, as it is not required to be reported in progress updates on Form C–U.[34]

We are unable to predict precisely the number of issuers likely to rely on the temporary rules while they are in effect.[35] A review of new filings made on Form C on or after May 4, 2020 provides some information about issuer reliance on the temporary rules. As of July 31, 2020, we find that, of the 248 new offerings on Form C by eligible issuers (out of 292 total offerings), 94, or 38% (32%) relied on one or more of the provisions of the temporary relief.[36]

The temporary relief, which took effect on May 4, 2020, was accompanied by an increase in Regulation Crowdfunding offering activity through the end of the period of analysis (July 31, 2020), as illustrated in Table 3 below. The increase was observed in comparison to both the pre-rule period of equivalent length (89 days from February 5, 2020 to May 3, 2020) and the same period in the previous year (May 4, 2019 to July 31, 2019). The increase was most pronounced for issuers that had been formed at least six months prior to the offering and thus would have been eligible under the temporary rules.

TABLE 3—NEW REGULATION CROWDFUNDING ACTIVITY, MAY 4, 2020–JULY 31, 2020 [37]

Period	Number of new filings	Aggregate target amount ($ million)	Aggregate maximum amount ($ million)
All issuers:			
Post (May 4, 2020–July 31, 2020).	292	15.5	173.4
Pre (Feb. 5, 2020–May 3, 2020).	199	10.0	110.9
Change Post vs. Pre	47%	56%	56%
2019 (May 4, 2019–July 31, 2019).	128	7.9	72.6
Change Post vs. 2019	128%	98%	139%
Issuers formed at least six months before the offering:			
Post (May 4, 2020–July 31, 2020).	251	13.4	156.1
Pre (Feb. 5, 2020–May 3, 2020).	161	7.8	86.6
Change Post vs. Pre	56%	72%	80%
2019 (May 4, 2019—July 31, 2019).	100	5.7	58.8
Change Post vs. 2019	151%	137%	165%

Important caveats apply: (1) The post-May 4, 2020 period coincided with a significant strengthening of the broader market sentiment, compared to the market sentiment in the preceding months;[38] (2) due to the time required for the closing of an offering and lags in Form C–U filing, we lack systematic data on the success rate and proceeds realized in offerings initiated under the temporary rules.[39] We cannot infer causal effects because the regulatory change coincided with potential confounding aggregate factors. It is also possible that the trends in the number of initiated offerings reflect a general increase in issuer interest in crowdfunding over time independent of

[31] *See infra* note 13. In addition, we recognize that many of the past Regulation Crowdfunding issuers may meet the six-month eligibility criterion as of the effective date of these amendments, should they wish to avail themselves of the temporary relief for a follow-on offering under Regulation Crowdfunding.

[32] This figure likely provides a lower bound on the number of issuers that have initiated a follow-on offering after successfully completing a prior offering due to incomplete reporting of offering proceeds on Form C–U. *See supra* note 22. Follow-on issuance activity may differ from historical data due to changes in the crowdfunding market as a result of confounding market factors and continued uptake of the relief under the temporary rules by past issuers. *See also* Temporary Amendments Adopting Release, at 27124.

[33] *See https://www.finra.org/about/funding-portals-we-regulate* (retrieved Aug. 22, 2020).

[34] *See also* Temporary Amendments Adopting Release, at 27124.

[35] For a more detailed discussion, *see* Temporary Amendments Adopting Release, at 27124–5.

[36] Among those 94 offerings, 50 offerings initially omitted financial statements, 38 relied on the shorter closing time, and 27 provided certified rather than reviewed financial statements. (Some offerings relied on multiple provisions.) These estimates may represent a lower bound because reliance on the provisions is not disclosed in a structured data or standardized format and was evaluated based on manual review of filings for mention of the temporary rules. *See supra* note 13.

[37] Based on staff analysis of EDGAR filings on Form C, excluding amendments.

[38] Based on Bloomberg data, between May 4 and July 31, 2020, Russell 3000 gained approximately 16%. This is in contrast to the 16% decline in the index between February 5 and May 4, 2020.

[39] As of July 31, 2020, only a handful of reports of proceeds on Form C–U were filed for offerings initiated on or after May 4, 2020. Issuers generally file Form C–U upon completion of an offering. The typical issuer that has filed Form C–U has filed it over two months after the initial filing of Form C.

the temporary rules. Small sample sizes warrant further caution in interpreting the changes.

B. Economic Effects

The temporary final rules currently in effect serve as the economic baseline against which the costs and benefits, as well as the impact on efficiency, competition, and capital formation, of the amendments are measured. Because the extension of the expiration dates in the temporary final rules maintains the status quo, we do not expect additional significant costs or benefits to result from the extension. We also do not expect the extension to have additional significant effects on efficiency, competition, or capital formation. In addition, while we expect the extension of the temporary relief to benefit small businesses, it will not eliminate the large-scale challenges facing small businesses as a result of the COVID–19 crisis and ensuing disruptions to individual industries, the broader economy, purchasing power of these businesses' consumers, and investor confidence.

In the alternative, we could have allowed the temporary final rules to expire. Not extending the relief would impose costs and reduce the flexibility for small issuers adversely affected by COVID–19 seeking to meet their financing needs through Regulation Crowdfunding. It also would create competitive disparities for otherwise similar issuers that initiate offerings before and after the expiration of the existing relief (August 31, 2020). As a general matter, the flexibility to access capital under Regulation Crowdfunding on an expedited basis facilitates capital formation and reduces some of the barriers to accessing capital markets for small issuers, allowing some issuers to raise additional capital or to optimize their financing cost through a more efficient and streamlined offering process.[40] By providing targeted relief in a market segment that primarily attracts small businesses, which are disproportionately affected by downturns, the temporary rules also serve to incrementally enhance competition between small businesses and larger businesses (which tend to be less financially constrained).[41]

We recognize that the alternative of allowing the temporary rules to expire could incrementally decrease concerns about investor protection,[42] either due to the investors' reduced time period within which to make an informed decision about an offering or the increased ability of opportunistic issuers seeking to exploit COVID–19 concerns to raise capital from investors through crowdfunding in an expedited timeframe. Generally, however, the aggregate incremental effect of the temporary rules on retail investor protection is likely limited by various factors, including the tailoring of the relief (through the eligibility requirements and the narrow scope and time-limited nature of the relief) and the modest size of the Regulation Crowdfunding market compared to other market segments that draw retail investors. Importantly, the eligibility requirements exclude issuers that were noncompliant with the requirements of Regulation Crowdfunding in previous offerings in which they sold securities. Further, to the extent that investors know less about newly formed issuers with a limited track record, the incremental risk of the temporary relief to investors is reduced by the exclusion from eligibility of issuers formed, or with operations for, less than six months prior to the offering. This limitation on eligibility will tailor the relief to assist existing issuers that require additional funds because of adverse effects caused by the closures and safety measures designed to slow the spread of COVID–19. Further, issuers are required to disclose reliance on the temporary rules to investors, enabling more informed decisions. Moreover, while issuers may solicit investor interest after an initial Form C filing without certain financial disclosures, intermediaries are not allowed to accept investor commitments before the issuer provides all required financial information.

In addition, we note that several essential safeguards contained in the 2015 Regulation Crowdfunding rules continue to apply to issuers that rely on the temporary rules. Crucially, offering and investment limits serve to limit the potential magnitude of investor losses, irrespective of cause. Further, Regulation Crowdfunding offerings will continue to be conducted through registered crowdfunding intermediaries, which remain subject to Commission and FINRA oversight. Crowdfunding intermediaries remain required to take measures to reduce the risk of fraud, provide investor education materials and issuer disclosures to investors, and meet other substantive requirements of Regulation Crowdfunding. Intermediaries remain required to provide communications channels on the online platform to allow investors to draw on the wisdom of the crowd, particularly in analyzing dynamic information about short-term offerings. Issuers remain subject to the extensive disclosure requirements of Form C as well as annual report obligations. While the temporary rules provide exceptions to certain timing requirements of Regulation Crowdfunding for eligible issuers, investors remain able to rescind their commitments within 48 hours from the time of making their commitment, and from the time of a material change to the offering. These safeguards, as well as various other requirements of Regulation Crowdfunding offerings may have served as key deterrents to potential misconduct. Since the inception of Regulation Crowdfunding, there have been relatively few enforcement actions taken against issuers and intermediaries in the crowdfunding market.[43] Staff is not aware of an increase in misconduct due to the adoption of the temporary rules. However, this inference is inherently limited by the difficulty of identifying misconduct.

As another alternative, we could extend the relief for a shorter or longer time period than specified in these amendments. The alternative of extending the relief for a shorter (longer) time period would lead to fewer (more) potential issuers being afforded the flexibility in capital raising under the temporary rules, compared to the amendments. Because of the severe and continuing economic impact of the COVID–19 crisis, we believe that the extension of the temporary rules is appropriate.[44]

[40] *See also supra* notes 11, 12, and 14.

[41] Research has related small size to financing constraints, and conversely, larger size to being less financially constrained. *See, e.g.,* Nathalie Moyen (2004) Investment–Cash Flow Sensitivities: Constrained versus Unconstrained Firms, *Journal of Finance* 59(5), 2061–2092; Christopher Hennessy, Amnon Levy, and Toni Whited (2007) Testing Q Theory with Financing Frictions, *Journal of Financial Economics* 83(3), 691–717. Other studies also show that diversified firms can rely on internal capital markets to mitigate financing constraints. *See, e.g.,* Venkat Kuppuswamy and Belén Villalonga (2016) Does Diversification Create Value in the Presence of External Financing Constraints? Evidence from the 2007–2009 Financial Crisis, *Management Science* 62(4), 905–923 (showing that "the value of corporate diversification increased during the 2007–2009 financial crisis" and that "conglomerates' access to internal capital markets became more valuable"). *See also supra* note 25.

[42] *See also* Temporary Amendments Adopting Release, at 27122; Better Markets letter.

[43] *See* 2019 Regulation Crowdfunding Report, at 5.

[44] As another alternative, we could extend some but not all of the provisions of the temporary rules, or modify further some of the provisions of the temporary relief. For a detailed discussion of the economic effects of the individual provisions and the alternatives involving modifications of the provisions in the temporary rules, see Temporary Amendments Adopting Release, at 27121–31.

IV. Procedural and Other Matters

The Administrative Procedure Act (''APA'') generally requires an agency to publish notice of a rulemaking in the **Federal Register** and provide an opportunity for public comment. This requirement does not apply, however, if the agency ''for good cause finds . . . that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.'' [45] The APA also generally requires that an agency publish an adopted rule in the **Federal Register** at least 30 days before it becomes effective. This requirement does not apply, however, if the agency finds good cause for making the rule effective sooner.[46]

Given the temporary nature of both the relief contemplated by the temporary final rules and the extension of such relief, as well as the significant, unprecedented, and immediate impact of COVID–19 on affected issuers, as discussed above, the Commission finds that good cause exists to dispense with notice and comment as impracticable, unnecessary, or contrary to the public interest, and to act immediately to extend the applicability and expiration dates of the temporary amendments to Rules 100, 201, 301, 303 and 304 of Regulation Crowdfunding.[47] In particular, small businesses continue to be affected by the closures and safety measures designed to slow the spread of COVID–19 and may face urgent funding needs [48] that could be addressed by use of the internet to reach potential investors. In the current circumstances, a delay in implementation would substantially undermine the relief provided by the temporary rules and could exacerbate the existing challenges faced by many small businesses in urgent need of capital to continue their operations.

The temporary final rules provide relief from certain financial information requirements of Regulation Crowdfunding. In addition, the temporary final rules require issuers relying on the temporary relief to provide certain additional disclosures, although, as we stated in the Temporary Amendments Adopting Release, we expect the burden of those disclosures to be minimal. We also stated in the Temporary Amendments Adopting Release that overall, we expect the temporary final rules to result in a net decrease in compliance burden per form for Form C (OMB Control No. 3235–0307); however, because of a possible increase in the number of issuers relying on Regulation Crowdfunding, we believe that the net change in paperwork burden will be minimal.[49] Accordingly, we did not adjust the burden or cost estimates associated with existing collections of information under Regulation Crowdfunding for purposes of the Paperwork Reduction Act of 1995.[50] The extension of the applicability and expiration dates of the temporary final rules does not change our analysis.

Pursuant to the Congressional Review Act,[51] the Office of Information and Regulatory Affairs has designated the temporary final rules as a ''major rule,'' as defined by 5 U.S.C. 804(2).

V. Statutory Basis

We are temporarily amending Rules 100, 201, 301, 303, and 304 of Regulation Crowdfunding and Form C under the authority set forth in the Securities Act (15 U.S.C. 77a *et seq.*), particularly, Section 28 thereof as follows, and the expiration date for the temporary final rules published May 7, 2020 (85 FR 27116) is extended from March 1, 2021, to September 1, 2021.

List of Subjects

17 CFR Part 227

Crowdfunding, Funding portals, Intermediaries, Reporting and recordkeeping requirements, Securities.

17 CFR Part 239

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

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 227—REGULATION CROWDFUNDING, GENERAL RULES AND REGULATIONS

■ 1. The authority citation for part 227 continues to read as follows:

Authority: 15 U.S.C. 77d, 77d–1, 77s, 77z–3, 78c, 78o, 78q, 78w, 78mm, and Pub. L. 112–106, secs. 301–305, 126 Stat. 306 (2012).

§ 227.100 [Amended]

■ 2. In § 227.100(b)(7) introductory text, remove the date ''August 31, 2020'' and add in its place the date ''February 28, 2021''.

§ 227.201 [Amended]

■ 3. In § 227.201(z) introductory text, remove the date ''August 31, 2020'' and add in its place the date ''February 28, 2021''.

§ 227.301 [Amended]

■ 4. In § 227.301(d), remove the date ''August 31, 2020'' and add in its place the date ''February 28, 2021''.

§ 227.303 [Amended]

■ 5. In § 227.303(g)(1) introductory text and (2), remove the date ''August 31, 2020'' and add in its place the date ''February 28, 2021''.

§ 227.304 [Amended]

■ 6. In § 227.304(e) introductory text, remove the date ''August 31, 2020'' and add in its place the date ''February 28, 2021''.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 7. The general authority citation for part 239 continues to read 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.

* * * * *

■ 8. In Form C (referenced in § 239.900) remove the words ''August 31, 2020'' in the second paragraph to the introductory paragraphs in the Optional Question and Answer Format for an Offering Statement and add, in their place, the words ''February 28, 2021''.

By the Commission.

Dated: August 28, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–19468 Filed 8–31–20; 11:15 am]

BILLING CODE 8011–01–P

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[45] 5 U.S.C. 553(b)(3)(B).

[46] 5 U.S.C. 553(d)(3).

[47] This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the temporary final rules to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a Federal agency finds that notice and public comment are impractical, unnecessary or contrary to the public interest, a rule shall take effect at such time as the Federal agency promulgating the rule determines). The temporary final rules also do not require analysis under the Regulatory Flexibility Act. *See* 5 U.S.C. 604(a) (requiring a final regulatory flexibility analysis only for rules required by the APA or other law to undergo notice and comment). One commenter expressed concern that the Commission adopted the temporary final rules without public input. *See* Better Markets letter. However, consistent with the discussion above, we believe this approach was warranted given the extraordinary challenges faced by many issuers under the current circumstances as well as the fact that any delay in implementation would have substantially undermined the intended benefits of the temporary relief.

[48] *See supra* note 1.

[49] We note that the temporary nature of the amendments and the inherent uncertainty in estimating how many issuers will take advantage of the temporary relief makes estimation of the net change in paperwork burden difficult.

[50] 44 U.S.C. 3501 *et seq.*

[51] 5 U.S.C. 801 *et seq.*

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2019–0008; T.D. TTB–162; Ref: Notice No. 186]

RIN 1513–AC53

Establishment of the Royal Slope Viticultural Area

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) establishes the approximately 156,389-acre ''Royal Slope'' viticultural area in Adams and Grant Counties, in Washington. The Royal Slope viticultural area is located entirely within the existing Columbia Valley viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

DATES: This final rule is effective October 2, 2020.

FOR FURTHER INFORMATION CONTACT: Karen A. Thornton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; phone 202–453–1039, ext. 175.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated the functions and duties in the administration and enforcement of these provisions to the TTB Administrator through Treasury Order 120–01, dated December 10, 2013 (superseding Treasury Order 120–01, dated January 24, 2003).

Part 4 of the TTB regulations (27 CFR part 4) authorizes TTB to establish definitive viticultural areas and regulate the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) sets forth standards for the preparation and submission to TTB of petitions for the establishment or modification of American viticultural areas (AVAs) and lists the approved AVAs.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features, as described in part 9 of the regulations, and a name and a delineated boundary, as established in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to the wine's geographic origin. The establishment of AVAs allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of an AVA is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations (27 CFR 4.25(e)(2)) outlines the procedure for proposing an AVA and provides that any interested party may petition TTB to establish a grape-growing region as an AVA. Section 9.12 of the TTB regulations (27 CFR 9.12) prescribes standards for petitions for the establishment or modification of AVAs. Petitions to establish an AVA must include the following:

- Evidence that the area within the proposed AVA boundary is nationally or locally known by the AVA name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed AVA;
- A narrative description of the features of the proposed AVA affecting viticulture, such as climate, geology, soils, physical features, and elevation, that make the proposed AVA distinctive and distinguish it from adjacent areas outside the proposed AVA boundary;
- If the proposed AVA is to be established within, or overlapping, an existing AVA, an explanation that both identifies the attributes of the proposed AVA that are consistent with the existing AVA and explains how the proposed AVA is sufficiently distinct from the existing AVA and therefore appropriate for separate recognition;
- The appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed AVA, with the boundary of the proposed AVA clearly drawn thereon; and
- A detailed narrative description of the proposed AVA boundary based on USGS map markings.

Royal Slope Petition

TTB received a petition from Dr. Alan Busacca, a licensed geologist and founder of Vinitas Vineyard Consultants, LLC, on behalf of the Royal Slope Wine Grower's Association, proposing the establishment of the ''Royal Slope'' AVA in Adams and Grant Counties, in Washington. The proposed Royal Slope AVA lies entirely within the established Columbia Valley AVA (27 CFR 9.74).

Within the 156,389-acre proposed AVA, there are currently 13 producing commercial vineyards which cover a total of approximately 14,100 acres. There is also one winery within the proposed AVA. According to the petition, the distinguishing features of the proposed Royal Slope AVA are its climate, topography, geology, and soils.

The climate of the proposed Royal Slope AVA is described as warm but not excessively hot, making it a suitable climate for growing a variety of red and white grape varietals, including Cabernet Franc, Merlot, Syrah, Chardonnay, and Riesling. The proposed AVA generally has greater growing degree day [1] accumulations and an average cool-climate viticulture sustainability index [2] number than all of the surrounding regions except the regions to the south and north. The proposed AVA also has a lower risk of vine-damaging freezes, as it generally has fewer days per year with temperatures below 32 degrees Fahrenheit (F) than all of the surrounding regions except the region to the south. Finally, the proposed AVA has an average of only 9 days a year with temperatures above 95 degrees F, which is fewer than the region to the south, and has fewer very hot days per year than the regions to the north, east,

[1] See Albert J. Winkler, *General Viticulture* (Berkeley: University of California Press, 2nd ed. 1974), pages 61–64. In the Winkler climate classification system, annual heat accumulation during the growing season, measured in annual growing degree days (GDDs), defines climatic regions. One GDD accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees, the minimum temperature required for grapevine growth.

[2] The cool-climate viticulture sustainability index represents the number of days between the last temperature below 29 degrees F in the spring and the first temperature below 29 degrees F in the fall.

and west. Grape vines shut down photosynthesis at temperatures above 95 degrees F, which can slow or even stop the synthesis of sugars and other ripening factors and may delay harvest.

The topography of the proposed Royal Slope AVA is characterized by the gentle, south-facing slopes of an east-west trending range of hills called the Frenchman Hills. Slope angles are generally less than 15 percent, with very few slopes having angles of less than 3 percent. The slopes are gentle enough for agricultural purposes and are not as freeze-prone as flatter terrains such as valley floors. To the north of the proposed AVA, the Frenchman Hills fall away to the Quincy Basin, which is a large, flat-floored valley. To the northeast are sand dunes and ''pothole'' ponds between the dune crests. To the east and south of the proposed AVA is the Crab Creek Coulee, which is described as a ''moonscape of bedrock-dominated scabland'' unsuitable for agriculture. To the west is the canyon of the Columbia River, which has lower elevations and steeper, rockier terrain than the proposed AVA.

The proposed Royal Slope AVA, like the rest of the Columbia Valley AVA, is underlain with Miocene-era basaltic bedrock and has been affected by Ice Age megafloods. Within the region of the proposed AVA, the floodwaters followed flood channels to the east and northeast. The waters entered the region in a relatively smooth fashion, and the proposed AVA remained largely above the floodwaters. As a result, the proposed AVA was not heavily eroded and remained a landscape of gentle hills with deep soils suitable for cultivation. By contrast, the regions to the east and south of the proposed AVA were eroded by fast-moving floodwaters which cut deeply into the landscape and formed the scablands of Crab Creek Coulee. Similarly strong floodwaters flowed through the region to the west of the proposed AVA, creating the steep canyon of the Columbia River. North of the proposed AVA, the floodwaters were smoother and gentler and deposited vast amounts of sand in what is now the Quincy Basin, creating a landscape of dunes and ''pothole'' lakes.

Within the proposed AVA, the soils are a combination of sediments from glacial floods and wind-blown post-glacial sand and silt (loess). The soils are generally deep enough for vines to extend their roots far into the soil before encountering bedrock or other impediments. The predominant soils are Aridosols, which are characterized as well-drained and low in organic material. Major soil series include Warden, Sagemoore, Adkins, and Kennewick, which together comprise approximately 59 percent of the soil in the proposed AVA. By contrast, the regions to the east, west, and immediate south of the proposed AVA are scablands, which have very little, if any, topsoil. Farther south of the proposed AVA, within the established Wahluke Slope AVA (27 CFR 9.192), the soils are deep and fertile but are primarily Entisols, including the Quincy soil series, which comprise less than two percent of the soils in the proposed AVA. The region to the north of the proposed AVA is also primarily composed of Entisols, including the Quincy soil series.

Notice of Proposed Rulemaking and Comments Received

TTB published Notice No. 186 in the **Federal Register** on October 15, 2019 (84 FR 55075), proposing to establish the Royal Slope AVA. In the notice, TTB summarized the evidence from the petition regarding the name, boundary, and distinguishing features for the proposed AVA. The notice also compared the distinguishing features of the proposed AVA to the surrounding areas. For a detailed description of the evidence relating to the name, boundary, and distinguishing features of the proposed AVA and boundary modification, and for a detailed comparison of the distinguishing features of the proposed AVA to the surrounding areas, see Notice No. 186.

In Notice No. 186, TTB solicited comments on the accuracy of the name, boundary, and other required information submitted in support of the petition. In addition, given the proposed Royal Slope AVA's location within the Columbia Valley AVA, TTB solicited comments on whether the evidence submitted in the petition regarding the distinguishing features of the proposed AVA sufficiently differentiates it from the established AVA. TTB also requested comments on whether the geographic features of the proposed AVA are so distinguishable from the established Columbia Valley AVA that the proposed AVA should no longer be part of the established AVA. The comment period closed December 16, 2019.

In response to Notice No. 186, TTB received a total of 24 comments. The commenters included individuals from several wineries within Washington State who use grapes grown in the proposed AVA, vineyard owners within the proposed AVA, a sommelier, a contributing editor from a wine magazine, and a wine grape consultant. All of the comments supported the establishment of the proposed Royal Slope AVA and generally state that the proposed AVA has a distinct character due to its soils and microclimate. Three of the comments support creating the proposed Royal Slope AVA so as to distinguish this region from other areas within the established Columbia Valley AVA. However, no commenters state the features within the proposed AVA are so distinguishable as to result in the proposed Royal Slope AVA no longer being part of the established Columbia Valley AVA.

TTB Determination

After careful review of the petition and the comments received in response to Notice No. 186, TTB finds that the evidence provided by the petitioner supports the establishment of the Royal Slope AVA. Accordingly, under the authority of the FAA Act, section 1111(d) of the Homeland Security Act of 2002, and parts 4 and 9 of the TTB regulations, TTB establishes the ''Royal Slope'' AVA in Adams and Grant Counties, in Washington, effective 30 days from the publication date of this document.

TTB has also determined that the Royal Slope AVA will remain part of the established Columbia Valley AVA. As discussed in Notice No. 186, the Royal Slope AVA shares some broad characteristics with the established AVA. For example, the proposed AVA and the Columbia Valley AVA are both described as treeless regions of undulating hills adjacent to the Columbia River. Additionally, the Royal Slope AVA and Columbia Valley AVA both have growing seasons longer than 150 days and similar annual rainfall amounts. However, the smaller Royal Slope AVA is much more uniform in its climate, topography, geology, and soils than the much larger Columbia Valley AVA. For example, the Royal Slope AVA does not contain any scablands or any other regions with large amounts of exposed bedrock, and it has a more limited variety of soils than the diverse Columbia Valley AVA.

Boundary Description

See the narrative description of the boundary of the Royal Slope AVA in the regulatory text published at the end of this final rule.

Maps

The petitioners provided the required maps, and they are listed below in the regulatory text. The Royal Slope AVA boundary may also be viewed on the AVA Map Explorer on the TTB website, at *https://www.ttb.gov/wine/ava-map-explorer.*

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. For a wine to be labeled with an AVA name or with a brand name that includes an AVA name, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible for labeling with an AVA name and that name appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the AVA name appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label. Different rules apply if a wine has a brand name containing an AVA name that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

With the establishment of the Royal Slope AVA, its name, ''Royal Slope,'' will be recognized as a name of viticultural significance under § 4.39(i)(3) of the TTB regulations (27 CFR 4.39(i)(3)). The text of the regulations clarifies this point. Consequently, wine bottlers using the name ''Royal Slope'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, will have to ensure that the product is eligible to use the AVA name as an appellation of origin.

The establishment of the Royal Slope AVA will not affect the existing Columbia Valley AVA, and any bottlers using ''Columbia Valley'' as an appellation of origin or in a brand name for wines made from grapes grown within the Columbia Valley will not be affected by the establishment of this new AVA. The establishment of the Royal Slope AVA will allow vintners to use ''Royal Slope'' and ''Columbia Valley'' as appellations of origin for wines made primarily from grapes grown within the Royal Slope AVA if the wines meet the eligibility requirements for the appellation.

Regulatory Flexibility Act

TTB certifies that this regulation will not have a significant economic impact on a substantial number of small entities. The regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of an AVA name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

It has been determined that this final rule is not a significant regulatory action as defined by Executive Order 12866 of September 30, 1993. Therefore, no regulatory assessment is required.

Drafting Information

Karen A. Thornton of the Regulations and Rulings Division drafted this final rule.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

For the reasons discussed in the preamble, TTB amends title 27, chapter I, part 9, Code of Federal Regulations, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

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

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Adding § 9.271 to subpart C to read as follows:

§ 9.271 Royal Slope.

(a) *Name.* The name of the viticultural area described in this section is ''Royal Slope''. For purposes of part 4 of this chapter, ''Royal Slope'' is a term of viticultural significance.

(b) *Approved maps.* The one United States Geological Survey (USGS) 1:100,000 scale topographic map used to determine the boundary of the Royal Slope viticultural area is ''Priest Rapids, WA,'' 2015.

(c) *Boundary.* The Royal Slope viticultural area is located in Grant and Adams Counties in Washington. The boundary of the Royal Slope viticultural area is as described below:

(1) The point of the beginning is on the Priest Rapids map at the intersection of the 250 meter elevation contour and the northern boundary of Section 8, T17N/R23E. From the beginning point, proceed east for approximately 7 miles along the northern boundaries of Sections 8, 9, 10, 11, and 12, T17N/R23E, and Sections 7 and 8, T17N/R24E to the northeast corner of Section 8, T17N/R24E; then

(2) Proceed south for approximately 1 mile along the eastern boundary of Section 8 to the southeast corner of Section 8, T17N/R24 E; then

(3) Proceed east for approximately 4 miles along the southern boundaries of Sections 9, 10, 11, and 12, T17N/R24E, to the southeastern corner of Section 12, T17N/R24E; then

(4) Proceed north for approximately 1.8 miles along the eastern boundaries of Sections 12 and 1, T17N/R24E, to the intersection of the eastern boundary of Section 1 and the southern boundary of the Desert Unit of the Columbia Basin State Wildlife Area; then

(5) Proceed easterly for approximately 20 miles along the boundary of the Desert Unit of the Columbia Basin State Wildlife Area to the intersection of the wildlife area boundary with O'Sullivan Dam Road/State Highway 262; then

(6) Proceed east for approximately 1.5 miles along O'Sullivan Dam Road/State Highway 262 to the intersection of the road with an unnamed road known locally as H Road SE; then

(7) Proceed southeasterly for approximately 1.6 miles along H Road SE to the intersection of the road with the southern boundary of Section 16, T17N/R28E; then

(8) Proceed east for approximately 0.4 mile along the southern boundary of Section 16 to the intersection of the southeastern corner of Section 16, T17N/R28E, and the western boundary of the Columbia National Wildlife Refuge; then

(9) Proceed southerly, then southwesterly, for approximately 8 miles along the western boundary of the Columbia National Wildlife Refuge and the concurrent western boundary of the Goose Lakes Unit of the Columbia Basin State Wildlife Area to the intersection of the wildlife refuge boundary with the eastern boundary of Section 14, T16N/R27E; then

(10) Proceed south along the eastern boundaries of Sections 14, 23, 26, and 35, T16N/R27E, to the intersection of the eastern boundary of Section 35 with State Highway 26; then

(11) Proceed northwesterly for approximately 3 miles along State Highway 26 to the intersection of the highway with the 250-meter elevation contour in the southwest corner of Section 21, T16/R27E; then

(12) Proceed westerly for approximately 28 miles along the 250-meter elevation contour to the intersection of the elevation contour with the eastern boundary of Section 26, T16N/R23E; then

(13) Proceed north for approximately 1,100 feet along the eastern boundary of Section 26 to the northeast corner of Section 26, T16N/R23E; then

(14) Proceed west for 1 mile along the northern boundary of Section 26, T16N/R23E, to the intersection with the

eastern boundary of Section 22, T16N/R23E; then

(15) Proceed north for 1 mile along the eastern boundary of Section 22 to the northern boundary of Section 22, T16N/R23E; then

(16) Proceed west for approximately 1.05 miles along the northern boundary of Section 22, T16N/R23E, to the intersection of the section boundary with the 250-meter elevation contour; then

(17) Proceed northerly for approximately 10 miles along the 250-meter elevation contour to return to the beginning point.

Signed: April 15, 2020.

Mary G. Ryan,

Acting Administrator.

Approved: July 1, 2020.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).

[FR Doc. 2020–17423 Filed 9–1–20; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2020–0468]

RIN 1625–AA08

Special Local Regulation; Atlantic Intracoastal Waterway, Morehead City, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary special local regulation (SLR) for certain navigable waters of the Atlantic Intracoastal Waterway (AICW) and Beaufort Inlet in Morehead City, North Carolina. This SLR is intended to restrict vessel traffic on the AICW and Beaufort Inlet during high-speed boat races. The restriction of vessel traffic movement in the SLR is intended to protect participants and spectators from the hazards posed by these events. Entry of vessels or persons into this regulated area is prohibited unless specifically authorized by the Captain of the Port (COTP) North Carolina or a designated representative.

DATES: This rule is effective from 9 a.m. to 5 p.m. on September 13, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0468 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 Chief Petty Officer Joshua O'Rourke, Waterways Management Division, U.S. Coast Guard Sector North Carolina, Wilmington, NC; telephone 910–772–2227, email *Joshua.P.Orourke@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

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 it would be impracticable and contrary to the public interest. The Coast Guard was unable to publish an NPRM and hold a comment period for this rulemaking due to the short time period between event planners notifying the Coast Guard of the event and required publication of this rule. Immediate action is needed to protect persons and vessels from the hazards associated with this event. It is impracticable and contrary to the public interest to publish an NPRM because a final rule needs to be in place by September 13, 2020, to minimize potential danger to the participants and the public during the event.

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 public interest because immediate action is needed to protect persons and vessels from the hazards associated with this event on September 13, 2020.

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 COTP North Carolina has determined that potential hazards associated with the Crystal Coast Grand Prix race scheduled for 9:00 a.m. through 5:00 p.m. on September 13, 2020, is a safety concern for mariners during a high speed boat race on portions of the Alantic Intra Coastal Waterway (AICW) and Beaufort Inlet in Morehead City, North Carolina. This rule is necessary to protect safety of life from the potential hazards associated with the high-speed boat race.

IV. Discussion of the Rule

This rule establishes an SLR on a portion of the AICW and Beaufort Inlet from 9 a.m. to 5 p.m. on September 13, 2020. The time of enforcement will be broadcast locally over VHF–FM marine radio. The SLR will include a race area on all navigable waters of the AICW and Beaufort Inlet, North Carolina, from approximate positions: Latitude 34°42′52″ N, longitude 076°43′16″ W, then east to latitude 34°42′52.2″ N, longitude 076°42′11.04″ W, then east to latitude 34°42′53.76″ N, longitude 076°41′38.04″ W, then southeast to latitude 34°42′10.8″ N, longitude 076°40′44.4″ W, then south to latitude 34°42′4.3″ N, longitude 076°40′48.1″ W, then northwest to latitude 34°42′47.34″ N, longitude 076°41′49″ W, then west to latitude 34°42′50″ N, longitude 076°43′16″ W, then north to the point of origin. This rule also temporarily establishes a portion of the AICW to be used as a spectator zone. The spectator area will be marked with temporary buoys and will be at least 100 yards from the race course, south of Sugarloaf Island, North Carolina, from approximate positions: Latitude 34°42′42″ N, longitude 076°43′15″ W, then east to latitude 34°42′41″ N, longitude 076°42′14″ W, then south to latitude 34°42′32″ N, longitude 076°42′14″ W, then west to latitude 34°42′32″ N, longitude 076°43′15″ W, then north to the point of origin. This rule also temporarily establishes a buffer area around the perimeter of the race area, from approximate positions: Latitude 34°42′55″ N, longitude 076°43′15″ W, then east to latitude 34°42′56″ N, longitude 076°42′13″ W, then east to latitude 34°42′57″ N, longitude 076°41′41″ W, then east to latitude 34°42′57″ N, longitude 076°41′25″ W, then south east to latitude 34°42′23″ N, longitude 076°40′44″ W, then south to latitude 34°41′59″ N, longitude 076°40′43″ W, then north west to latitude 34°42′41″ N, longitude 076°42′05″ W, then west to latitude 34°42′42″ N, longitude 076°43′15″ W, then north to its point of origin.

The duration of this SLR is intended to protect participants and spectators on the navigable waters of the AICW and Beafort Inelt during the high-speed boat race. Vessels may request permission to pass through the SLR between race heats. No vessel or person will be permitted to enter the SLR without obtaining permission from the COTP North Carolina or a designated representative. The regulatory text appears at the end of this document.

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 SLR. Vessel traffic will not be allowed to enter or transit a portion of the AICW or Beaufort Inlet during an active race event from 9 a.m. through 5 p.m. on Setember 13, 2020. The Coast Guard will transmit a Broadcast Notice to Mariners via VHF–FM marine channel 16 regarding the enforcement period of the SLR. This rule allows vessels to request permission to pass through the regulated area between race heats.

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 SLR may be small entities, for the reasons stated in section IV.A above, this proposed rule would 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 an SLR lasting only eight hours on September 13, 2020, to be enforced during active race events. It is categorically excluded from further review under paragraph L61 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 100

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

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. Add § 100.T500–0468 to read as follows:

§ 100.T500–0468 Crystal Coast Grand Prix, Morehead City, NC.

(a) *Regulated areas.* The regulations in this section apply to the following areas:

(1) The Race Area is designated as all navigable waters of the AICW and Beaufort Inlet, North Carolina, from approximate positions: Latitude 34°42′52″ N, longitude 076°43′16″ W, then east to latitude 34°42′52.2″ N, longitude 076°42′11.04″ W, then east to latitude 34°42′53.76″ N, longitude 076°41′38.04″ W, then southeast to latitude 34°42′10.8″ N, longitude 076°40′44.4″ W, then south to latitude 34°42′4.3″ N, longitude 076°40′48.1″ W, then northwest to latitude 34°42′47.34″ N, longitude 076°41′49″ W, then west to latitude 34°42′50″ N, longitude 076°43′16″ W, then north to the point of origin.

(2) The Spectator Area is designated as all waters of the AICW, North Carolina, from approximate positions: Latitude 34°42′42″ N, longitude 076°43′15″ W, then east to latitude 34°42′41″ N, longitude 076°42′14″ W, then south to latitude 34°42′32″ N, longitude 076°42′14″ W, then west to latitude 34°42′32″ N, longitude 076°43′15″ W, then north to the point of origin.

(3) The Buffer Area is designated as all waters of the AICW and Beaufort Inlet, North Carolina, from approximate positions: Latitude 34°42′55″ N, longitude 076°43′15″ W, then east to latitude 34°42′56″ N, longitude 076°42′13″ W, then east to latitude 34°42′57″ N, longitude 076°41′41″ W, then east to latitude 34°42′57″ N, longitude 076°41′25″ W, then south east to latitude 34°42′23″ N, longitude 076°40′44″ W, then south to latitude 34°41′59″ N, longitude 076°40′43″ W, then north west to latitude 34°42′41″ N, longitude 076°42′05″ W, then west to latitude 34°42′42″ N, longitude 076°43′15″ W, then north to its point of origin.

(b) *Definitions.* As used in this section—

Buffer Area is a neutral area that surrounds the perimeter of the Race Area within the regulated area described by this section. The purpose of a buffer area is to minimize potential collision conflicts with marine event participants and spectator vessels or nearby transiting vessels. This area provides separation between a Race Area and a specified Spectator Area or other vessels that are operating in the vicinity of the regulated area established by the special local regulations.

Captain of the Port means the Commander, Sector North Carolina.

Designated representative means a Coast Guard Patrol Commander, including a Coast Guard commissioned, warrant, or petty officer designated by the Captain of the Port North Carolina (COTP) for the enforcement of the safety zone.

Spectator Area is an area described by a line bound by coordinates provided in latitude and longitude that outlines the boundary of a spectator area within the regulated area defined by this part.

(c) *Regulations.*

(1) Everyone other than participants are prohibited from entering, transiting through, anchoring in, or getting underway within the regulated area described in paragraph (a)(1) of this section unless authorized by the COTP North Carolina or their designated representative.

(2) Everyone other than particpants, including those engaged in spectating, may be directed by a designated representative to the regulated area described in section (a) of this section, where they must remain during the effective period unless otherwise authorized or directed by a designated representative.

(3) To seek permission to enter, contact the COTP by calling the Sector North Carolina Command Center at 910–343–3882 or contact the COTP's designated representative on Marine band Radio, VHF–FM channel 16 (156.8 MHz). Those in the regulated area must comply with all lawful orders or directions given to them by the COTP or the designated representative.

(d) *Enforcement officials.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement.* This SLR will be enforced from 9 a.m. through 5 p.m. on Septmeber 13, 2020.

Dated: August 20, 2020.

Matthew J. Baer,

Captain, U.S. Coast Guard, Captain of the Port North Carolina.

[FR Doc. 2020–19430 Filed 9–1–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2020–0056]

Drawbridge Operation Regulation; Fox River, Oshkosh, WI

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations; request for comments.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule for the Canadian National Bridge, mile 55.72, over the Fox River to operate remotely. The request was made by the bridge owner. This test deviation will test the remote operations with tenders onsite, and will not change the operating schedule of the bridge.

DATES: This deviation is effective without actual notice from September 2, 2020 through 11:59 p.m. on October 8, 2020. For purposes of enforcement, actual notice will be used from 12:01 a.m. on April 26, 2020 to September 2, 2020 Comments and relate material must reach the Coast Guard on or before October 9, 2020.

ADDRESSES: You may submit comments identified by docket number USCG–2020–0056 using Federal eRulemaking Portal at *https://www.regulations.gov.*

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this test deviation, call or email Mr. Lee D. Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone 216–902–6085, email *Lee.D.Soule@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Background, Purpose and Legal Basis

In 2010 we published a Notice of Proposed Rule Making (NPRM) (USCG–2010–1029) to solicit comments concerning allowing the Canadian National Bridge, mile 55.72, over the Fox River to operate remotely. In addition to the regular remote monitoring equipment, the public requested that the bridge owner install and maintain additional warning lights. The NPRM was withdrawn because the railroad refused to install and maintain the additional warning lights the public requested. Recently, the Railroad has agreed that from April 27 through October 7 additional warning lights, specifically those alternating flashing red lights that mimic a Grade Crossing Signal commonly found at highway railroad crossing would be installed and maintained to warn mariners that the bridge was about to close. The remote operator shall also announce that the bridge is opening or closing on VHF–FM Marine Radiotelephone. The owners of the bridge shall maintain two board gauges in accordance with 33 CFR 118.160 of this chapter. The remote drawtender may be contacted by mariners at any time by radiotelephone or commercial phone number; this information shall be so posted on the bridge so that they are plainly visible to vessel operators approaching the up or downstream side of the bridge. The drawbridge currently operates under Title 33 of the Code of Federal Regulation (CFR), section 117.1087.

The bridge was remotely operated without authorization and was ordered to reinstate drawtenders at the bridge after the District Commander received numerous complaints that the bridge was not responsive.

The test deviation is necessary to allow the public to observe the bridge in operation and allow the permanent and seasonal residents of the area the opportunity to comment on the operation of the bridge.

Most of the marine traffic at the bridge is recreational to include both powered and unpowered vessels. Approximately 100 vessels pass through the bridge on average each day and most vessels require the bridge to open.

The test schedule will run from 12:01 a.m. on April 26, 2020 to 11:59 p.m. on October 8, 2020. During this test schedule, the bridge will operate remotely with tenders at the bridge to monitor the effectiveness of the remote equipment. The bridge owner will continue to maintain a drawtender's log and provide those logs at the end of the test deviation. Vessels able to safely pass under the bridge without an opening may do so at any time.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

II. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Documents mentioned in this test deviation as being available in this docket and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

Dated: 12 August 2020.

D.L. Cottrell,

Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.

[FR Doc. 2020–18084 Filed 9–1–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2020–0247]

RIN 1625–AA00

Safety Zone; I–5 Bridge Construction Project, Columbia River, Vancouver, WA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain waters of the Columbia River. This action is necessary to provide for the safety of life on these navigable waters around the Northbound I–5 Interstate Bridge at Columbia River Mile 106.5. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Columbia River.

DATES: This rule is effective from 12:01 a.m. on September 6, 2020, through 11:59 p.m. on September 26, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0247 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 Lieutenant Commander Dixon Whitley, Waterways Management Division, Marine Safety Unit Portland, U.S. Coast Guard; telephone 503–240–9319, email *msupdxwwm@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Oregon Department of Transportation notified the Coast Guard that they will be replacing bridge components at the south end of the Northbound I–5 Interstate Bridge over the Columbia River at River Mile 106.5 beginning September 6, 2020, through September 26, 2020. In response, on June 22, 2020, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Safety Zone; I–5 Bridge Construction Project, Columbia River, Vancouver, WA (85 FR 37397). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this construction project. During the comment period that ended July 22, 2020, we did not receive any relevant comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of Port Sector Columbia River has determined that the potential hazards associated with the construction project would be a safety concern for anyone within the designated area of the I–5 bridge construction project. The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters within the designated area of the I–5 bridge construction project.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no relevant comments on our NPRM published June 22, 2020. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a safety zone from 12:01 a.m. on September 6, 2020, through 11:59 p.m. on September 26, 2020. The safety zone will cover all navigable waters of the Columbia River, directly below the lifting span of the I–5 bridge from the Washington shoreline to the edge of the lifting span (approx. 800 ft.), and approximately 400 ft. both east and west of the bridge. The duration of the zone is intended to ensure the safety of vessels and these navigable waters while the bridge construction is underway. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, duration, and time-of-year of the safety zone. Vessel traffic would be able to safely transit around this safety zone, which would only impact a small designated area of the Columbia River, during the bridge construction project. Moreover, the Coast Guard will issue Broadcast Notice to Mariners via VHF–FM marine channel 16 about the safety zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting 20 days that will prohibit vessel traffic from transiting underneath the lift span of the I–5 Bridge during bridge repair and construction operations. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard is amending 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.T13–0247 to read as follows:

§ 165.T13 0247 Safety Zone[s]; Safety Zone; I–5 Bridge Construction Project, Columbia River, Vancouver, WA.

(a) *Location.* The following area is a safety zone: All navigable waters of the Columbia River, surface to bottom, encompassed by a line connecting the following points beginning at the shoreline at 45°37′17.7″ N/122°40′31.4″ W, southwest to 45°37′12.1″ N/122°40′35.0″ W, southeast to 45°37′08.8″ N 122°40′22.1″ W, thence northeast to 45°37′15.0″ N/122°40′18.3″ W, and along the shoreline back to the beginning point.

(b) *Definitions.* As used in this section, *designated representative* means any Coast commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Columbia River (COTP) to act on his behalf, or a Federal, State, and local officer designated by or assisting the Captain of the Port Columbia River in the enforcement of the safety zone.

(c) *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) Vessel operators desiring to enter or operate within the safety zone may contact the COTP's on-scene designated representative by calling 503–209–2468 or the Sector Columbia River Command Center on Channel 16 VHF–FM. 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.

(d) *Enforcement period.* This section is in effect from 12:01 a.m. on September 6, 2020 through 11:59 p.m. on September 26, 2020. It will be subject to enforcement this entire period unless the Captain of the Port, Columbia River determines it is no longer needed. The Coast Guard will inform mariners of any change to this period of enforcement via Broadcast Notice to Mariners.

Dated: August 6, 2020.

J.C. Smith,

Captain, U.S. Coast Guard, Captain of the Port Columbia River.

[FR Doc. 2020–17913 Filed 9–1–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2020–0447]

RIN 1625–AA00

Safety Zone; Beals Island Bridge Demolition, Moosabec Reach, Jonesport, ME

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of Moosabec Reach, ME within a 500-yard radius of the Beals Island Bridge between Jonesport, ME and Beals Island, ME. The Safety Zone is needed to protect personnel, vessels, and the marine environment from the potential hazards created by underwater explosives demolition of the Beals Island Bridge. This Safety Zone prohibits persons and vessels from being in the safety zones unless authorized by Sector Northern New England COTP or their Designated Representative.

DATES: This rule is effective without actual notice from September 2, 2020 through 31 October 2020. For the purposes of enforcement, actual notice will be used from 17 August 2020 through September 2, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0447 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 Chief Marine Science Technician Thomas Watts, Sector Northern New England Waterways Management Division, U.S. Coast Guard; telephone 207–347–5003, email *Thomas.F.Watts@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code
COTP Captain of the Port
RNA Regulated Navigation Area
TFR Temporary Final Rule

II. Background Information and Regulatory History

On June 27, 2017, the U.S. Coast Guard District One Bridge Branch issued a permit approving the construction of the Beals Island Bridge across the Moosabec Reach in Jonesport, Maine. On September 11, 2017, the contractor selected for the project submitted their request to the Waterways Management Division of U.S. Coast Guard Sector Northern New England. The COTP Sector Northern New England determined that an RNA would be required to enforce speed, wake, and beam restrictions, as well as provide for intermittent closure of the waterway during the construction of the replacement bridge and subsequent demolition of the original structure. On October 24, 2017, the Coast Guard published a TFR entitled ''Regulated Navigation Area; Beals Island Bridge Replacement, Moosabec Reach, Jonesport, ME'' in the **Federal Register** (82 FR 49106) that would allow the Coast Guard to enforce speed and wake restrictions and prohibit vessel traffic through the RNA during bridge replacement operations on the Beals Island Bridge that could pose an imminent hazard to persons and vessels operating in the area. This rule would allow the Coast Guard to enforce additional navigation restrictions and prohibit vessel traffic during drilling, blasting, and dredging operations in support of the bridge replacement project.

In June 2020 the project manager for the Beals Island Bridge notified Coast Guard that the demolition plan had been revised to include underwater explosive demolition of the old Beals Island Bridge. The contractor requested the Coast Guard create a safety zone to prohibit vessels and persons within a 250-foot radius of the old bridge and any vessel movement within 500-yards during each blasting event in accordance with 29 CFR 1926.912. During this approximate 60-minute window, no vessels or persons will be authorized within the safety zone unless authorized by the Sector Northern New England COTP or Designated Representative.

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 the schedule for the demolition of old Beals Island Bridge was only recently finalized and timely action is needed to respond to the potential safety hazards associated with this demolition project. It is impracticable and contrary to the public interest to publish an NPRM in order to establish this safety zone by 17 August 2020 to allow for the timely demolition of old Beals Island Bridge and promote the safety of the public.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The COTP has determined that potential hazards associated with underwater explosives demolition will be a safety concern for anyone within a 500-yard radius of the old Beals Island Bridge. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during underwater explosives demolition of the old Beals Island Bridge.

IV. Discussion of the Rule

This rule establishes a safety zone from 08:00 a.m. August 17, 2020 through 11:59 p.m. October 31, 2020. Currently there are six blast events requiring closures lasting approximately one hour each. The zone will only be enforced during the periods of demolition. Notification of enforcement and blasting will be made with as much advanced notice as possible with no less than 48 hours. The safety zone covers all navigable waters of the Moosabec Reach, within approximately 500 yards of any portion of the old Beals Island Bridge approximate position 44°31′28″ N, 067°36′53″ W (NAD 83). Although we expect the blasting to be completed by October 11, 2020, we are publishing this rulemaking to be effective, and enforceable, through October 31, 2020 in case the project is delayed due to unforeseen circumstances.

The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the old Beals Island Bridge is demolished for eventual removal. No vessel or person will be permitted to enter the safety zone without obtaining permission from the Sector Northern New England COTP or designated representative.

The Coast Guard will notify the public and local mariners of this safety zone through the Local Notice to Mariners and/or Broadcast Notice to Mariners via VHF–FM marine channel 16 in advance of any scheduled enforcement period.

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, time of day, and the duration of enforcement of the safety zone. Although vessel traffic will not be able to safely transit around this safety zone when enforced, the zone will only be enforced during the blasting events. As a result, enforcement of the safety zone will be limited in duration, likely only one hour during each of the six events. Additionally, the Coast Guard will issue Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting approximately 60 minutes during six separate blasting events that will prohibit entry within 500-yards of the old Beals Island Bridge. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T01–0447 to read as follows:

§ 165.T01–0447 Safety Zone; Beals Island Bridge Demolition, Moosabec Reach, Jonesport, ME.

(a) *Location.* The following area is a safety zone: All waters from surface to bottom of Moosabec Reach within 500-yards of the old Beals Island Bridge, at approximate position 44°31′28″ N, 067°36′53″ W (NAD 83).

(b) *Definitions.* The following definitions apply to this section:

(1) *Designated Representative.* A ''Designated Representative'' is any Coast Guard Commissioned, Warrant or Petty Officer who has been designated by the Captain of the Port, Sector Northern New England (COTP), to act on his or her behalf. The Designated Representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official patrol vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(c) *Enforcement Periods.* (1) This safety zone is effective from August 17, 2020 to October 31, 2020 but will only be enforced when bridge blasting operations are in progress.

(2) The Coast Guard will utilize marine broadcasts and local notice to mariners to notify the public of the time and duration that the safety zone will be enforced. Violations of this safety zone may be reported to the COTP or the Designated Representative via VHF channel 16 or (207) 741–5465 (Coast Guard Sector Northern New England Command Center).

(d) *Regulations.* (1) The general regulations contained in 33 CFR 165.23, as well as the following regulations, apply.

(2) No person or vessel is allowed within the safety zones unless authorized by the cognizant Captain of the Port or their Designated Representative.

(3) During periods of enforcement, all persons and vessels must comply with all orders and directions from the COTP or a COTP's designated representative.

(4) During periods of enforcement, upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light, or other means, the operator of the vessel must proceed as directed.

Dated: August 13, 2020.

B.J. LeFebvre,

Captain, U.S. Coast Guard, Captain of the Port, Sector Northern New England.

[FR Doc. 2020–18196 Filed 9–1–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2020–0545]

RIN 1625–AA00

Safety Zones; Delaware River Dredging, Marcus Hook, PA

AGENCY: Coast Guard, DHS.

ACTION: Interim final rule; request for comments.

SUMMARY: The Coast Guard is establishing temporary safety zones on the waters of the Delaware River in portions of Marcus Hook Range and Anchorage 7 off Marcus Hook Range. The safety zones will temporarily restrict vessel traffic from transiting or anchoring in portions of the Delaware River while maintenance dredging is being conducted within the Delaware River. The safety zones are needed to protect personnel, vessels and the marine environment from hazards created by dredging operations. Entry of vessels or persons into these zones is prohibited unless specifically authorized by the Captain of the Port (COTP) or his designated representatives.

DATES: This interim rule is effective without actual notice from September 2, 2020 through October 15, 2020. For the purposes of enforcement, actual notice will be used from August 25, 2020, through September 2, 2020. Comments and related material must be received by the Coast Guard on or before October 2, 2020.

ADDRESSES: You may submit comments identified by docket number USCG–2020–0545 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0545 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 Petty Officer Edmund Ofalt, Waterways Management Branch, U.S. Coast Guard Sector Delaware Bay; telephone (215) 271–4889, email *Edmund.J.Ofalt@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this interim 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 it is impracticable and contrary to the public interest. There is insufficient time to allow for a reasonable comment period prior to the start date for dredging operations. The rule must be in force by August 25, 2020, to serve its purpose of ensuring the safety of the general public from hazards associated with dredging operations.

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 mitigate the potential safety hazards associated with dredging operations in these locations.

We are soliciting comments on this rulemaking. If the Coast Guard determines that changes to the rule are necessary we will publish a subsequent rulemaking document in the **Federal Register**.

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 COTP has determined that there are potential hazards associated with dredging operations. The purpose of this rulemaking is to ensure the safety of personnel, vessels, and the marine environment within a 250-yard radius of dredging operations and all associated pipeline and equipment.

IV. Discussion of the Rule

This rule establishes safety zones from August 25, 2020, through October 15, 2020. The safety zones are necessary to facilitate annual maintenance dredging of the Delaware River in the vicinity of Marcus Hook Range and Anchorage 7 off Marcus Hook Range (as described in 33 CFR 110.157(a)(8)). Dredging will most likely be conducted with the dredge ESSEX, though other dredges may be used, along with associated dredge pipeline and boosters. The pipeline consists of a combination of floating hoses immediately behind the dredge ESSEX and submerged pipeline leading to upland disposal areas. Due to the hazards related to dredging operations, the associated pipeline and the location of submerged pipeline, safety zones are being established in the following areas:

(1) Safety zone one includes all navigable waters within 250 yards of the dredge displaying lights and shapes for vessels restricted in ability to maneuver as described in 33 CFR 83.27 and all related dredge equipment when the dredge is operating in Marcus Hook Range, and Anchorage 7. This safety zone is being established for the duration of the maintenance project. Vessels requesting to transit the safety zone must contact the dredge on VHF channel 13 or 16 at least 1 hour prior to arrival to arrange safe passage. At least one side of the main navigational channel will be kept clear for safe passage of vessels in the vicinity of the safety zone. At no time will the entire main navigational channel be closed to vessel traffic. Vessels should avoid meeting in these areas where one side of the main navigational channel is open and proceed per this rule and the Rules of the Road (33 CFR subchapter E).

(2) Safety zone two includes all the waters of Anchorage 7 off Marcus Hook Range, as described in 33 CFR 110.157(a)(8). Vessels wishing to anchor in Anchorage 7 off Marcus Hook Range while this rule is in effect must obtain permission from the COTP at least 24 hours in advance by calling (215) 271–4807. Vessels requesting permission to anchor within Anchorage 7 off Marcus Hook must be at least 650 feet in overall length. The COTP will permit, at minimum, only one vessel to anchor at a time on a ''first-come, first-served'' basis. Vessels will only be allowed to anchor for a 12 hour period. Vessels that require an examination by the Public Health Service, Customs, or Immigration authorities will be directed to an anchorage by the COTP for the required inspection. Vessels are encouraged to use Anchorage 9 near the entrance to Mantua Creek, Anchorage 10 at Naval Base, Philadelphia, and Anchorage 6 off Deepwater Point Range as alternative anchorages.

Preference is being given to vesesls at least 650 feet in length in the Anchorage 7 while this rule is in effect because vessels of this size are limited in their ability to utilize other anchorages due to draft. The depth of Anchorage 7 provides an acceptable depth for large vessels to bunker and stage for facility arrival. Smaller vessels maintain a host of other options to include, but are not limited to Anchorage 9 and 10 as recommended above.

Entry into, transiting, or anchoring within safety zone one is prohibited unless vessels obtain permission from the COTP or make satisfactory passing arrangements with the operating dredge per this rule and the Rules of the Road (33 CFR subchapter E). The COTP may issue updates regarding the vessel and equipment being utilized for these dredging operations via Marine Safety Information Bulletin and Broadcast Notice to Mariners.

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 size, location, duration, and traffic management of the safety zones. The safety zones will be enforced in an area and in a manner that does not conflict with transiting commercial and recreational traffic. At least one side of the main navigational channel will be open for vessels to transit at all times. Moreover, the Coast Guard will work in coordination with the pilots to ensure vessel traffic can transit the area safely.

Although this regulation will restrict access to regulated areas, the effect of this rule will not be significant because there are a number of alternate anchorages available for vessels to anchor. Furthermore, vessels may transit through the safety zones with the permission of the COTP or make satisfactory passing arrangements with the dredge ESSEX, or other dredge(s) that may be used in accordance with this rule and the Rules of the Road (33 CFR subchapter E). The Coast Guard will notify the maritime public about the safety zones through maritime advisories, allowing mariners to alter their plans accordingly.

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 zones 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 safety zones to protect waterway users that would prohibit entry within 250 yards of dredging operations and will close only one side of the main navigation channel. Vessels can request permission to enter the channel. It is categorically excluded from further review under paragraph L[60a] 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.

VI. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *https://*

www.regulations.gov. If your material cannot be submitted using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's Correspondence System of Records notice (84 FR 48645, September 26, 2018).

Documents mentioned in this interim final rule as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions.

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.T05–0545 to read as follows:

§ 165.T05–0545 Safety Zones, Delaware River Dredging; Marcus Hook, PA.

(a) *Location.* The following areas are safety zones:

(1) Safety zone one includes all waters within 250 yards of the dredge displaying lights and shapes for vessels restricted in ability to maneuver as described in 33 CFR 83.27, as well as all related dredge equipment, while the dredge is operating in Marcus Hook Range. For enforcement purposes Marcus Hook Range includes all navigable waters of the Delaware River shoreline to shoreline, bound by a line drawn perpendicular to the center line of the channel at the farthest upriver point of the range to a line drawn perpendicular to the center line of the channel at the farthest downriver point of the range.

(2) Safety zone two includes all the waters of Anchorage 7 off Marcus Hook Range, as described in 33 CFR 110.157(a)(8) and depicted on U.S. Nautical Chart 12312.

(b) *Definitions.* As used in this section, *designated representative* means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port to assist with enforcement of the safety zone described in paragraph (a) of this section.

(c) *Regulations.* (1) Entry into or transiting within the safety zone one is prohibited unless vessels obtain permission from the Captain of the Port via VHF–FM channel 16 or 215–271–4807, or make satisfactory passing arrangements via VHF–FM channel 13 or 16 with the operating dredge per this section and the rules of the road (33 CFR subchapter E). Vessels requesting to transit shall contact the operating dredge via VHF–FM channel 13 or 16 at least 1 hour prior to arrival.

(2) Vessels desiring to anchor in safety zone two, Anchorage 7 off Marcus Hook Range, must obtain permission from the Captain of the Port (COTP) at least 24 hours in advance by calling (215) 271–4807. The COTP will permit, at minimum, one vessel at a time to anchor on a ''first-come, first-served'' basis. Vessels will only be allowed to anchor for a 12 hour period. Vessels that require an examination by the Public Health Service, Customs, or Immigration authorities will be directed to an anchorage for the required inspection by the COTP.

(3) Vessels desiring to anchor in safety zone two, Anchorage 7 off Marcus Hook Range, must be at least 650 feet in length overall.

(4) This section applies to all vessels except those engaged in the following operations: Enforcement of laws, service of aids to navigation, and emergency response.

(d) *Enforcement.* The U.S. Coast Guard may be assisted by Federal, state, and local agencies in the patrol and enforcement of the zone.

(e) *Enforcement period.* This section will be enforced from August 25, 2020, through October 15, 2020, unless cancelled earlier by the Captain of the Port.

Dated: August 25, 2020.

Jonathan D. Theel,

Captain, U.S. Coast Guard, Captain of the Port, Delaware Bay.

[FR Doc. 2020–19328 Filed 9–1–20; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2018–0716; FRL–10012–88–Region 6]

Air Plan Approval; Texas; Beaumont-Port Arthur Area Second Maintenance Plan for 1997 Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is approving a revision to the Texas State Implementation Plan (SIP). The EPA is approving a second ten-year maintenance plan for maintaining the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS or standard) through 2032 in the Beaumont-Port Arthur (BPA) area.

DATES: This rule is effective on October 2, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2018–0716. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jeff Riley, EPA Region 6 Office, Infrastructure and Ozone Section, 214–665–8542, *riley.jeffrey@epa.gov.* Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID–19. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

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

I. Background

The background for this action is discussed in detail in our June 8, 2020 Proposal (85 FR 35041, ''Proposal''). In that document we proposed to approve, as a revision to the Texas SIP, an updated (second) 1997 ozone NAAQS maintenance plan for the BPA area. On

February 5, 2019, the Texas Commission on Environmental Quality (TCEQ) submitted the second maintenance plan for the BPA area. The maintenance plan is designed to keep the area in attainment of the 1997 ozone NAAQS through the end of the second 10-year maintenance period (2032).

Our June 8, 2020 Proposal provided a detailed description of the revisions [1] and the rationale for EPA's proposed action, together with a discussion of the opportunity to comment. The public comment period for the action closed on July 8, 2020. See the docket for this rulemaking for a copy of the public comments received and our Proposal at 85 FR 35041 for more information.

We received comments on our proposal from two commenters: TCEQ and an anonymous citizen. Our responses to the comments are below.

II. Response to Comments

Comment 1: TCEQ expressed support of EPA's proposed approval of the BPA area's second 10-year maintenance plan under the 1997 8-hour ozone NAAQS, and stated its intent to withdraw from EPA's consideration both the request to redesignate the BPA area to attainment for the revoked 1-hour ozone standard and the 10-year maintenance plan for the 1-hour ozone standard.

Response 1: EPA appreciates TCEQ's support of our June 8, 2020 Proposal, and informing us of their plans to withdraw the 1-hour ozone standard redesignation request and 10-year maintenance plan for the BPA area.

Comment 2: The Commenter argues that EPA cannot approve maintenance plans which rely on emission reductions attributable to Federal mobile source control strategies which EPA is actively attempting to roll back.

Response 2: We disagree with the assertion that EPA is taking steps to roll back Federal mobile source control strategies. The Commenter appears to reference the final rulemaking entitled ''The Safer Affordable Fuel Efficient (SAFE) Vehicles Final Rule for Model Years 2021–2026'' (SAFE Rule Part Two). This is the sole example given by the Commenter of EPA's alleged rollback of Federal mobile source control strategies. This rulemaking was developed by the National Highway Traffic Safety Administration (NHTSA) and EPA to finalize updated Corporate Average Fuel Economy (CAFE) and greenhouse gas (GHG) emissions standards for passenger cars and light trucks and establish new standards, covering model years 2021 through 2026. See 85 FR 24174 (April 30, 2020). We note that CAFE and GHG standards are separate and distinct from EPA standards for control of criteria pollutants from motor vehicles, such as those in the Tier 3 motor vehicle emission and fuel standards.[2] As such, auto manufacturers must simultaneously comply with unique requirements under both of these sets of standards, as well as any other Federal standards applicable to specific vehicle types. The SAFE Rule Part Two does not weaken or affect the regulatory framework for any of the Federal mobile source control strategies the State of Texas relied upon (*e.g.* Tier 1, Tier 2, and Tier 3 light-duty and medium-duty passenger vehicle standards; heavy-duty vehicle standards; low sulfur gasoline and diesel standards; National Low Emission Vehicle standards; and gasoline volatility standards) for nitrogen oxides (NO_X) and volatile organic compound (VOC) ozone precursor emissions reductions in developing the BPA area's second 10-year maintenance plan for the 1997 8-hour ozone NAAQS, and therefore the state's reliance upon these standards as valid Federal control measures is appropriate for this SIP action.

The SAFE Rule Part Two is a component of a larger proposed rulemaking [3] which also yielded the final action entitled ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program'' (One National Program). See 84 FR 51310 (September 27, 2019). The One National Program negates the ability of California and states that adopted California's zero emissions vehicle (ZEV) sales mandate and/or GHG emissions standards to enforce such standards. Neither the State of Texas nor the BPA area have adopted local tailpipe GHG emissions standards or local ZEV mandates; therefore, the One National Program rulemaking also does not affect any of the Federal mobile source control strategies relied upon by the State of Texas in developing the BPA area's second 10-year maintenance plan for the 1997 8-hour ozone NAAQS.

SAFE Rule Part Two will not result in on-road emissions increases of NO_X or VOCs in the BPA area; however, there may be some small NO_X and VOC emissions increases in area and point source emissions due to potential increases in sales, transport and production of gasoline. As was noted by the Commenter, the maintenance plan has projected some growth in emissions from these categories. Even if this growth is slightly underestimated due to SAFE Rule Part Two changes or other reasons, EPA is confident that any such underestimate would be substantially less than the overall decreases in NO_X and VOC emissions that are projected to occur between 2014 and 2032, which are discussed in the notice of proposed rulemaking for this action.

Contrary to the assertion that EPA is taking steps to roll back Federal mobile source control strategies, on January 6, 2020, the Administrator signed an Advanced Notice of Proposed Rulemaking soliciting pre-proposal comments on the Clean Truck Initiative (CTI), which, if finalized, would tighten NO_X emissions standards for heavy-duty vehicles for the first time since 2001.

Finally, we note that Texas has adopted a contingency plan, as part of the maintenance plan for the BPA area, to address possible future ozone air quality problems, as required by section 175A of the CAA. As explained in our June 8, 2020 Proposal, this contingency plan includes such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that occurs after redesignation of the area to attainment of the NAAQS. The maintenance plan provides that a monitored and certified violation of the NAAQS triggers the requirement to consider, adopt, and implement the plan's contingency measures. Additionally, in the event that any of the Federal measures upon which the State has relied are repealed or weakened, the EPA has Clean Air Act authority, pursuant to 42 U.S.C. 7410(k)(5), to require a state to revise an approved SIP if it finds that it has become substantially inadequate to maintain the NAAQS. Moreover, CAA section 175A provides the EPA discretion to require the state to submit a revised SIP should the area fail to maintain the NAAQS.

[1] The revision included motor vehicle emissions budgets (MVEBs) for the last year of the maintenance plan (in this case 2032). Since EPA's current transportation conformity regulation requires a regional emissions analysis only during the time period beginning one year after a nonattainment designation for a particular NAAQS until the effective date of revocation of that NAAQS (40 CFR 93.109(c)), a regional emissions analysis using MVEBs is not required for conformity determinations for the 1997 ozone NAAQS because that NAAQS has been revoked (80 FR 12264).

[2] See 79 FR 23414 (April 28, 2014).

[3] On August 24, 2018, the EPA and the NHTSA jointly published in the **Federal Register** a notice of proposed rulemaking entitled, ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks.'' In the NPRM, EPA proposed new GHG standards and NHTSA proposed new CAFE standards for model year 2021 to 2026 light duty vehicles. EPA also proposed to withdraw the waiver it had previously provided to California for that State's model year 2021 to 2025 GHG and ZEV standards under section 209 of the Clean Air Act. See 83 FR 42986.

II. Final Action

We are approving the second maintenance plan for the 1997 ozone NAAQS for the BPA area, submitted by TCEQ on February 5, 2019, as a revision to the Texas SIP. This maintenance plan is designed to keep the area in attainment of the 1997 ozone NAAQS through the second 10-year maintenance period. As further explained in our Proposal, we are not approving the submitted 2032 NO_X and VOC motor vehicle emissions budgets (MVEBs) for transportation conformity purposes because a regional emissions analysis using MVEBs is not required for conformity determinations for the 1997 ozone NAAQS because that NAAQS has been revoked. We are finding that the projected emissions inventory which reflects these budgets is consistent with maintenance of the revoked 1997 ozone standard. This action is being taken under section 175A of the Act.

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

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

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

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

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

List of Subjects in 40 CFR Part 52

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

Dated: August 3, 2020.

Kenley McQueen,

Regional Administrator, Region 6.

For the reasons stated in the preamble, EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart SS—Texas

■ 2. In § 52.2270, in paragraph (e), amend the table ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP'' by adding an entry for ''Beaumont-Port Arthur Second 10-Year Maintenance Plan for the 1997 8-hour Ozone Standard.'' at the end of the table to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(e) * * *

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

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/ effective date	EPA approval date	Comments
* * *	*	*	*	*
Beaumont-Port Arthur Second 10-Year Maintenance Plan for the 1997 8-hour Ozone Standard.	Hardin, Jefferson and Orange Counties.	2/5/2019	9/2/2020, [Insert **Federal Register** citation].	

* * * * *

[FR Doc. 2020–17228 Filed 9–1–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2019–0217; FRL–10013–28–Region 4]

Air Plan Approvals; KY; Prevention of Significant Deterioration and Modeling Infrastructure Requirements for 2015 Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve portions of the Kentucky infrastructure State Implementation Plan (SIP) submission for the 2015 8-hour ozone National Ambient Air Quality Standards (NAAQS) submitted to EPA in a letter dated January 11, 2019. Whenever EPA promulgates a new or revised NAAQS, the Clean Air Act (CAA or Act) requires that each state adopt and submit a SIP submission to establish that the state's SIP meets infrastructure requirements for the implementation, maintenance, and enforcement of each such NAAQS. Specifically, EPA is taking final action to approve portions of the Kentucky infrastructure SIP submission that address the prevention of significant deterioration (PSD) and modeling requirements for the 2015 8-hour ozone NAAQS.

DATES: This rule is effective October 2, 2020.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2019–0217. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials can either be retrieved electronically via *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Andres Febres, 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) 562–8966. Mr. Febres can also be reached via electronic mail at *febres-martinez.andres@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Overview

On October 1, 2015, EPA promulgated revised primary and secondary NAAQS for ozone, revising the 8-hour ozone standards from 0.075 parts per million (ppm) to a new more protective level of 0.070 ppm. *See* 80 FR 65292 (October 26, 2015). Pursuant to section 110(a)(1) of the CAA, states are required to submit SIP revisions meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements, and legal authority that are designed to assure attainment and maintenance of the NAAQS. This particular type of SIP is commonly referred to as an ''infrastructure SIP.'' States were required to submit such SIP revisions for the 2015 8-hour ozone NAAQS to EPA no later than October 1, 2018.[1]

As explained in a notice of proposed rulemaking (NPRM) published on July 6, 2020 (85 FR 40165), Kentucky cites to several regulations [2] to demonstrate that their respective SIPs meet the PSD-related requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (Prong 3),[3] 110(a)(2)(J), and 110(a)(2)(K). In addition to the regulations approved into the SIP, a state may also rely on EPA's January 17, 2017 (82 FR 5182), final rulemaking entitled, ''*Revisions to the Guideline on Air Quality Models: Enhancements to the AERMOD Dispersion Modeling System and Incorporation of Approaches To Address Ozone and Fine Particulate Matter*'' (also referred to as the 2017 *Guideline*) [4] to satisfy the modeling requirements of Section 110(a)(2)(K). On February 4, 2020, the Commonwealth of Kentucky submitted a letter to EPA to demonstrate that its existing SIP-approved regulations provide the state with the authority to integrate and implement the requirements and recommendations of the current version of EPA's 2017 *Guideline*. In its February 4, 2020, letter, the Commonwealth clarified that, pursuant to 401 KAR 50:040 and 401 KAR 51:017, the Commonwealth has the authority to use

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

[2] Kentucky's January 11, 2019, infrastructure SIP submission cites several SIP-approved regulations under Chapters 50 and 51, including the following: 401 KAR 51:010,1 *Attainment status designations;* 401 KAR 51:017, *Prevention of significant deterioration of air quality*; and 401 KAR 50:040, *Air quality models,* to meet the PSD program requirements of sections 110(a)(2)(C),110(a)(2)(D)(i)(II) (Prong 3), 110(a)(2)(J), and 110(a)(2)(K).

[3] Section 110(a)(2)(D)(i)(II) contains a provision that prohibits emissions activity in one state from interfering with measures required to prevent significant deterioration of air quality in another state, which is commonly referred to as ''prong 3.''

[4] EPA's *Guideline on Air Quality Models* is codified at 40 CFR part 51, Appendix W and is generically referred to as *Guideline* herein.

alternative modeling, and that modeling based on the *Guideline,* as published on January 17, 2017, is the most appropriate.[5]

EPA has evaluated Kentucky's January 11, 2019, submittal [6] and the February 4, 2020, letter and is making the determination that Kentucky has demonstrated that it has the authority to use the 2017 *Guideline,* and notes that the February 4, 2020, letter includes KY DAQ's determination that the 2017 *Guideline* is most appropriate for use. Accordingly, EPA is taking final action to approve Kentucky's use of the 2017 *Guideline* as outlined in KY DAQ's February 4, 2020, letter and making a finding that Kentucky's infrastructure SIP submission demonstrates that new major sources and major modifications in areas of the Commonwealth designated attainment or unclassifiable for the specified NAAQS are subject to a federally-approved PSD permitting program meeting all the current structural requirements of part C of title I of the CAA to satisfy the infrastructure SIP PSD elements. EPA also concludes that Kentucky's infrastructure SIP submission, supplemented with the February 4, 2020, letter, meets the requirements of 110(a)(2)(C) for the infrastructure requirements for the 2015 8-hour ozone NAAQS.

In the NPRM published on July 6, 2020, EPA proposed approval of Kentucky's infrastructure submission provided on January 11, 2019, for the applicable infrastructure SIP requirements of the 2015 8-hour ozone NAAQS. The NPRM provides additional detail regarding the background and rationale for EPA's action. Comments on the NPRM were due on or before July 27, 2020. EPA did not receive any comments during the comment period.

II. Final Action

EPA is taking final action to approve the portions of Kentucky's January 11, 2019, 2015 8-hour ozone infrastructure SIP submission that address the PSD-related requirements of CAA sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (prong 3), and 110(a)(2)(J), and modeling requirements related to CAA section 110(a)(2)(K). All other outstanding applicable infrastructure requirements for this SIP submission have been or will be addressed in separate rulemakings.

III. 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. These actions merely approve state law as meeting Federal requirements and do not impose additional requirements beyond those imposed by state law. For that reason, these actions:

- Are not significant regulatory actions subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Are not Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory actions because SIP approvals are exempted under Executive Order 12866;
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Do 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 SIPs subject to these actions are not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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

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

List of Subjects in 40 CFR Part 52

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

Dated: July 31, 2020.

Mary Walker,

Regional Administrator, Region 4.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as follows:

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[5] See February 4, 2020, letter ''RE: Clarification of the use of Appendix W within Kentucky's 2015 8-hour Ozone Infrastructure SIP submittal'' from Melissa Duff, Director of Division of Air Quality for Kentucky Energy and Environment Cabinet, Department of Environmental Protection to Mary S. Walker, Regional Administrator for U.S. Environmental Protection Agency, Region 4. The February 4, 2020, letter is in the docket for this proposed rulemaking.

[6] The Commonwealth of Kentucky submitted its infrastructure submission through the State Planning Electronic Collaboration System on January 9, 2019; however, the cover letter of the submittal is dated January 11, 2019.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart S—Kentucky

■ 2. In § 52.920 amend the table in paragraph (e) by adding an entry for ''110(a)(1) and (2) Infrastructure Requirements for the 2015 8-Hour Ozone NAAQS'' at the end of the table to read as follows:

§ 52.920 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED KENTUCKY NON-REGULATORY PROVISIONS

Name of non-regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approval date	Explanations
* *	*	*	*	* *
110(a)(1) and (2) Infrastructure Requirements for the 2015 8-Hour Ozone NAAQS.	Kentucky	1/11/2019	9/2/2020, [Insert citation of publication].	Addressing PSD provisions related to major sources under sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (prong 3), and 110(a)(2)(J), and air quality modeling under section 110(a)(2)(K).

[FR Doc. 2020–17263 Filed 9–1–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2019–0412; FRL–10011–59–Region 10]

Determination of Failure To Attain by the Attainment Date and Denial of Serious Area Attainment Date Extension Request; AK: Fairbanks North Star Borough 2006 24-Hour Fine Particulate Matter Serious Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing the determination that the Fairbanks North Star Borough nonattainment area failed to attain the 2006 24-hour fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) by the December 31, 2019 ''Serious'' area attainment date. This determination is based on complete, quality-assured and certified $PM_{2.5}$ monitoring data for 2017 through 2019. The EPA is also finalizing the denial of the State's request for an extension of the Serious area attainment date for the Fairbanks North Star Borough nonattainment area. Based on this final action, the State will be subject to further statutory and regulatory requirements for this area, including a new State Implementation Plan (SIP) submission meeting additional requirements that the State must submit by December 31, 2020.

DATES: The final rule is effective October 2, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2019–0412. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at *https://www.regulations.gov,* or please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Matthew Jentgen at (206) 553–0340, or *jentgen.matthew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' is used, it is intended to refer to the EPA.

Table of Contents

I. Background Information

On May 19, 2020, the EPA proposed to determine that the Fairbanks North Star Borough $PM_{2.5}$ nonattainment area (Fairbanks $PM_{2.5}$ Nonattainment Area) failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by the December 31, 2019, Serious area attainment date (85 FR 29879). The EPA also proposed to deny the State's request for an extension of the Serious area attainment date for the Fairbanks $PM_{2.5}$ Nonattainment Area. The reasons for our proposed actions were included in the notice of proposed rulemaking and will not be restated here. The public comment period for our proposed action ended on June 18, 2020.

The EPA received three comments on the proposed actions. Two comments were supportive of the actions as proposed. These comments also raised additional issues related to air quality planning and monitoring in the Fairbanks North Star Borough. These issues are beyond the scope of the proposed actions. The EPA notes that, as a result of failing to attain the NAAQS by the Serious area attainment date, the State is required to submit a revised nonattainment plan that meets the requirements of CAA Section 189(d) by December 31, 2020. The public will have the opportunity to comment on these plan revisions.

The final comment the EPA received was clearly not related to these actions and thus not adverse to these actions. The comment lacked the required specificity to the proposed actions and did not recommend a different action than the one proposed. Therefore, the EPA is finalizing the actions as proposed.

II. Final Action

Pursuant to CAA section 179(c)(1), the EPA is making a final determination that the Fairbanks $PM_{2.5}$ Nonattainment Area did not attain the NAAQS by the applicable outermost Serious area attainment date of December 31, 2019, in accordance with CAA section

188(c)(2). In accordance with CAA section 188(e) and 40 CFR 51.1005(b), the EPA is also finalizing the denial of the State's request to extend the Serious area attainment date.

III. Statutory and Executive Order Reviews

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

These actions are exempt from review by the Office of Management and Budget (OMB) because the actions satisfy the CAA obligation to make a determination of attainment based on an area's air quality as of the attainment date and deny an attainment date extension request.

B. Executive Order 13771: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

These actions are not Executive Order 13771 regulatory actions because they are not significant regulatory actions under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

These actions do not impose any additional information collection burden under the provisions of the PRA, 44 U.S.C. 3501 *et seq.* Neither the action to find that the Fairbanks $PM_{2.5}$ Nonattainment Area failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by the Serious area attainment date, nor the denial of the attainment extension request establish any new information collection burden not already covered under OMB control number 2060–0611.

D. Regulatory Flexibility Act (RFA)

I certify that these actions will not have a significant economic impact on a substantial number of small entities under the RFA. These actions will not impose any requirements on small entities. Neither a determination that the Fairbanks $PM_{2.5}$ Nonattainment Area failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by the Serious area attainment date, nor a denial of an attainment date extension request create any new requirements or directly regulate any entities.

E. Unfunded Mandates Reform Act (UMRA)

These actions do not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and do not significantly or uniquely affect small governments. These actions do not impose additional requirements beyond those imposed by state law. Thus, these actions impose no enforceable duty on any state, local or tribal governments or the private sector.

F. Executive Order 13132: Federalism

These actions do not have federalism implications. They 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

These actions do not have tribal implications as specified in Executive Order 13175. The CAA and the Tribal Authority Rule establish the relationship of the federal government and tribes in developing plans to attain the NAAQS, and these actions do nothing to modify that relationship. Thus, Executive Order 13175 does not apply to these actions.

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

These actions are not subject to Executive Order 13045 because they are not economically significant as defined in Executive Order 12866, and because the EPA does not believe any environmental health or safety risks addressed by these actions present a disproportionate risk to children.

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

These actions are not subject to Executive Order 13211, because they are not significant regulatory actions under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

These actions are not subject to the requirements of Section 12(d) of the NTTAA because these actions do not involve technical standards.

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

The EPA believes that these actions do 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). Pursuant to the CAA, these actions determine that the Fairbanks $PM_{2.5}$ Nonattainment Area did not attain by the applicable attainment date and deny the state's attainment date extension request.

L. Congressional Review Act (CRA)

These actions are 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. These actions are not a ''major rule'' as defined by 5 U.S.C. 804(2).

M. Judicial Review

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: July 28, 2020.

Christopher Hladick,

Regional Administrator, Region 10.

[FR Doc. 2020–17541 Filed 9–1–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2020–0103; FRL–10012–91–Region 4]

Air Plan Approval; KY; Jefferson County Existing and New Miscellaneous Metal Parts and Products Surface Coating Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving revisions to the Jefferson County portion of the Kentucky State Implementation Plan (SIP), submitted by the Commonwealth of Kentucky (Commonwealth), through

the Energy and Environment Cabinet (Cabinet) on September 5, 2019. The revisions were submitted by the Cabinet on behalf of the Louisville Metro Air Pollution Control District and make a singular change to two regulations for clarity purposes regarding the applicability of exempt surface coating standards for existing and new miscellaneous metal parts and products operations. EPA is approving the change to both regulations as it is consistent with the Clean Air Act (CAA or Act).

DATES: This rule is effective October 2, 2020.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2020–0103. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT:
Sarah LaRocca, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–8994. Ms. LaRocca can also be reached via electronic mail at *larocca.sarah@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

EPA is approving a change to Regulation 6.31, *Standard of Performance for Existing Miscellaneous Metal Parts and Products Surface Coating Operations,* and Regulation 7.59, *Standard of Performance for New Miscellaneous Metal Parts and Products Surface Coating Operations,* of the Jefferson County portion of the Kentucky SIP, submitted by the Commonwealth on September 5, 2019. The change clarifies the applicability of the surface coating standard exemptions as it pertains to Section 3 of Regulations 6.31 and 7.59. The SIP revisions ensure consistency across the regulations and update the current SIP-approved version of Regulation 6.31 (Version 6) and Regulation 7.59 (Version 6) to Version 7 of each.

EPA has found that surface coatings of miscellaneous metal parts and products operations emit hazardous air pollutants (HAP). *See* 69 FR 129 (January 2, 2004). Regulation of these sources protects air quality and promotes public health by reducing HAP emissions into the environment. The organic HAP emitted by surface coatings and miscellaneous metal parts and products operations are volatile organic compounds (VOC), as defined by 40 CFR 51.100(s).[1]

Tropospheric ozone, commonly known as smog, occurs when VOC and nitrogen oxides (NOx) react in the atmosphere. Because of the harmful health effects of ozone, EPA limits the VOC and NOx emissions that can be released into the atmosphere. VOC are compounds of carbon excluding carbon monoxide, carbon dioxide, and carbonates, and ammonium carbonate, which participate in atmospheric photochemical reactions, including in the formation of ozone. The compounds of carbon (or organic compounds) have different levels of photochemical reactivity; therefore, they do not form ozone to the same extent.

II. Analysis of State Submission

Jefferson County Air Quality Regulations 6.31 and 7.59 address VOC emitted by miscellaneous metal parts and products surface coating operations at existing and new facilities, respectively. In this action, EPA is approving a change to these two regulations. In Paragraph 5.1 of Section 5, *Exemptions,* of both regulations, clarifying text is being added to ensure consistency with Paragraph 5.2. In the SIP-approved versions of these regulations, Paragraph 5.1 lists the types of surface coatings that are ''exempt from this regulation'' and Paragraph 5.2 exempts any affected facility from Section 3 (Standards for Volatile Organic Compounds) if the total VOC emissions[2] from all affected facilities subject to this regulation are less than or equal to five tons per year. The SIP revisions create consistency between Paragraphs 5.1 and 5.2 by clarifying that the exemption in Paragraph 5.1 applies only to Section 3 (*i.e.,* the phrase ''exempt from this regulation'' is replaced with ''exempt from the standards in Section 3 of this regulation''). These revisions do not change how the regulation operates and solely serves as an update to clarify that the exemption only applies to emissions standards in each regulation, as recordkeeping requirements are still explicitly required.

In a notice of proposed rulemaking (NPRM) published on May 4, 2020 (85 FR 26418), EPA proposed to approve the revisions to the Jefferson County portion of the Kentucky SIP, provided on September 5, 2019. Comments on the NPRM were due on or before June 3, 2020. Only one comment was received in favor of the action.

III. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of Louisville Metro Air Pollution Control District Regulation 6.31, *Standard of Performance for Existing Miscellaneous Metal Parts and Products Surface Coating Operations,* Version 7, and Regulation 7.59, *Standard of Performance for New Miscellaneous Metal Parts and Products Surface Coating Operations,* Version 7, state effective June 19, 2019. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[3]

IV. Final Action

EPA is approving the Louisville Metro Air Pollution Control District's September 5, 2019, SIP submission, which clarifies the applicability of

[1] Specifically, the organic HAP emitted by these operations include xylenes, toluene, methyl ethyl ketone (MEK), phenol, cresols/cresylic acid, glycol ethers (including ethylene glycol monobutyl ether (EGBE)), styrene, methyl isobutyl ketone MIBK), and ethyl benzene. *See* 69 FR 129. The aforementioned compounds are identified as VOC in 40 CFR 51.100(s)(1).

[2] Potential emissions prior to any add-on controls.

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

surface coating standard exemptions as it pertains to Section 3 of Regulation 6.13 and 7.59.

V. Statutory and Executive Order Reviews

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

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

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

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

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

List of Subjects in 40 CFR Part 52

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

Dated: July 31, 2020.

Mary Walker,

Regional Administrator, Region 4.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart (S)—Kentucky

■ 2. In 52.920 amend Table 2 in paragraph (c) by:

■ a. Under ''Reg 6—Standards of Performance for Existing Affected Facilities'' revising the entry for ''6.31''; and

■ b. Under ''Reg 7—Standards of Performance for New Affected Facilities'' revising the entry for ''7.59''.

The revisions read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

TABLE 2—EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY

Reg	Title/subject	EPA approval date	**Federal Register** notice	District effective date	Explanation
*	*	*	*	*	*
Reg 6—Standards of Performance for Existing Affected Facilities					
*	*	*	*	*	*
6.31	Standards of Performance for Existing Miscellaneous Metal Parts and Products Surface Coating Operations.	9/2/20	[Insert citation of publication]	6/19/19	

TABLE 2—EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY—Continued

Reg	Title/subject	EPA approval date	Federal Register notice	District effective date	Explanation
*	*	*	*	*	*
Reg 7—Standards of Performance for New Affected Facilities					
*	*	*	*	*	*
7.59	Standards of Performance for New Miscellaneous Metal Parts and Products Surface Coating Operations.	9/2/20	[Insert citation of publication]	6/19/19	
*	*	*	*	*	*

* * * * *

[FR Doc. 2020–17229 Filed 9–1–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 121004518–3398–01; RTID 0648–XA446]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Re-Opening of Recreational Sector for Gulf of Mexico Gray Triggerfish

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

ACTION: Temporary rule; re-opening.

SUMMARY: NMFS announces the re-opening of the recreational sector for gray triggerfish in the exclusive economic zone (EEZ) of the Gulf of Mexico (Gulf) through this temporary rule. The most recent recreational landings of gray triggerfish indicate that the recreational annual catch target (ACT) for 2020 fishing year has not yet been reached. Therefore, NMFS re-opens the recreational sector for gray triggerfish in the Gulf EEZ on September 1, 2020, through October 25, 2020, or until the recreational ACT is reached or projected to be reached, whichever happens first, to allow the recreational ACT to be caught.

DATES: This rule is effective 12:01 a.m., local time, September 1, 2020, until 12:01 a.m., local time, October 26, 2020.

FOR FURTHER INFORMATION CONTACT: Kelli O'Donnell, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *kelli.odonnell@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS manages the Gulf reef fish fishery, which includes gray triggerfish, under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council (Council) and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) through regulations at 50 CFR part 622. All gray triggerfish weights discussed in this temporary rule are in round weight.

The recreational annual catch limit (ACL) for Gulf gray triggerfish is 241,200 lb (109,406 kg), and the recreational ACT is 217,100 lb (98,475 kg) (50 CFR 622.41(b)(2)(iii)).

As specified in 50 CFR 622.41(b)(2)(i), NMFS is required to close the recreational sector for gray triggerfish when the recreational ACT is reached or is projected to be reached by filing a notification to that effect with the Office of the Federal Register. NMFS previously projected that the recreational ACT for the Gulf gray triggerfish for the 2020 fishing year would be reached by May 2, 2020. Accordingly, NMFS published a temporary rule in the **Federal Register** to implement the accountability measure (AM) to close the recreational sector for gray triggerfish in the Gulf EEZ effective from May 2, 2020, until the start of the 2021 fishing year on January 1, 2021 (85 FR 10624, February 25, 2020).

However, the most recent landings data for gray triggerfish now indicate the recreational ACT has not been reached. Consequently, and in accordance with 50 CFR 622.8(c), NMFS temporarily re-opens the recreational sector for gray triggerfish on September 1, 2020. The recreational sector will remain open through October 25, 2020, or until the recreational ACT is reached or projected to be reached, whichever happens first. Re-opening the recreational sector allows participants in that sector an additional opportunity to harvest gray triggerfish while minimizing the risk of exceeding the recreational ACT.

Once the recreational sector closes again on October 26, 2020, or sooner if the recreational ACT is reached or projected to be reached, the bag and possession limits for gray triggerfish in or from the Gulf EEZ are zero. The prohibition on possession of Gulf gray triggerfish also applies in Gulf state waters for any vessel issued a valid Federal charter vessel/headboat permit for Gulf reef fish.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required under 50 CFR 622.8(c) which was issued pursuant to section 304(b) of the Magnuson-Stevens Act, and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best scientific information available. The Assistant Administrator for NOAA Fisheries (AA), finds that the need to immediately implement this action to temporarily re-open the recreational sector for gray triggerfish constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such procedures are unnecessary and contrary to the public interest. Such procedures are unnecessary because the regulations at 50 CFR 622.8(c) and the rule implementing the recreational ACT and AMs have already been subject to notice and comment, and all that remains is to notify the public of the re-opening. Such procedures are contrary to the public interest because of the need to immediately implement this action to allow recreational fishers to harvest the remainder of the recreational ACT beginning on September 1, 2020. Prior notice and opportunity for public comment would require time and would delay the re-opening of the recreational sector. Opening the recreational sector by September 1 provides an opportunity for recreational fishers to make trips during the early fall when the weather is generally more favorable. A delay of reopening until October increases the likelihood of inclement weather and the chance that recreational trips will not be possible.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: August 27, 2020.

Jennifer M. Wallace,

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

[FR Doc. 2020–19324 Filed 8–28–20; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 200730–0202]

RTID 0648–XA341

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fishery; 2020 Illex Squid Quota Harvested

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

ACTION: Temporary rule; reduction of possession limit.

SUMMARY: Federal *Illex* squid vessel permit holders are prohibited from fishing for, catching, possessing, transferring or landing more than 10,000 lb (4,535 kg) of *Illex* squid per trip, and from landing *Illex* squid more than once per calendar day. This prohibition is required when NMFS projects that 95 percent of the 2020 annual catch limit will have been caught by the effective date. This action is intended to prevent over-harvest of *Illex* squid for the fishing year.

DATES: Effective 0001 hr local time, August 31, 2020, through December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Alyson Pitts, Fishery Management Specialist, (978) 281–9352.

SUPPLEMENTARY INFORMATION: Regulations for the *Illex* squid fishery are at 50 CFR part 648. The regulations at § 648.24(a)(2) require that when the Regional Administrator projects that *Illex* squid catch will reach 95 percent of the domestic annual harvest (DAH) quota, NMFS must prohibit Federal *Illex* squid vessel permit holders from directed fishing. Vessels may not catch, possess, transfer, or land more than 10,000 lb (4,535 kg) of *Illex* squid per trip, or land *Illex* squid more than once per calendar day. The Regional Administrator monitors the *Illex* squid fishery catch based on dealer reports, state data, and other available information. When 95 percent of the DAH has been reached, NMFS must provide at least 72 hours of notice to the public that it made this determination. NMFS must also publish the date that the catch is projected to reach 95 percent of the quota, and the date when prohibitions on catch and landings for the remainder of the fishing year become effective.

The Regional Administrator has determined, based on dealer reports and other available information, that the *Illex* squid fleet will catch 95 percent of the total *Illex* squid DAH quota for the 2020 season through December 31, 2020, by August 31, 2020. Therefore, effective 0001 August 31, 2020, federally permitted vessels may not fish for, catch, possess, transfer, or land more than 10,000 lb (4,535 kg) of *Illex* squid, and may not land *Illex* squid more than once per calendar day. Vessels that have entered port before 0001 hr on August 31, 2020, may offload and sell more than 10,000 lb (4,535 kg) of *Illex* squid from that trip. Also, federally permitted dealers may not receive *Illex* squid from federally permitted *Illex* squid vessels that harvest more than 10,000 lb (4,535 kg) of *Illex* squid through 2400 hr, December 31, 2020, unless it is from a trip landed by a vessel that entered port before 0001 hr on August 31, 2020.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 648, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

NMFS finds good cause pursuant to 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3) to waive prior notice and the opportunity for public comment and the delayed effectiveness because it would be contrary to the public interest and impracticable. Data and other information indicating the *Illex* squid fleet will have landed at least 95 percent of the 2019 DAH quota have only recently become available. Landings data are updated on a weekly basis, and NMFS monitors catch data on a daily basis as catch increases toward the limit. Further, high-volume catch and landings in this fishery increases total catch relative to the quota quickly. The regulations at § 648.24(a)(2) require such action to ensure that *Illex* squid vessels do not exceed the 2020 DAH quota. If implementation of this action is delayed, the quota for the 2020 fishing year may be exceeded, thereby undermining the conservation objectives of the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan. Also, the public had prior notice and full opportunity to comment on this process when the provisions regarding closures and the 2020 quota levels were put in place.

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

Dated: August 28, 2020.

Kelly Denit,

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

[FR Doc. 2020–19372 Filed 8–28–20; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 171
Wednesday, September 2, 2020

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0753; Product Identifier 2019–CE–033–AD]

RIN 2120–AA64

Airworthiness Directives; Pilatus Aircraft Ltd. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Pilatus Aircraft Ltd. Model PC–24 airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as overheating of the electrical wiring splices close to the right-hand pitot-static connector on frame 10. The FAA is proposing this AD to require actions to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by October 19, 2020.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Pilatus Aircraft Ltd., Customer Technical Support (MCC), P.O. Box 992, CH–6371 Stans, Switzerland; telephone: +41 (0)41 619 67 74; fax: +41 (0)41 619 67 73; email: *Techsupport@pilatus-aircraft.com;* internet: *https://www.pilatus-aircraft.com/en.* You may review this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0753.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0753; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090; email: *doug.rudolph@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–0753; Product Identifier 2019–CE–033–AD'' at the beginning of your comments. The FAA will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Doug Rudolph, Aerospace Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090; email: *doug.rudolph@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No. 2019–0166, dated July 15, 2019 (referred to after this as ''the MCAI''), to correct an unsafe condition for Pilatus Aircraft Ltd. Model PC–24 airplanes. The MCAI states:

> During maintenance it was found that affected parts located close to the right-hand pitot/static connector on frame 10 showed signs of overheating.
>
> This condition, if not corrected, could lead to an uncontrolled fire in the cockpit area, or

loss of probe heating and de-icing function, possibly resulting in reduced control of the aeroplane.

To address this potential unsafe condition, Pilatus issued the [service bulletin] SB to provide modification instructions.

For the reason described above, this [EASA] AD requires replacement of affected parts with serviceable parts, and prohibits (re)installation of affected parts.

The MCAI identifies the ''affected part'' as electrical wiring splice part number (P/N) 971.31.32.561 and a ''serviceable part'' as electrical wiring splice P/N 971.31.32.641. EASA identified the root cause of the overheating as internal corrosion of the affected splices, which are not immersion-resistant, due to moisture ingress. The serviceable splices are immersion-resistant. You may examine the MCAI on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0753.

Related Service Information Under 1 CFR Part 51

Pilatus Aircraft Ltd. has issued Pilatus PC–24 Service Bulletin No. 30–002, dated April 3, 2019. The service information contains procedures for replacing certain electrical splices and wire for the pitot and static probes. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of the Proposed AD

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

Costs of Compliance

The FAA estimates that this proposed AD will affect 16 products of U.S. registry. The FAA also estimates that it would take 6 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $65 per product.

Based on these figures, the FAA estimates the cost of the proposed AD on U.S. operators to be $9,200, or $575 per product.

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Pilatus Aircraft Ltd.: Docket No. FAA–2020–0753; Product Identifier 2019–CE–033–AD.

(a) Comments Due Date

The FAA must receive comments by October 19, 2020.

(b) Affected ADs

None.

(c) Applicability

This airworthiness directive (AD) applies to Pilatus Aircraft Ltd. Model PC–24 airplanes, serial numbers 101 through 125 inclusive, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 30: Ice and Rain Protection.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as overheating of the electrical wiring splices close to the right-hand pitot-static connector on frame 10. The FAA is issuing this AD to prevent overheating of the pitot and static probe electrical splices, which could lead to loss of probe heating and de-icing function or an inflight fire.

(f) Actions and Compliance

Unless already done, do the following actions in paragraphs (f)(1) and (2):

(1) Within 3 months after the effective date of this AD, for the pitot and static probes de-ice wiring, replace wire H279A10 with wire H279A12, and replace each electrical wiring splice part number (P/N) 971.31.32.561 with electrical wiring splice P/N 971.31.32.641 by following the Accomplishment Instructions—Aircraft, section 3.B., of Pilatus Aircraft Ltd. PC–24 Service Bulletin No. 30–002, dated April 3, 2019.

(2) After completing the requirements of paragraph (f)(1) of this AD, do not install a pitot and static probes de-ice wire H279A10 or electrical wiring splice P/N 971.31.32.561 on any airplane.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to Doug Rudolph, Aerospace Engineer, FAA, General Aviation & Rotorcraft Section, International Validation Branch, 901

Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090; email: *doug.rudolph@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(h) Related Information

Refer to MCAI European Union Aviation Safety Agency (EASA) AD No. 2019–0166, dated July 15, 2019. You may examine the MCAI on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0753. For service information related to this AD, contact Pilatus Aircraft Ltd., Customer Technical Support (MCC), P.O. Box 992, CH–6371 Stans, Switzerland; telephone: +41 (0)41 619 67 74; fax: +41 (0)41 619 67 73; email: *Techsupport@pilatus-aircraft.com;* internet: *https://www.pilatus-aircraft.com/en.* You may review this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Issued on August 26, 2020.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–19264 Filed 9–1–20; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–HQ–OAR–2020–0292; FRL–10013–35–OAR]

Redesignation of Certain Unclassifiable Areas for the 2010 1-Hour Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to redesignate certain unclassifiable areas designated during the EPA's Round 2 air quality designations for the 2010 1-Hour Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS). Specifically, the EPA believes that it now has sufficient information to determine that certain unclassifiable areas in Missouri, Nebraska, Ohio, and Texas are attaining the 2010 1-hour SO_2 primary NAAQS, and, therefore, is proposing to redesignate these areas to attainment/unclassifiable for the 2010 1-hour SO_2 primary NAAQS.

DATES: Comments must be received on or before October 2, 2020.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2020–00292, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *regulations.gov.* The EPA may publish any comment received to our public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, Cloud, or other file sharing system). For additional submission methods, 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.*

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 the EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

Send information identified as CBI only to the following address: Tiffany Purifoy, OAQPS Document Control Officer, U.S. EPA, Office of Air Quality Planning and Standards, 109 T.W. Alexander Drive, Mail Code C404–02, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2020–0292. There will be a delay in confirming receipt of CBI packages, because the EPA–RTP office is closed to reduce the risk of transmitting COVID–19. Due to the office closure, the EPA is also requesting that parties notify the OAQPS Document Control Officer via telephone at (919) 541–0878 or email at *purifoy.tiffany@epa.gov* when mailing information identified as CBI.

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.

FOR FURTHER INFORMATION CONTACT: For general questions concerning this action, please contact Ashley Keas, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division, C539–04, Research Triangle Park, NC 27709, by email at *keas.ashley@epa.gov,* or Gobeail McKinley, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division, C539–04, Research Triangle Park, NC 27709, by email at *mckinley.gobeail@epa.gov.* The following EPA contacts can answer questions regarding areas in a particular EPA Regional office:

U.S. EPA REGIONAL OFFICE CONTACTS

Regional office	Affected state	Contact	Telephone	Email
Region V	Ohio	Mary Portanova	(312) 353–5954	*portanova.mary@epa.gov.*
Region VI	Texas	Robert Imhoff	(214) 665–7262	*imhoff.robert@epa.gov.*
Region VII	Missouri, Nebraska	Will Stone	(913) 551–7714	*stone.william@epa.gov.*

The information can also be reviewed online at *https://www.epa.gov/sulfur-dioxide-designations* and also in the public docket for these SO_2 redesignations at *https://www.regulations.gov* under Docket ID No. EPA–HQ–OAR–2020–0292.

SUPPLEMENTARY INFORMATION:

Throughout this document ''we,'' ''us,'' or ''our'' means the EPA.

I. Background

The Clean Air Act (CAA or Act) establishes a process for air quality management through the establishment and implementation of the NAAQS.

After the promulgation of a new or revised NAAQS, the EPA is required to designate all areas of the country, pursuant to section 107(d)(1)–(2) of the CAA. For the 2010 SO_2 primary NAAQS, designations are based on the EPA's application of the nationwide analytical approach to, and technical assessment of, the weight of evidence for each area, including but not limited to available air quality monitoring data and air quality modeling results. In advance of designating the areas that are the subject of this proposed redesignation, the EPA issued updated designations guidance through a March 20, 2015, memorandum from Stephen D. Page, Director, U.S. EPA, Office of Air Quality Planning and Standards, to Air Division Directors, U.S. EPA Regions 1–10 titled, ''Updated Guidance for Area Designations for the 2010 Primary Sulfur Dioxide National Ambient Air Quality Standard,'' which contains the factors the EPA evaluated in determining the appropriate designations and associated boundaries, including: (1) Air quality characterization via ambient monitoring or dispersion modeling results; (2) emissions-related data; (3) meteorology; (4) geography and topography; and (5) jurisdictional boundaries. The guidance also references the EPA's non-binding Monitoring Technical Assistance Document (Monitoring TAD) that existed at that time.[1]

The EPA completed the first set of initial area designations for the 2010 1-hour SO_2 NAAQS in 2013 (Round 1). Pursuant to a March 2, 2015, consent decree and court-ordered schedule, the EPA finalized a second set of initial area designations for the 2010 1-hour SO_2 NAAQS in 2016 (Round 2). The March 2, 2015, consent decree identified the following emissions criteria such that the EPA must designate, in Round 2, an area surrounding any stationary source which had (a) annual emissions in 2012 exceeding 16,000 tons of SO_2, or (b) both an annual average emissions rate of at least 0.45 pounds of SO_2 per one million British thermal units (lbs SO_2/mmBTU), according to the EPA's Clean Air Markets Division Database, and annual emissions of at least 2,600 tons of SO_2 in 2012. Areas in Missouri, Nebraska, Ohio, and Texas, each contained one source that met these Round 2 criteria. The EPA evaluated each area, using the five factors identified previously, during the Round 2 designations. Specifically, as discussed further in Section III of this document, the Franklin County area in Missouri contains the Labadie Energy Center; the Lancaster County area in Nebraska contains Sheldon Station; the Gallia County area in Ohio contains the Gavin Plant; and the Milam County area in Texas contains the Sandow Plant.

The March 20, 2015, guidance also specified the designation category definitions to be used in the Round 2 designations. Specifically, the EPA defined: A ''nonattainment'' area as an area that the EPA has determined violates the 2010 SO_2 NAAQS based on the most recent 3 years of ambient air quality monitoring data or an appropriate modeling analysis, or that the EPA has determined contributes to a violation in a nearby area; an ''attainment'' area as an area that the EPA has determined meets the 2010 SO_2 NAAQS and does not contribute to a violation of the NAAQS in a nearby area based on either: (a) the most recent 3 years of ambient air quality monitoring data from a monitoring network in an area that is sufficient to be compared to the NAAQS per the EPA interpretations in the Monitoring TAD, or (b) an appropriate modeling analysis. As discussed further in Section III of this document, the EPA was unable to determine whether the areas in Missouri, Nebraska, Ohio, and Texas that are the subject of this action, met the definition of a nonattainment area or the definition of an attainment area based on the available information at the time of the Round 2 designations. As a result, the EPA designated each of these four areas as unclassifiable in the Round 2 designations published on July 12, 2016, and December 13, 2016.[2]

Detailed rationale, analyses, and other information supporting our initial designation for these four areas can be found in the intended and final Round 2 designations' technical support documents for Missouri, Nebraska, Ohio, and Texas, respectively. These Round 2 documents, along with all other supporting materials for the initial 2010 1-hour SO_2 primary NAAQS designations for these areas, can be found on the EPA's SO_2 designations website.[3] Specific technical support documents (TSDs) for the covered states are referenced and linked in later sections of this notice.

II. What are the criteria for redesignating an area from unclassifiable to attainment/unclassifiable?

CAA Section 107(d)(3)(A) provides that the Administrator may notify the Governor of any state that the designation of an area should be revised ''on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate.''[4] The Act further provides in section 107(d)(3)(D) that even if the Administrator has not notified a state Governor that a designation should be revised, the Governor of any state may, on the Governor's own motion, submit a request to revise the designation of any area, and the Administrator must approve or deny the request. In keeping with CAA section 107(d)(3)(A), areas that are redesignated to attainment/unclassifiable[5] must meet the requirements for attainment areas and thus must meet the relevant NAAQS. In addition, the area must not contribute to ambient air quality in a nearby area that does not meet the NAAQS. See the definitions for nonattainment area, attainment area, and unclassifiable area in CAA section 107(d)(1)(A)(i)–(iii).

In its designations under the 2010 SO_2 NAAQS, the EPA has generally defined an attainment/unclassifiable area as an area that meets the NAAQS and does not contribute to ambient air quality in a nearby area that does not meet the NAAQS. We are proposing to find that these specific areas now meet this definition of attainment/unclassifiable based on the available valid monitoring data in each area that demonstrates attainment, *i.e.,* no violations of and not contributing to a nearby area that is not meeting the 2010 1-hour SO_2 NAAQS. The EPA finds this information sufficient for the purposes of redesignating an area from unclassifiable to attainment/unclassifiable, similar to initial

[1] The version of the EPA's ''SO_2 NAAQS Designations Source-Oriented Monitoring Technical Assistance Document'' (Monitoring TAD) available at the time of the Round 2 designations action was released in December 2013. The current version of the Monitoring TAD was released in February 2016 and superseded the version released in December 2013.

[2] *See* actions published on July 12, 2016 (81 FR 45039) and December 13, 2016 (81 FR 89870).

[3] *https://www.epa.gov/sulfur-dioxide-designations.*

[4] While CAA section 107(d)(3)(E) also lists specific requirements for redesignations, those requirements only apply to redesignations of nonattainment areas to attainment and, therefore, are not applicable in the context of a redesignation of an area from unclassifiable to attainment/unclassifiable.

[5] Historically, the EPA has designated most areas that do not meet the definition of nonattainment as ''unclassifiable/attainment.'' The EPA has reversed the order of the label to be ''attainment/unclassifiable'' to better convey the definition of the designation category and so that the category is more easily distinguished from the separate unclassifiable category. *See* 83 FR 1098 (January 9, 2018) and 83 FR 25776 (June 4, 2018). The EPA reserves the ''attainment'' category for when the EPA redesignates a nonattainment area that has attained the relevant NAAQS and has an approved maintenance plan.

designations, where the inquiry is also whether the area is factually attaining the NAAQS, based on actual and current air quality data. Such redesignations are functionally similar to initial designations and are not subject to CAA section 107(d)(3)(E), which, amongst other things, requires attainment to be due to permanent and enforceable measures and which requires a demonstration that the area will maintain the NAAQS for 10 years.

For the areas in Nebraska, Ohio, and Texas, those states have submitted formal requests [6] to the EPA to redesignate those areas from unclassifiable to attainment/unclassifiable.[7] Therefore, the EPA is proposing in this action to approve those requests and redesignate the areas based on the available monitoring data in those areas. For the area in Missouri, for which the EPA has not received a formal request to redesignate the area, the EPA is concurrently notifying the Governor of its recommendation that the area be redesignated to attainment/unclassifiable per CAA section 107(d)(3)(A), based on the currently available information that demonstrates attainment of the 2010 1-hour SO_2 NAAQS.[8] The EPA is issuing this proposal concurrently with notification to the state in anticipation of the statutory timeframe provided under CAA section 107(d)(3)(B) and (C).

III. What is the EPA's rationale for proposing to redesignate these areas?

As previously mentioned, the EPA designated each of these areas as unclassifiable in the Round 2 designations published on July 12, 2016 (intended designations) and December 13, 2016 (final designations). As discussed in this section, information available for each of these areas at the time of the Round 2 designations was inconclusive and therefore the EPA was unable to make a determination of the area's attainment status. For each of these areas, the states selected the monitoring pathway for purposes of air quality characterization pursuant to the EPA's SO_2 Data Requirements Rule (DRR) (80 FR 51052, August 21, 2015). For each of these areas, the state either identified existing SO_2 monitors and/or installed and began operating new monitors in accordance with the DRR.[9] These monitors now have complete 3-year design values for the 2017–2019 period. Specifically, each area now has at least one monitor with a complete, valid 3-year design value that is attaining the 2010 1-hour SO_2 NAAQS.

A. Franklin and St. Charles Counties, Missouri

The Franklin County area contains a stationary source, the Ameren Labadie Energy Center (Labadie), that met the Round 2 criteria, discussed in Section I of this document, requiring the EPA to designate this area in 2016, under the March 2, 2015, court-ordered schedule. In its September 25, 2015, submission, regarding the second round of designations, Missouri recommended that the area surrounding Labadie be designated as unclassifiable. After review of all available information at that time, including modeling provided by the state, Ameren, and Sierra Club with differing results and uncertainties, the EPA was unable to determine the area's attainment status. Therefore, the EPA designated portions of Franklin and St. Charles Counties as unclassifiable in Round 2 of designations for the 2010 1-hour SO_2 primary NAAQS.[10] [11]

Pursuant to requirements under the DRR to characterize the air quality in the area around Labadie, Missouri identified existing monitors and installed additional monitors around Labadie and began collecting data at these monitors by January 1, 2017.[12]

As part of this proposed action, the EPA considered design values for air quality monitors in Franklin and St. Charles Counties, in the Labadie area, by assessing the most recent 3 consecutive years (*i.e.,* 2017–2019) of quality-assured, certified ambient air quality data in the EPA Air Quality System (AQS) using data from Federal Reference Method (FRM) and Federal Equivalent Method (FEM) monitors that are sited and operated in accordance with 40 CFR parts 50 and 58.[13] Procedures for using monitored air quality data to determine whether a violation has occurred are given in 40 CFR part 50 Appendix T, as revised in the 2010 SO_2 NAAQS rulemaking. The 2010 1-hour SO_2 NAAQS is met when the design value is 75 parts per billion (ppb) or less. Whenever several monitors are located in an area, the design value for the area is determined by the monitor with the highest valid design value. Table 1 contains the 2017–2019 design values for the monitors in this area. The monitor with the highest design value is the North site (Site ID: 29–183–9004). Although one of the monitors in this area, the Valley site (Site ID: 29–071–9001), does not have a valid design value for this period, the remaining three monitors all have valid design values and are all attaining the NAAQS. Therefore, data collected at these monitors indicate that this area is in attainment of the 2010 1-hour SO_2 NAAQS.

[6] These redesignation requests are included in the docket for this action.

[7] Ohio's April 27, 2020, letter requested that the Gallia County area be designated attainment/unclassifiable as part of the EPA's Round 4 designation process. As the Gallia County area was already designated unclassifiable in Round 2, the EPA is treating Ohio's April 27, 2020, letter as a redesignation request pursuant to CAA section 107(d)(3)(D).

[8] On June 26, 2020, the Missouri Department of Natural Resources posted a redesignation request for the Franklin County area on its website for public comment as part of the state's public process. Missouri expects to submit the request to the EPA in the coming months.

[9] Analyses used to support the siting of these monitors are discussed in each state's 2016 or 2017 annual monitoring network plans.

[10] For more information on the EPA's Round 2 designations, see: *https://www.epa.gov/sulfur-dioxide-designations/epa-completes-second-round-sulfur-dioxide-designations* For the intended and final TSDs specific to Missouri, see: *https://www.epa.gov/sites/production/files/2016-03/documents/mo-epa-tsd-r2.pdf* and *https://www.epa.gov/sites/production/files/2016-07/documents/r7_mo_final_designation_tsd_07012016.pdf.*

[11] On September 8, 2016, Sierra Club submitted a petition for reconsideration of the final unclassifiable designation of the Franklin County area. In a January 18, 2017, letter, the EPA responded to Sierra Club's petition for reconsideration, stating that the EPA intended to initiate a new rulemaking process to be concluded by December 31, 2020, in which the Agency would evaluate the monitoring data for the area anticipated to be newly available at that time. Sierra Club also filed a petition for judicial review of the Round 2 designations that included this area; that litigation is currently in abeyance in the D.C. Circuit. Finalizing this proposed action would constitute the evaluation contemplated by the EPA's January 18, 2017, letter. This letter is available on our website here: *https://www.epa.gov/sulfur-dioxide-designations/reconsideration-requests-areas-illinois-missouri-and-ohio.*

[12] More details on the analyses used to support the monitor placement are contained in the state's 2016 annual monitoring network plan.

[13] SO_2 air quality data are available from the EPA's website at *https://www.epa.gov/outdoor-air-quality-data.* SO_2 air quality design values are available at *https://www.epa.gov/air-trends/air-quality-design-values.*

TABLE 1—2010 SO_2 NAAQS DESIGN VALUES FOR THE FRANKLIN COUNTY AREA

AQS site ID	Monitor location (latitude, longitude)	2017 99th percentile (ppb)	2018 99th percentile (ppb)	2019 99th percentile (ppb)	2017–2019 design value (ppb)
29–071–9001 *	Valley (38.572522, –90.796911)	25	38	21	28
29–071–9002	Southwest (38.52814, –90.86326)	22	20	30	24
29–183–9002	Northwest (38.581799, –90.865528)	21	17	19	19
29–183–9004	North (38.595607, –90.830618)	30	22	36	29

* This monitor does not have a valid design value, but all remaining monitors in the area do have valid design values that are below the level of the NAAQS.

Under the EPA's authority to undertake a redesignation action [14] under CAA section 107(d)(3)(A), and reviewing all available information, we are proposing to find that the 3 years of monitored ambient SO_2 data from the existing and new monitors adequately characterize the SO_2 air quality in Franklin and St. Charles Counties and demonstrate attainment of the 2010 1-hour SO_2 NAAQS in the same area. Specifically, the data from these monitors indicate there are no violations in this area. Additionally, there is no evidence of monitored or modeled violations in the surrounding counties [15] such that the source is not contributing to any nearby area that does not meet the NAAQS. The EPA is, therefore, proposing to redesignate the portions of Franklin and St. Charles Counties in Missouri that were designated as unclassifiable in July 2016, to attainment/unclassifiable based on the currently available information that demonstrates attainment of the 2010 1-hour SO_2 NAAQS.

B. Lancaster County, Nebraska

The Lancaster County area contains a stationary source, the Nebraska Public Power District's (NPPD) Sheldon Station (Sheldon), that met the Round 2 criteria, discussed in Section I of this document, requiring the EPA to designate this area in 2016, under the March 2, 2015, court-ordered schedule. In its September 18, 2015, submission regarding the second round of designations, Nebraska recommended that the area surrounding Sheldon be designated as unclassifiable. After review of all available information at that time, including modeling results from the state and Sierra Club with differing results and uncertainties, the EPA was unable to determine the area's attainment status and designated Lancaster County as unclassifiable in Round 2 of designations for the 2010 1-hour SO_2 primary NAAQS.[16]

Pursuant to requirements under the DRR to characterize the air quality in the area around Sheldon, Nebraska installed a new monitor near the source to begin collecting data at this monitor by January 1, 2017.[17]

On May 6, 2020, Nebraska submitted a letter [18] to the EPA requesting that the entirety of Lancaster County, containing Sheldon Station, be redesignated to attainment/unclassifiable based on the newly available monitoring information, which demonstrates attainment of the 2010 1-hour SO_2 NAAQS. To evaluate Nebraska's redesignation request, the EPA considered the design value for the air quality monitor in Lancaster County, in the Sheldon area, by assessing the most recent 3 consecutive years (*i.e.,* 2017–2019) of quality-assured, certified ambient air quality data in the EPA AQS using data from FRM and FEM monitors that are sited and operated in accordance with 40 CFR parts 50 and 58.[19] Procedures for using monitored air quality data to determine whether a violation has occurred are given in 40 CFR part 50 Appendix T, as revised in the 2010 SO_2 NAAQS rulemaking. As noted previously, the 2010 1-hour SO_2 NAAQS is met when the design value is 75 ppb or less. Table 2 contains the 2017–2019 design value for this area. Data collected at this monitor indicate that this area is in attainment of the NAAQS.

TABLE 2—2010 SO_2 NAAQS DESIGN VALUE FOR THE LANCASTER COUNTY AREA

AQS site ID	Monitor location (latitude, longitude)	2017 99th percentile (ppb)	2018 99th percentile (ppb)	2019 99th percentile (ppb)	2017–2019 design value (ppb)
31–109–0025	SW 42nd Street (40.554760, −96.780350)	44	10	33	29

After reviewing Nebraska's request under CAA section 107(d)(3)(D) and all available information, we are proposing to find that the 3 years of monitored ambient SO_2 data from the new monitor adequately characterize the SO_2 air quality in Lancaster County and demonstrate attainment of the 2010 1-hour SO_2 NAAQS in the same area. Specifically, the data from this monitor indicate there are no violations in this area. Additionally, there is no evidence of monitored or modeled violations in the surrounding counties such that the source is not contributing to any nearby

[14] On June 26, 2020, the Missouri Department of Natural Resources posted a redesignation request for the Franklin County area on its website for public comment as part of the state's public process. Missouri expects to submit the request to the EPA in the coming months.

[15] While a portion of neighboring Jefferson County is currently designated as nonattainment for the 2010 SO_2 NAAQS, the EPA determined in a final action published on September 13, 2017, that this area is now attaining the NAAQS per the EPA's clean data policy. *See* 82 FR 42945.

[16] For more information on the EPA's Round 2 designations, *see https://www.epa.gov/sulfur-dioxide-designations/epa-completes-second-round-sulfur-dioxide-designations.* For the intended and final TSDs specific to Nebraska, *see https://www.epa.gov/sites/production/files/2016-03/documents/ne-epa-tsd-r2.pdf* and *https://www.epa.gov/sites/production/files/2016-07/documents/r7_ne_final_designation_tsd_06302016.pdf.*

[17] More details on the analyses used to support the monitor placement are contained in the state's 2016 annual monitoring network plan.

[18] This letter is included in the docket for this action.

[19] SO_2 air quality data are available from the EPA's website at *https://www.epa.gov/outdoor-air-quality-data.* SO_2 air quality design values are available at *https://www.epa.gov/air-trends/air-quality-design-values.*

area that does not meet the NAAQS. The EPA is therefore proposing to approve Nebraska's redesignation request and proposing to redesignate the entirety of Lancaster County that was designated as unclassifiable in July 2016, to attainment/unclassifiable based on the currently available information that demonstrates attainment of the 2010 1-hour SO_2 NAAQS.

C. Gallia and Meigs Counties, Ohio

The Gallia County area contains a stationary source, the General James M. Gavin power plant (Gavin plant), that met the Round 2 criteria, discussed in Section I of this document, requiring the EPA to designate this area in 2016, under the March 2, 2015, court-ordered schedule. In its September 16, 2015, submission, regarding the second round of designations, Ohio recommended that the area surrounding the Gavin plant be designated as attainment based on a modeling demonstration. After review of all available information at that time, including modeling provided by both the state and Sierra Club with differing results and uncertainties, the EPA was unable to determine the area's attainment status. Therefore, the EPA designated the entirety of Gallia County and a portion of Meigs County as unclassifiable in Round 2 of the designations for the 2010 1-hour SO_2 primary NAAQS.[20] [21]

Pursuant to requirements under the DRR to characterize the air quality in the area around the Gavin plant and another nearby power plant,[22] Ohio installed four monitors in Gallia County, Ohio and Mason County, West Virginia, to begin collecting data at these monitors by January 1, 2017.[23]

On April 27, 2020, Ohio submitted a letter [24] to the EPA requesting that the entirety of Gallia County and the unclassifiable portion of Meigs County be redesignated to attainment/unclassifiable based on monitoring information demonstrating attainment. To evaluate Ohio's redesignation request, the EPA considered the design values for the air quality monitors in Gallia County, Ohio and Mason County, West Virginia, in the Gallia County area, by assessing the most recent 3 consecutive years (*i.e.,* 2017–2019) of quality-assured, certified ambient air quality data in the EPA AQS using data from FRM and FEM monitors that are sited and operated in accordance with 40 CFR parts 50 and 58.[25] Procedures for using monitored air quality data to determine whether a violation has occurred are given in 40 CFR part 50 Appendix T, as revised in the 2010 SO_2 NAAQS rulemaking. Whenever multiple monitors are located in an area, the design value for the area is determined by the monitor with the highest valid design value. Table 3 contains the 2017–2019 design values for the Gallia County area. Data collected at these monitors indicate that this area attains the 2010 1-hour SO_2 NAAQS set at 75 ppb.

TABLE 3—2010 SO_2 NAAQS DESIGN VALUES FOR THE GALLIA COUNTY AREA

AQS site ID	Monitor location (latitude, longitude)	2017 99th percentile (ppb)	2018 99th percentile (ppb)	2019 99th percentile (ppb)	2017–2019 design value (ppb)
39–053–0005	Ridge monitor 583 Honeysuckle Dr. (38.89495, −82.14893).	34	38	54	42
39–053–0004	Cheshire school monitor Watson Grove Rd. (38.95018, −82.12211).	27	41	54	41
39–053–0006	Guiding Hand monitor 323 SR 7 North (38.949450, −82.110400).	38	28	54	40
54–053–0001	Lakin monitor Mason County, WV (38.95649, −82.08866)	35	57	61	51

After reviewing Ohio's request under CAA section 107(d)(3)(D) and all available information, we are proposing to find that the 3 years of monitored ambient SO_2 data from the four new monitors adequately characterize the SO_2 air quality in Gallia and Meigs Counties and demonstrate attainment of the 2010 1-hour SO_2 NAAQS in the same area. Specifically, the data from these monitors indicate there are no violations in this area. Additionally, there is no evidence of monitored or modeled violations in the surrounding counties such that the source is not contributing to any nearby area that does not meet the NAAQS. The EPA is therefore proposing to approve Ohio's redesignation request and proposing to redesignate the entirety of Gallia County and the portion of Meigs County, that were designated as unclassifiable in July 2016, to attainment/unclassifiable based on the currently available information that demonstrates attainment of the 2010 1-hour SO_2 NAAQS.

D. Milam County, Texas

The Milam County area contains a stationary source, the Luminant Generation Company's Sandow 5 Generating Plant (Sandow plant), that met the Round 2 criteria, discussed in Section I of this document, requiring the EPA to designate this area in 2016, under the March 2, 2015, court-ordered schedule. In its September 18, 2015, submission, regarding Round 2 of designations, Texas noted that it was not able to model all the sources impacted in that round of designations and therefore did not provide a technical analysis for the Milam County area nor did the state provide an updated recommendation for this area

[20] For more information on EPA's Round 2 designations, *see https://www.epa.gov/sulfur-dioxide-designations/epa-completes-second-round-sulfur-dioxide-designations* For the intended and final TSDs specific to Ohio, *see https://www.epa.gov/sites/production/files/2016-03/documents/oh-epa-tsd-r2.pdf* and *https://www.epa.gov/sites/production/files/2016-07/documents/r5_oh_final_designation_tsd_06302016.pdf.*

[21] On January 6, 2017, Sierra Club submitted a petition for reconsideration of the final unclassifiable designation of the Gallia County area. In a January 18, 2017, letter, the EPA responded to Sierra Club's petition for reconsideration, stating that the EPA intended to initiate a new rulemaking process to be concluded by December 31, 2020, in which the Agency would evaluate the monitoring data for the area anticipated to be newly available at that time. Finalizing this proposed action would constitute the evaluation contemplated by the EPA's January 18, 2017, letter. This letter is available on our website *https://www.epa.gov/sulfur-dioxide-designations/reconsideration-requests-areas-illinois-missouri-and-ohio.*

[22] Kyger Creek Station is approximately 2.5 kilometers southwest of the Gavin plant and was also a source required to be characterized under the EPA's SO_2 Data Requirements Rule.

[23] More details on the analyses used to support the monitor placement are contained in the state's 2016 and 2017 annual monitoring network plans.

[24] This letter is included in the docket for this action. As discussed in Section II of this document, the EPA is treating Ohio's April 27, 2020, letter as a request for redesignation under CAA section 107(d)(3)(D).

[25] SO_2 air quality data are available from EPA's website at *https://www.epa.gov/outdoor-air-quality-data.* SO_2 air quality design values are available at *https://www.epa.gov/air-trends/air-quality-design-values.*

but rather reiterated its previous recommendation for areas without existing monitors to be designated as unclassifiable/attainment. After review of all available information at that time, the EPA was unable to determine the area's attainment status based on the lack of information and designated the entirety of Milam County, Texas, as unclassifiable in Round 2 of designations for the 2010 1-hour SO_2 primary NAAQS.[26]

Pursuant to requirements under the DRR to characterize the air quality in the area around Sandow, Texas installed a new monitor near Sandow to begin collecting data at this monitor by January 1, 2017.[27]

On June 26, 2020, Texas submitted a letter[28] to the EPA requesting that the entirety of Milam County be redesignated to attainment/unclassifiable based on the newly available monitoring information which demonstrates attainment. To evaluate Texas' redesignation request, the EPA considered the design value for the air quality monitor in Milam County, in the Sandow area, by assessing the most recent 3 consecutive years (*i.e.,* 2017–2019) of quality-assured, certified ambient air quality data in the EPA AQS using data from FRM and FEM monitors that are sited and operated in accordance with 40 CFR parts 50 and 58.[29] Procedures for using monitored air quality data to determine whether a violation has occurred are given in 40 CFR part 50 Appendix T, as revised in the 2010 SO_2 NAAQS rulemaking. The 2010 1-hour SO_2 NAAQS is met when the design value is 75 ppb or less. Table 4 contains the 2017–2019 design value for this area. Data collected at this monitor indicate that this area is in attainment of the NAAQS.

TABLE 4—2010 SO_2 NAAQS DESIGN VALUES FOR THE MILAM COUNTY AREA

AQS site ID	Monitor location (latitude, longitude)	2017 99th percentile (ppb)	2018 99th percentile (ppb)	2019 99th percentile (ppb)	2017–2019 design value (ppb)
48–331–1075	3990 John D Harper Road (30.569534, −97.076294)	37	4	2	14

Texas' redesignation request to the EPA also indicated that the Sandow plant permanently ceased operations in January 2018. The EPA independently confirmed the plant is no longer permitted to operate.[30]

After reviewing Texas' request under CAA section 107(d)(3)(D) and all available information, we are proposing to find that the 3 years of monitored ambient SO_2 data from the new monitor adequately characterize the SO_2 air quality in Milam County and demonstrate attainment of the 2010 1-hour SO_2 NAAQS in the same area. Specifically, the data from this monitor indicate there are no violations in this area. Additionally, there is no evidence of monitored or modeled violations in the surrounding counties such that the source is not contributing to any nearby area that does not meet the NAAQS. The EPA is therefore proposing to approve Texas' redesignation request and proposing to redesignate the entirety of Milam County, that was designated as unclassifiable in December 2016, to attainment/unclassifiable based on the currently available information that demonstrates attainment of the 2010 1-hour SO_2 NAAQS.

IV. Proposed Action

The EPA is proposing to redesignate to attainment/unclassifiable the unclassifiable portions of Franklin and St. Charles Counties in Missouri; the entirety of Lancaster County in Nebraska; the entirety of Gallia County and the unclassifiable portion of Meigs County in Ohio; and the entirety of Milam County in Texas. Additionally, the EPA is proposing to approve requests for redesignation from the states of Nebraska, Ohio, and Texas. For the area in Missouri, the EPA is initiating this redesignation action under the authority of CAA section 107(d)(3)(A). As discussed in prior sections, this proposed action is based on the currently available monitoring data for these areas that demonstrate attainment of the 2010 1-hour SO_2 primary NAAQS. If finalized, this redesignation action and approval of the redesignation requests would change the legal designation for these listed areas, found at 40 CFR part 81, from unclassifiable to attainment/unclassifiable for the 2010 1-hour SO_2 primary NAAQS.

V. Statutory and Executive Order Reviews

Under CAA section 107(d)(3), redesignation of an area to attainment/unclassifiable is an action that affects the status of a geographical area and does not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment/unclassifiable does not in and of itself create any new requirements. Accordingly, this proposed action merely proposes to redesignate an area to attainment/unclassifiable and does not impose additional requirements. For that reason, this proposed action:

- Is exempt from 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 it is exempt 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 not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

[26] For more information on EPA's Round 2 designations, *see https://www.epa.gov/sulfur-dioxide-designations/epa-completes-second-round-sulfur-dioxide-designations.* For the intended and final TSDs specific to Texas, *see https://www.epa.gov/sites/production/files/2016-03/documents/tx-epa-tsd-r2.pdf* and *https://www.epa.gov/sites/production/files/2016-11/documents/texas_4_deferred_luminant_tsd_final_docket.pdf*

[27] More details on the analyses used to support the monitor placement are contained in the state's 2016 annual monitoring network plan.

[28] This letter is included in the docket for this action.

[29] SO_2 air quality data are available from EPA's website at *https://www.epa.gov/outdoor-air-quality-data.* SO_2 air quality design values are available at *https://www.epa.gov/air-trends/air-quality-design-values.*

[30] In a letter dated February 14, 2018, from Luminant to the Texas Commission on Environmental Quality (TCEQ), Luminant requested to void Sandow permits 4980, PSDTX28, PSDTX28M1, 16684, 39718, 45425, 72521, 97146, and 125855. The remaining permits (NSR Permit 5473, PBR 87631, PBR 94625 and Standard Permit 108271) are material handling permits maintained while closure activities are completed, such as coal piles, silos, and conveyors. In a letter dated July 19, 2018, from the TCEQ to Luminant, TCEQ verified the air quality federal operating permit O54 for the Sandow plant was voided. These letters are included in the docket for this action.

• 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);

• Is not subject because it does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it does not establish an environmental standard intended to mitigate health or safety risks;

• 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 this action does not involve technical standards;

• Will not have disproportionate human health or environmental effects under Executive Order 12898 (59 FR 7629, February 16, 1994); and

• Does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000) because no tribal lands are located within the areas covered in this action and the redesignation does not create new requirements. The EPA notes this proposed action will not impose substantial direct costs on Tribal governments or preempt Tribal law.

Anne Austin,

Principal Deputy Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2020–17548 Filed 9–1–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[GC Docket No. 20–221; FCC 20–92; FRS 16967]

Updating the Commission's Ex Parte Rules

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission begins a new proceeding to consider several updates to the Commission's *ex parte* rules. First, the Commission seeks comment on a proposal to exempt from its *ex parte* rules, in certain proceedings, government-to-government consultations between the Commission and federally recognized Tribal Nations. Second, the Commission seeks comment on a proposal to extend the exemption to its *ex parte* rules for communications with certain program administrators, such as the Universal Service Administrative Company, to include the Toll-Free Numbering Administrator and the Reassigned Numbers Database Administrator, and to clarify the conditions under which this exemption applies. Third, the Commission seeks comment on a proposal to require that all written *ex parte* presentations and written summaries of oral *ex parte* presentations (other than presentations that are permitted during the Sunshine period) be submitted before the Sunshine period begins and to require that replies to these *ex parte* presentations be filed within the first day of the Sunshine period.

DATES: Comments due on or before October 2, 2020; reply comments due on or before November 2, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. Max Staloff of the Office of General Counsel, at (202) 418–1764, or *Max.Staloff@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking,* GC Docket No. 20–221, FCC 20–92, adopted on July 8, 2020 and released on July 9, 2020. The full text of this document is available for public inspection by downloading the text from the Commission's website at *https://www.fcc.gov/document/updating-commissions-ex-parte-rules*. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format) by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

1. The Commission seeks comment on three proposals: (1) Exempting from Commission *ex parte* rules certain government-to-government consultations between Commission staff and leaders and official representatives of federally recognized Tribal Nations; (2) clarifying the *ex parte* exemption for the administrators of certain Commission programs and expanding that exemption to include the Toll-Free Numbering Administrator and the Reassigned Numbers Database Administrator; and (3) modifying the filing deadlines for presentations made shortly before the beginning of the Sunshine period and replies to those presentations as set forth in 47 CFR 1.1206(b)(2).

Exemption to Ex Parte Rules for Government-to-Government Tribal Consultations

2. The Commission's existing *ex parte* rules have no exemptions or provisions tailored to presentations to or from federally recognized Tribal Nations. Throughout this *Notice of Proposed Rulemaking,* "Tribes" or "Tribal Nations" mean those Nations, including Alaska Native Villages, that have been granted federal recognition. Thus, in a permit-but-disclose proceeding, written presentations and summaries of oral presentations between a Tribal representative and Commission staff must be filed as prescribed in the rules, unless an exemption applies. In a restricted proceeding, *ex parte* presentations are forbidden, and those presentations that are permitted must be filed or summarized in the record. In addition, the Sunshine period prohibitions apply fully to presentations to or from representatives of Tribal Nations.

3. Outside the Tribal context, the Commission has created exemptions from the *ex parte* rules for communications with particular parties where the circumstances require a greater degree of confidentiality than the rules would otherwise permit. Many of these exemptions are subject to conditions appropriate to the circumstances of each exemption. For example, presentations involving a military or foreign affairs function of the United States or classified security information are exempt from disclosure requirements and Sunshine restrictions without limitation. Presentations to or from an agency or branch of the Federal Government involving a matter of shared jurisdiction with the Commission are similarly exempt, but this exemption is subject to the condition that the Commission disclose any new factual information adduced from these presentations that it relies on its decision-making. In the case of presentations requested by the Commission or staff to clarify or adduce evidence or to resolve issues, any new information elicited must ordinarily be promptly disclosed, subject to certain exceptions. In yet another variant, if an exempt presentation is made that directly relates to an emergency in which the safety of life is endangered or substantial loss of property is threatened, the presentation or a summary must be promptly placed in the record and disclosed to other parties "as appropriate."

4. The relationship between the United States Government and federally recognized Tribal Nations is unique.

The Federal Government has a trust relationship with Indian Tribes, and this historic relationship requires the Federal Government to adhere to certain fiduciary standards in its dealings with Indian Tribes. Certain statutes also impose legal obligations on the Commission to consult with Tribal governments regarding categories of actions that could affect Tribal interests. In recognition of this relationship, the Commission has established a policy to consult with Tribal governments, to the extent practicable, prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources. The consultation process implies a frank exchange of information and views, with the goal of reaching common understandings to the extent practicable.

5. In light of this unique relationship and to facilitate consultation, the Commission proposes to adopt a new exemption for government-to-government consultations with federally recognized Tribal Nations that relate to permit-but-disclose proceedings. While the Commission encourages Tribal Nations and their representatives, like other parties, to file comments and reply comments that may be considered on the record in such proceedings, the Commission recognizes their interest in consulting on a government-to-government basis without concern about documenting such consultations on the rulemaking record in every case. Previously, the Commission has modified the *ex parte* rules on a case-by-case basis in rulemaking proceedings that have significantly or uniquely affected Tribal Nations to enable government-to-government consultation outside of the public record while also ensuring that any facts and arguments on which the Commission relies in its decision-making process are placed in the record. Based on the Commission's experience in these proceedings, the Commission proposes to codify this exemption for all permit-but-disclose proceedings. Specifically, under this proposed exemption, Commission staff and authorized representatives of Tribal governments could consult on a government-to-government basis without having to disclose the fact or content of their discussions through an *ex parte* filing in the record of any permit-but-disclose proceedings to which they relate. If, however, a Tribe were to wish the Commission to rely on views or materials presented during such consultations in its decision-making, it would need to disclose the relevant information in the record of the proceeding. If the Commission were to desire, on its own initiative, to rely on information presented during Tribal consultation, the Commission would coordinate with the Tribal government and obtain its consent to disclose such information. If such consent were denied, the Commission would forgo reliance on the information. Finally, new information could not be added to the record during the Sunshine period by a Tribal government (like any other party) unless requested or authorized by the Commission or its staff, or unless another exception were to apply.

6. The Commission seeks comment on this proposal. As an initial matter, the Commission seeks comment on whether codifying an exemption for all permit-but-disclose proceedings would be more efficient than continuing to modify the *ex parte* rules on a case-by-case basis. In particular, while not all rulemakings or other permit-but-disclose proceedings implicate issues that significantly or uniquely affect Tribal government interests, it is not always possible to predict in which proceedings such issues will arise. By proposing an exemption that would apply to all permit-but-disclose proceedings, the Commission aims to avoid the need to promulgate special procedures during the course of a proceeding when Tribal interests come to light such that government-to-government consultation is appropriate. Furthermore, the Commission is concerned that it may inhibit consultation, and impose burdens on both Tribal governments and Commission staff, if the parties must be concerned about whether anything said during potentially wide-ranging consultations might implicate issues in any permit-but-disclose proceeding. The Commission invites comment on whether an exemption applicable to all permit-but-disclose proceedings would appropriately and effectively avoid these harms. Are there offsetting considerations that counsel against applying this exemption to all permit-but-disclose proceedings? Are there any classes of rulemakings or other permit-but-disclose proceedings that should be excluded from the exemption, and if so, how can they be identified?

7. Consistent with Commission policy, the Commission proposes to limit the exemption to presentations in the course of consultation with leaders or authorized representatives of Tribal governments. Thus, it would not encompass presentations to or from an individual Tribal member, or an employee or official of a Tribally owned business, unless that person has been authorized by the Tribal government to represent its interests in the relevant matter. It also would not encompass a presentation to or from a Tribal government official that is not in the nature of consultation; *i.e.,* involving a matter significantly or uniquely affecting the Tribal government, its land and resources. For example, it would not include a presentation by a Tribal leader regarding the leader's personal financial interests. The Commission seeks comment on whether these conditions appropriately and sufficiently limit the scope of the exemption to government-to-government consultation. Is further specificity needed in defining the scope of the exemption, and if so, how should the definition be refined?

8. The Commission further seeks comment on the proposal that any information a Tribal government presents during an exempt consultation, including factual information, views, and arguments, would need to be disclosed on the record in order for the Commission to rely on that information when rendering a decision in any proceeding. The Commission believes this proposed disclosure requirement will ensure that Commission decisions are transparent and that all parties will have a reasonable opportunity to respond to information of decisional significance, as required under the Administrative Procedure Act, while preserving the ability of Tribal governments to consult with the Commission in confidence if they so choose. To the extent otherwise permitted under Commission rules, a Tribal Nation could submit confidential materials in the record with a request that they be withheld from public inspection. Does this proposed disclosure provision effectively advance both of these ends and, if not, what alternative would serve those ends better? In addition, the Commission proposes that if the Commission wishes on its own initiative to rely on information originally presented by a Tribal Nation during exempt consultation, the Commission would coordinate with the Tribal government before disclosing such information and would disregard any material it does not want disclosed. The Commission invites comment on this proposal.

9. The Commission also seeks comment on the timing of disclosure. Under the exemption that the Commission proposes, outside of the Sunshine period, Tribal governments could submit information originally presented during an exempt consultation into the record at any time. Thus, a Tribe that delays submitting such information into the record (like

any party that chooses to wait until late in the process to make an *ex parte* presentation) would bear the risk of acting too late for the Commission to consider the information while affording other parties a reasonable opportunity to respond. To partially address this concern, the *ex parte* rules ordinarily require that a permissible written presentation, or a written summary of an oral presentation, be included in the record within a specified period of time after the presentation is made, usually two business days. Should the Commission similarly require that, in order to be considered, information must be submitted in the record within some time period after it is presented in consultation? If so, what should that time period be, and how might the Commission best administer the requirement given that the same information may be presented in multiple consultation sessions? Would such a requirement inhibit consultation by forcing Tribal governments to consider whether, by presenting information and views during consultation and not promptly submitting them in the record, they might preclude future consideration of such information and views as part of the Commission's decision-making process?

10. During the Sunshine period, however, the Commission proposes a different regime. Specifically, the Commission proposes that Commission officials and Tribal government representatives be permitted to continue consulting during the Sunshine period. However, unless another exemption applies, information presented during such consultation could be submitted into the record, and relied upon by the Commission, only if the Commission or its staff either requests its submission or approves its submission upon a Tribe's request. Similarly, information presented prior to the Sunshine period in the course of exempt consultation could be entered into the record during the Sunshine period only upon the Commission's request or with its approval. The Commission believes this proposal will advance both the Commission's policy of consulting with Tribal Nations regarding their interests and the policy underlying the Sunshine rules to afford a period of repose in the record before major decisions are made. The Commission seeks comment on this proposal. Would any other rule better balance the policy considerations underlying both government-to-government consultation and the Sunshine period?

11. The Commission does not propose to extend any exemption from the *ex parte* rules for presentations made in government-to-government consultation to restricted proceedings. The Commission recognizes that adjudications or other restricted proceedings may significantly affect the governments, land, and resources of individual Tribal Nations. For example, a contested licensing proceeding may overlap with consideration of the effects of an undertaking on a historic property of traditional religious and cultural importance to one or more Tribal Nations, which requires consultation under the National Historic Preservation Act. Nonetheless, the Commission believes that the nature of private party interests in many restricted proceedings, for example, license application proceedings, counsels against routinely permitting undisclosed consultations that may bear upon the issues in those proceedings. A Tribal Nation could request confidential treatment for material submitted into the record of a restricted proceeding to the extent permitted under Commission rules. The Commission seeks comment on this analysis. Is there any objectively identifiable subset of restricted proceedings for which the benefits of undisclosed consultation outweigh the potential for harm?

12. To be clear, although the Commission is not proposing any general exemption applicable to restricted proceedings, Commission staff would retain flexibility in specific proceedings to modify the applicable *ex parte* rules in the public interest. For example, staff could designate an otherwise restricted proceeding as permit-but-disclose. Under the exemption that the Commission proposes, such designation would both enable Commission staff to engage in dialogue with Tribal governments and other entities without inviting other parties to be present, subject to disclosure, and allow undisclosed consultation with Tribal governments, provided the Commission does not rely in rendering its decisions on any undisclosed information presented. Alternatively, or in addition, members of the Office of Native Affairs and Policy, or other Commission staff, could be designated as non-decisionmakers in any proceeding. This designation would allow the separated staff to communicate with Tribal government representatives outside of the *ex parte* restrictions, but they would not be able to have *ex parte* communications with decision-making staff except as otherwise permitted.

13. The Commission believes that given the unique nature of each restricted proceeding, it will be most efficient for staff to continue modifying the *ex parte* rules as needed on a case-by-case basis. The Commission seeks comment on this tentative conclusion and on whether the Commission should instead promulgate rules or guidelines. For example, should any class of proceedings that is currently restricted be presumptively designated permit-but-disclose so as to facilitate government-to-government consultation? Should the Commission designate the Office of Native Affairs and Policy as presumptively separated staff in restricted proceedings, or some subset of restricted proceedings, so that they can speak off the record with Tribal Nations but cannot communicate with decision-making staff except to the extent permitted under the *ex parte* rules? Instead of *ex ante* rules, should the Commission issue guidelines to inform staff in exercising their discretion whether to modify the *ex parte* rules for any particular restricted proceeding?

14. Finally, the Commission recognizes that Commission rules governing Tribal consultation and Tribal participation in Commission proceedings themselves significantly or uniquely affect Tribal governments, their land and resources. The Commission therefore directs the Office of Native Affairs and Policy, Consumer and Governmental Affairs Bureau, to arrange opportunities for consultation appropriate to the nature and circumstances of this proceeding. In addition, to facilitate consultation, the Commission modifies the *ex parte* rules for this proceeding as described in the Procedural Matters section of this document.

Exemption for Presentations Between Commission Staff and Program Administrators

15. The Commission also seeks comment on two proposed revisions to 47 CFR 1.1204(a)(12). That section currently classifies as exempt presentations between Commission staff and the interstate telecommunications relay services fund administrator, the North American Numbering Plan Administrator, the Universal Service Administrative Company, the Local Number Portability Administrator, the TRS Numbering Administrator, and the Pooling Administrator relating to their administrative functions. The exemption permits the various administrators to engage in the frequent and close communications with Commission staff necessary to exercise

their administrative functions efficiently.

16. The Commission proposes that the exemption be expanded to include the Toll-Free Numbering Administrator and the Reassigned Numbers Database Administrator. The relationship between the Toll-Free Numbering Administrator and the Commission in the administration of the Toll-Free Number Database is substantially the same as that of the other administrators to the Commission in the performance of their administrative responsibilities. Likewise, the relationship between the Reassigned Numbers Database Administrator and the Commission in the administration of the Reassigned Numbers Database is substantially the same as that of the other administrators to the Commission in the performance of their administrative responsibilities. Accordingly, the Commission believes that presentations involving the Toll-Free Numbering Administrator and Reassigned Numbers Database Administrator should be treated the same as those involving the other administrators. The Commission proposes to amend section 1.1204(a)(12) accordingly, and the Commission seeks comment on this proposal. Should the Toll-Free Numbering Administrator and the Reassigned Number Database Administrator be included among those subject to the exemption? Are there other administrators that should also be included?

17. As a related matter, in reviewing § 1.1204(a)(12), the Commission notes an anomaly. As applied to five of the six administrators covered, the exemption is categorical. However, § 1.1204(a)(12)(iv) applies only if the Local Number Portability Administrator ''has not filed comments or otherwise participated in the proceeding.''

18. The Commission can think of no reason to treat one administrator differently from the others and attributes the discrepancy to an apparent oversight. When the Commission enacted the first four subsections of the rules, the Commission intended the caveat to apply to all the administrators. Consistent with this intent, the caveat was drafted to apply to ''the relevant administrator'' and was apparently intended to follow, but not to be part of, what was then the final subsection of § 1.1204(a)(12). Subsequently, however, when the final two administrators were added, the caveat was not moved to the end of the subsection, making it appear that the caveat applied only to the Local Number Portability Administrator.

19. The Commission believes that applying the caveat to all the administrators would both effectuate the Commission's original intent and constitute sound policy. It is consistent with the overall philosophy of the *ex parte* rules to distinguish between situations in which an administrator is acting as a consultant or co-decisionmaker and situations in which the administrator is acting as a party. Except where there is an overriding reason to do so, the *ex parte* rules generally do not treat presentations involving a party as exempt. The Commission therefore proposes to revise the rule to make clear that the caveat is applicable to all the administrators. The Commission seeks comment on this proposal. Should the exclusion from the exemption for filing comments or otherwise participating as a party be applied to all administrators? Alternatively, should the exclusion be eliminated? Is there any reason to treat one administrator differently from another?

Amendment to Commission's Sunshine Period Ex Parte Rules

20. A Sunshine Agenda or Sunshine notice is typically released seven days before a Commission meeting and lists the items that will be presented to the Commission. The period between the release of the Sunshine Agenda and the Commission meeting is intended to provide decision-makers a ''period of repose'' during which they can consider the upcoming items free from outside interruptions. Although the Commission intended to establish a week-long ''period of repose,'' the existing rules do not in fact ensure a week-long period without changes to the record. Generally, the Commission prohibits *ex parte* communications made during the Sunshine period. As an exception to the rule, however, the Commission does not apply the Sunshine prohibition to the filing of a written *ex parte* presentation or a memorandum summarizing an oral *ex parte* presentation made on the day the Sunshine notice is released. In those cases, the *ex parte* filing must be submitted no later than the end of the next business day, and replies are due 24 hours after that. For example, assume a party makes an *ex parte* presentation in a permit-but-disclose proceeding to a Commissioner on a Friday. That same day, the Commission's Secretary releases the Sunshine Agenda for the next Commission meeting and that proceeding appears on the Agenda. The Sunshine period begins as of Saturday, and therefore the presenting party must file its *ex parte* notice by the end of the day (11:59:59 p.m.) on Monday, the next business day. Importantly, an entity making an *ex parte* presentation two days before the start of Sunshine would also have to submit its *ex parte* notice by the end of the day that the Sunshine period begins. Using the example from the text above, if an *ex parte* presentation is made on a Thursday and the Sunshine period begins Saturday, the *ex parte* notice would have to be submitted by 11:59:59 p.m. on Monday. In either event, a reply would be due by the end of the day (11:59:59 p.m.) on Tuesday. Importantly, if an *ex parte* notice is filed at 11:59:59 p.m. on Tuesday, it will not be available to Commission staff and the public until early Wednesday morning.

21. Given that filings vital to the proceeding may not be available to Commission staff and the public until well into the ''period of repose,'' the Commission and its staff have periodically encountered challenges fully evaluating all relevant filings in the limited time before a Commission meeting. Similarly, the Commission expects that the effective shortening of the period of repose may limit the ability of members of the public fully to evaluate the record. As a result, the Commission proposes to require parties to file *ex parte* notices of all presentations, other than presentations permissibly made during the Sunshine period pursuant to some other exception, before the Sunshine period begins, with replies due 24 hours after that. Applying the prior example to the proposed rule change, consider that a party makes an *ex parte* presentation in a permit-but-disclose proceeding to a Commissioner on a Friday. That same day, the Commission's Secretary releases the Sunshine Agenda for the next Commission meeting and that proceeding appears on the Agenda. The Sunshine period begins as of Saturday, and therefore the presenting party must file its *ex parte* notice by the end of the day (11:59:59 p.m.) on Friday. A reply would be due by the end of the day (11:59:59 p.m.) on Monday. Because the dates of Commission Open Meetings are publicly available, and because the Sunshine notice is routinely released seven days before the Commission meeting, the Commission expects parties will know ahead of time whether their *ex parte* meetings will fall on the date before the Sunshine period is due to begin, and thus have foreknowledge that their *ex parte* notices would be due at the end of that day. Furthermore, given the Commission's practice of announcing the tentative agenda and releasing draft items three weeks before the meeting date, parties should have ample time to prepare their arguments and schedule meetings earlier than the

last permissible date if they choose to do so.

22. The Commission seeks comment on this proposal. For example, will ensuring a more complete ''period of repose'' better enable Commission staff and the public to evaluate the record and the relevant issues, thereby leading to better and more informed decisions? What steps, if any, should the Commission take to ensure that parties making presentations to the Commission on the day before the Sunshine period begins are aware that they must file their *ex parte* notices in a timely manner? Will requiring that *ex parte* notices be submitted before the Sunshine period begins be unduly burdensome for parties meeting with the Commission? Assuming this rule is adopted, if a party fails to submit an *ex parte* notice by the required time, should the party be sanctioned by the Commission or should its notice not be included in the record?

Procedural Matters

23. *Paperwork Reduction Act Analysis.*—This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

24. *Regulatory Flexibility Act.* This proposed action would amend a procedural rule for which notice and comment are not required under the Administrative Procedure Act, and it therefore falls outside of the Regulatory Flexibility Act of 1980, as amended.

25. *Filing Requirements.*—Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

• *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/.*

• *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

• U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554.

• Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy,* Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

• During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

26. *People with Disabilities.*—To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

27. *Availability of Documents.*—Comments, reply comments, and *ex parte* submissions will be publicly available online via ECFS.

28. *Ex Parte Presentations.*—This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

29. In light of the Commission's trust relationship with Tribal Nations and the Commission's commitment to engage in government-to-government consultation with them, the Commission finds the public interest requires a limited modification of the *ex parte* rules in this proceeding. Tribal Nations, like other interested parties, should file comments, reply comments, and *ex parte* presentations in the record to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process consistent with the requirements of the Administrative Procedure Act. However, at the option of the Tribe, *ex parte* presentations made during consultations by elected and appointed leaders and duly appointed representatives of federally recognized Indian Tribes and Alaska Native Villages to Commission decision makers shall be exempt from the rules requiring disclosure in permit-but-disclose proceedings and exempt from the prohibitions during the Sunshine Agenda period. To be clear, while the Commission recognizes consultation is critically important, we emphasize that the Commission will rely in its decision-making only on those presentations that are placed in the public record for this proceeding.

Ordering Clauses

30. *It is ordered*, pursuant to the authority found in sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), and 303(r), that this *Notice of Proposed Rulemaking is hereby adopted.*

Lists of Subjects in 47 CFR Part 1

Administrative practice and procedure.

Federal Communications Commission

Marlene Dortch,

Secretary.

Proposed Rules

For the reasons discussed, the Federal Communications Commission proposes to amend 47 CFR part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 157, 160, 201, 225, 227, 303, 309, 310, 332, 1403, 1404, 1451, 1452, and 1455.

■ 2. Section 1.1204 is amended by revising paragraphs (a)(12) introductory text and (a)(12)(iii) through (vi), and adding paragraphs (a)(12)(vii) and (viii), and (a)(13) to read as follows:

§ 1.1204 Exempt ex parte presentations and proceedings.

(a) * * *

(12) The presentation is between Commission staff and any of the following administrators relating to the following subjects, *provided that* the relevant administrator has not filed comments or otherwise participated as a party in the proceeding:

* * * * *

(iii) The Universal Service Administrative Company relating to the administration of universal service support mechanisms pursuant to 47 U.S.C. 254;

(iv) The Local Number Portability Administrator relating to the administration of local number portability pursuant to 47 U.S.C. 251(b)(2) and (e);

(v) The TRS Numbering Administrator relating to the administration of the TRS numbering directory pursuant to 47 U.S.C. 225 and 47 U.S.C. 251(e);

(vi) The Pooling Administrator relating to the administration of thousands-block number pooling pursuant to 47 U.S.C. 251(e);

(vii) The Toll-Free Numbering Administrator relating to the administration of Toll-Free Number Database pursuant to 47 U.S.C. 251(e); or

(viii) The Reassigned Numbers Database Administrator relating to administration of the Reassigned Numbers Database pursuant to [47 CFR 64.1200(l) and (m)].

(13)(i) The presentation is in a permit-but-disclose proceeding and is made in the course of government-to-government consultation between a representative of the Commission and an elected or appointed leader or duly authorized representative of the government of a federally recognized Tribal Nation, *provided that* the Commission may not rely in its decision-making process on any such presentation that is not disclosed in the record, either by the Tribal government or by the Commission after coordination pursuant to paragraph (a)(13)(iii) of this section.

(ii) A presentation made pursuant to paragraph (a)(13) of this section may be disclosed on the record during the period of the Sunshine Agenda prohibition, and relied upon by the Commission, only at the request of or with the advance approval of the Commission pursuant to paragraph (a)(10) of this section, unless permitted under another exception.

(iii) The Commission will disclose a presentation made under paragraph (a)(13) of this section or information obtained through such a presentation only after advance coordination with the Tribal government involved in order to ensure that the Tribal government involved retains control over the timing and extent of any disclosure that may have an impact on that Tribal government's jurisdictional responsibilities. If the Tribal government involved does not wish such presentation or information to be disclosed, the Commission will not disclose it and will disregard it in its decision-making process, unless it fits within another exemption not requiring disclosure. The fact that a Tribal government's views are disclosed under paragraph (a)(13) of this section does not preclude further discussions pursuant to, and in accordance with, the exception.

* * * * *

■ 3. Section 1.1206 is amended by revising paragraphs (b)(2) introductory text and (b)(2)(iv) to read as follows:

§ 1.1206 Permit-but-disclose proceedings.

* * * * *

(b) * * *

(2) *Written and oral presentations.* A written *ex parte* presentation and a memorandum summarizing an oral *ex parte* presentation (and cover letter, if any) shall clearly identify the proceeding to which it relates, including the docket number, if any, and must be labeled as an *ex parte* presentation. Documents shown or given to Commission staff during ex parte meetings are deemed to be written *ex parte* presentations and, accordingly, must be filed consistent with the provisions of this section. Consistent with the requirements of § 1.49 paragraphs (a) and (f), additional copies of all written *ex parte* presentations and notices of oral *ex parte* presentations, and any replies thereto, shall be mailed, emailed or transmitted by facsimile to the Commissioners or Commission employees who attended or otherwise participated in the presentation.

* * * * *

(iv) *Filing dates for presentations made on the day that the Sunshine notice is released and the day before Sunshine notice is released.* For presentations made on the day the Sunshine notice is released and the day before Sunshine notice is released, any written *ex parte* presentation or memorandum summarizing an oral *ex parte* presentation required pursuant to § 1.1206 or 1.1208 must be submitted before the day that the Sunshine period begins. Written replies, if any, shall be filed no later than the end of the day that the Sunshine period begins, and shall be limited in scope to the specific issues and information presented in the *ex parte* filing to which they respond.

Example 1: On Tuesday, a party makes an *ex parte* presentation in a permit-but-disclose proceeding to a Commissioner. That same day, the Commission's Secretary releases the Sunshine Agenda for the next Commission meeting and that proceeding appears on the Agenda. The Sunshine period begins as of Wednesday, and therefore the presenting party must file its *ex parte* notice by the end of the day (11:59:59 p.m.) on Tuesday. A reply would be due by the end of the day (11:59:59 p.m.) on Wednesday.

Example 2: On Monday, a party makes an *ex parte* presentation in a permit-but-disclose proceeding to a Commissioner. On Tuesday, the Commission's Secretary releases the Sunshine Agenda for the next Commission meeting and that proceeding appears on the Agenda. The Sunshine period begins as of Wednesday, and therefore the presenting party must file its *ex parte* notice by the end of the day (11:59:59 p.m.) on Tuesday. A reply would be due by the end of the day (11:59:59 p.m.) on Wednesday.

[FR Doc. 2020–17266 Filed 9–1–20; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

RIN 0648–BJ74

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Amendment 29; 2021–2022 Biennial Specifications and Management Measures

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

ACTION: Availability of a proposed fishery management plan amendment; request for comments.

SUMMARY: NMFS announces that the Pacific Fishery Management Council has submitted Amendment 29 to the Pacific Coast Groundfish Fishery Management Plan to the Secretary of Commerce for review. If approved, Amendment 29 would reclassify shortbelly rockfish as an ecosystem component species and would make changes to the trawl/non-trawl allocations for blackgill rockfish within the southern slope complex south of 40°10′ North latitude (N lat.), petrale sole, lingcod south of 40°10′ N lat., and widow rockfish.

DATES: Comments on Amendment 29 must be received no later than November 2, 2020.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2020–0098, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0098,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Barry A. Thom., Regional Administrator, 7600 Sand Point Way NE, Seattle, WA 98115.

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).

Electronic Access

This rule is accessible via the internet at the Office of the Federal Register website at *https://www.federalregister.gov/.* Background information and documents including an integrated analysis for this action (Analysis), which addresses the statutory requirements of the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the National Environmental Policy Act, Executive Order 12866, and the Regulatory Flexibility Act are available at the NMFS West Coast Region website at *https://www.fisheries.noaa.gov/region/west-coast* and at the Pacific Fishery Management Council's website at *http://www.pcouncil.org.* The final 2020 Stock Assessment and Fishery Evaluation (SAFE) report for Pacific Coast groundfish, as well as the SAFE reports for previous years, are available from the Pacific Fishery Management Council's website at *http://www.pcouncil.org.*

FOR FURTHER INFORMATION CONTACT: Karen Palmigiano, telephone: (206) 526–4491 and email: *karen.palmigiano@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fisheries in the exclusive economic zone (EEZ) off Washington, Oregon, and California under the Pacific Coast Groundfish Fishery Management Plan (PCGFMP). The Pacific Fishery Management Council (Council) prepared and NMFS implemented the PCGFMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* and by regulations at 50 CFR parts 600 and 660. The Magnuson-Stevens Act requires that each regional fishery management council submit any fishery management plan (FMP) or plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP or amendment, immediately publish a notice that the FMP or amendment is available for public review and comment. This notice announces that proposed Amendment 29 to the FMP is available for public review and comment. NMFS will consider the public comments received during the comment period described above in determining whether to approve, partially approve, or disapprove Amendment 29 to the FMP.

Amendment 29 would make two changes to the PCGFMP. Amendment 29 would (1) reclassify shortbelly rockfish from a stock that requires conservation and management (previously known as ''in the fishery'') to an ecosystem component (EC) species; and (2) change the trawl/non-trawl allocations for blackgill rockfish within the southern slope complex south of 40°10′ N lat., petrale sole, lingcod south of 40°10′ N lat., and widow rockfish.

Shortbelly Rockfish as an EC Species

Shortbelly rockfish (*Sebastes jordani*) is one of the most abundant rockfish species and an important forage species in the California Current Ecosystem. Shortbelly rockfish is not the target of any fisheries and is mostly taken as bycatch in midwater trawl fisheries. Unlike most harvested Pacific coast rockfishes (*e.g.,* bocaccio and cowcod), shortbelly rockfish are small-bodied, relatively short-lived and semi-pelagic rockfish that school as adults. Shortbelly rockfish recruitment is highly variable among years, causing populations to undergo large ''booms and busts''. Historically, shortbelly rockfish were most abundant off central California from Monterey Bay to Point Reyes, common in southern California, and only rarely encountered north of Cape Mendocino, California. In recent years, shortbelly rockfish distribution has extended north of Cape Mendocino, California and into Oregon and Washington waters, the principal fishing areas the midwater trawl fishery operates in to harvest Pacific whiting. While shortbelly rockfish bycatch was historically low in the Pacific whiting fishery, the recent shift in distribution and a likely increase in abundance, has resulted in increased bycatch of shortbelly rockfish in the Pacific whiting midwater trawl fishery. See Chapter 4 of the Analysis for more information on high bycatch of shortbelly rockfish in the Pacific whiting fishery.

Shortbelly rockfish was last assessed in 2007. The assessment, available on the Council's website at *https://www.pcouncil.org/documents/2007/04/stock-assessment-model-for-theshortbelly-rockfish-sebastes-jordani-inthe-california-current.pdf/,* estimated the shortbelly rockfish stock to be 67 percent of unfished levels at the start of 2005. The Analysis (Chapter 3) describes NMFS survey data since the last assessment, including the Southwest Fisheries Science Center's Rockfish Recruitment and Ecosystem Analysis Survey (RREAS) and California

Cooperative Oceanic Fisheries Investigations (CalCOFI) and the Northwest Fisheries Science Center's West Coast Groundfish Bottom Trawl Survey, which provide more recent insight into the population trends of shortbelly rockfish. These survey data show extraordinarily high recruitment events occurred between 2013 and 2017, and provide evidence that the overall shortbelly rockfish population was very high in 2018–2019. The population size in southern California remains close to average levels and suggests the shortbelly rockfish population did not simply shift to northern waters. Increased encounters of shortbelly rockfish in northern midwater trawl fisheries is likely the result of increased recruitment and coastwide biomass coupled with an expansion of its geographic range on the West Coast. In addition to examining NMFS survey data for trends in shortbelly rockfish biomass and distribution, the Analysis (Chapter 3) describes recent research by Schroeder *et al.* 2018, which suggests that the shortbelly rockfish stock is expected to thrive for at least the next decade or so based on multiple strong incoming year-classes.

Shortbelly rockfish were initially considered for an EC species categorization under Amendment 23 to the PCGFMP. Rather than classifying shortbelly rockfish as an EC species, the Council chose to recommend a very restrictive annual catch limit (ACL) of 50 mt, or less than 1 percent of the acceptable biological catch (ABC), for the 2011–2012 (76 FR 27508, May 11, 2011) and the 2013–2014 (78 FR 580, January 3, 2013) management cycles. The ACL was increased to 500 mt beginning in 2015 to prevent unavoidable bycatch from prematurely shutting down emerging mid-water trawl fisheries targeting yellowtail and widow rockfish (80 FR 12567, March 10, 2015). At the time, the 500 mt ACL was still less than 10 percent of the ABC and was a level of harvest meant to accommodate unavoidable incidental bycatch of shortbelly rockfish while allowing most of the harvestable surplus of the stock to be available as forage for species in the California Current ecosystem. The shortbelly rockfish ACL was exceeded in 2018 and 2019. Bycatch of this stock was highly variable and unpredictable in the fishery. After review of the best available scientific information, the ACL was increased again to 3,000 mt in 2020 for the same reasons it was increased in 2015 (85 FR 36803, June 18, 2020).

Section 4.2 of the PCGFMP defines species categories for stocks and stocks complexes. The first three categories are identified for those stocks that need conservation or management and for which the Council sets biennial harvest specifications. The fourth category of species is identified as EC species. These species are not determined to be in need of conservation and management and therefore the Council and NMFS do not actively manage them. EC species are not targeted in any fishery and are not generally retained for sale or personal use.

Section 302(h)(1) of the Magnuson-Stevens Act requires a Council to prepare an FMP for each fishery under its authority that is in need of conservation and management. ''Conservation and management'' is defined in section 3(5) of the Magnuson-Stevens Act. The National Standard guidelines at § 600.305(c) (revised on October 18, 2016; 81 FR 71858) provide direction for determining which stocks will require conservation and management and provide direction to regional councils and NMFS for how to consider these factors in making this determination. Specifically, the guidelines direct regional fishery management councils and NMFS to consider a non-exhaustive list of 10 factors when deciding whether stocks require conservation and management. Below is a summary of information on shortbelly rockfish related to those 10 factors. Section 4.2.3.2 in the Analysis provides additional details on each of the 10 factors' relevance to shortbelly rockfish.

One of the factors a Council must consider when determining whether a stock requires conservation and management is whether maintaining it as a target species will improve or maintain the condition of the stock. The analysis shows that while shortbelly are currently classified as ''in the fishery'' in the PCGFMP, there has been no directed fishing for shortbelly rockfish and disincentives still exist to prevent a directed fishery from developing, such as a lack of market, the cost of having to land shortbelly versus the profits (~$0.02 per pound), and the possibility of fouling the mesh (See Section 4.1.1.5 of the Analysis for more information disincentives for targeting shortbelly rockfish). Shortbelly rockfish is not considered an important stock to commercial, recreational, or subsistence users, as very little is ever caught. Shortbelly rockfish is also not an important component of the regional or National economy and has limited economic value with ex-vessel landings totaling about $11,000 in 2019. There is no developing fishery for shortbelly rockfish in the EEZ off of the West Coast. Because there is no directed fishing and incidental fishing-related mortality has been low in comparison to the ABC, it is very unlikely that catch would exceed the overfishing limit for shortbelly rockfish, resulting in shortbelly rockfish becoming overfished and in need of rebuilding. There are no known conservation concerns for shortbelly rockfish since they are not targeted, are not profitable, and future uses of shortbelly rockfish remain unavailable. Therefore, maintaining shortbelly rockfish as a target species in the PCGFMP is not likely to change stock condition.

Based on a review of the best scientific information available, and after considering the National Standard guidelines, the Council recommended and NMFS is proposing to reclassify shortbelly rockfish as an EC species through Amendment 29 to the PCGFMP. While the Council determined that shortbelly rockfish are not in need of conservation and management as defined by the Magnuson-Stevens Act and the National Standard guidelines, the Council and NMFS determined that there are benefits to retaining shortbelly rockfish as an EC species complex in the PCGFMP because they are a component of the ecosystem as prey (forage fish). Additionally, the Council has adopted a list of candidate stocks for assessment in 2023 for which shortbelly rockfish is included. The Council will make a final decision on this candidate list in June 2022. Amendment 29 would reclassify shortbelly rockfish as an EC species in the PCGFMP to clarify that they are a non-target species and not in need of conservation and management. Recordkeeping and reporting requirements will be maintained to monitor the effects of incidental catch of shortbelly in the groundfish fisheries.

Changes to Trawl and Non-Trawl Allocations

The Council also recommended changing some fixed allocations that were originally established through Amendment 21 to the PCGFMP to 2-year allocations, and revising the trawl/non-trawl percentages for those allocations for blackgill rockfish within the southern slope complex south of 40°10′ N lat., petrale sole, lingcod south of 40°10′N lat., and widow rockfish. Table 1 provides the current trawl/non-trawl allocation for these stocks as was implemented through the 2019–20 biennium and the Council's recommended trawl/non-trawl allocations for the 2021–22 biennium.

TABLE 1—CURRENT AND PROPOSED TRAWL AND NON-TRAWL ALLOCATIONS FOR CHANGES TO THE TRAWL/NON-TRAWL ALLOCATIONS FOR BLACKGILL ROCKFISH WITHIN THE SOUTHERN SLOPE COMPLEX SOUTH OF 40°10′ N LAT., PETRALE SOLE, LINGCOD SOUTH OF 40°10′ N LAT., AND WIDOW ROCKFISH

Stock	2020				2021–22 Biennium			
	Trawl allocation		Non-trawl allocation		Trawl allocation		Non-trawl allocation	
	MT	Percent	MT	Percent	MT	Percent	MT	Percent
Southern slope complex south of 40°10′ N lat., includes blackgill rockfish.	723.8	63	456	37	2021-Slope (484.5), blackgill (72.4). 2022-Slope (483.2), blackgill (71.4).	Blackgill (41%), Other slope rockfish (91%).	2021-Slope (47.9), blackgill (104.2). 2022-Slope (47.8), blackgill (102.7).	Blackgill (59%), Other slope rockfish (9%).
Petrale sole	2,458	95	129.4	5	Remaining Amount.		30 MT	
Lingcod south of 40°10′ N lat.	462.5	45	565.2	55	435.6	40	653.4	60.
Widow Rockfish	10,540.2	91	1,042.4	9	Remaining Amount.		400	

Converting these allocations from fixed allocations to 2-year allocations would allow the Council to review and potentially revise them during each biennium. The changes to trawl and non-trawl allocations are expected to better align current catch with annual limits that maximize benefits to sectors while also under attainment of stocks that can occur when a sector is allocated more than they can harvest. The effects of each of these changes is discussed in Chapter 4 of the Analysis under the specific stock or stock complex.

NMFS welcomes comments on the proposed FMP amendment through the end of the comment period. A proposed rule to implement Amendment 29 has been submitted for Secretarial review and approval. NMFS expects to publish and request public review and comment on proposed regulations to implement Amendment 29 in the near future. For public comments on the proposed rule to be considered in the approval or disapproval decision on Amendment 29, those comments must be received by the end of the comment period on the amendment. All comments received by the end of the comment period for the amendment, whether specifically directed to the amendment or the proposed rule, will be considered in the approval/disapproval decision.

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

Dated: August 28, 2020.

Kelly Denit,

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

[FR Doc. 2020–19414 Filed 9–1–20; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 85, No. 171
Wednesday, September 2, 2020

DEPARTMENT OF AGRICULTURE

Forest Service

Collaborative Forest Restoration Program Technical Advisory Panel

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Collaborative Forest Restoration Program Technical Advisory Panel (Panel) will hold a virtual meeting. The Panel is established consistent with the Federal Advisory Committee Act of 1972 (FACA), and Title VI of the Community Forest Restoration Act (the Act). Additional information concerning the Panel, including the meeting summary/minutes, can be found by visiting the Panel's website at: *http://www.fs.usda.gov/goto/r3/cfrp.*

DATES: The meeting will be held on September 22–24, 2020:

• September 22–23 (Tuesday–Wednesday), with meeting each day from 9:30 a.m. to 3:45 p.m., and

• September 24 (Thursday) meeting will be held 9:30 a.m.–1:45 p.m.

All meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held with virtual attendance only. The following link with provide public access to view the Panel meeting: *https://www.youtube.com/channel/UCqExQ41C51-mSdijkwgGnww?view_as=subscriber.*

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at USDA Forest Service Region 3 Regional Office. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Ian Fox, Designated Federal Officer, by phone at 505–401–5245 or via email at *ian.fox@usda.gov.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

(1) Review Panel Bylaws, Charter, and what it means to be a Federal Advisory Committee;

(2) Evaluate and score the 2020 Collaborative Forest Restoration Program (CFRP) grant applications to determine which applications best meet the program objectives;

(3) Develop prioritized 2020 CFRP project funding recommendations for the Secretary; and

(4) Discuss the proposal review process used by the Panel to identify what went well and what could be improved.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by September 4, 2020, to be scheduled on the agenda.

Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Ian Fox, Designated Federal Officer, USDA Forest Service, Region 3 Regional Office, 333 Broadway Bouleveard Southwest, Albuqueque, New Mexico 87102; or by email to *ian.fox@usda.gov.*

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Dated: August 26, 2020.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2020–19323 Filed 9–1–20; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Collaborative Forest Restoration Program Technical Advisory Panel

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Collaborative Forest Restoration Program Technical Advisory Panel (Panel) will hold a virtual meeting. The Panel is established consistent with the Federal Advisory Committee Act of 1972 (FACA), and Title VI of the Community Forest Restoration Act (the Act). Additional information concerning the Panel, including the meeting summary/minutes, can be found by visiting the Panel's website at: *http://www.fs.usda.gov/goto/r3/cfrp.*

DATES: The meeting will be held on September 15–17, 2020, with meeting each day from 9:30 a.m. to 3:45 p.m.

All meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held with virtual attendance only. The following link with provide public access to view the Panel meeting: *https://www.youtube.com/channel/UCqExQ41C51-mSdijkwgGnww?view_as=subscriber.*

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at USDA Forest Service Region 3 Regional Office. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Ian Fox, Designated Federal Officer, by phone at 505–401–5245 or via email at *ian.fox@usda.gov.*

Individuals who use telecommunication devices for the deaf

(TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

(1) Review Panel Bylaws, Charter, and what it means to be a Federal Advisory Committee;

(2) Evaluate and score the 2020 Collaborative Forest Restoration Program (CFRP) grant applications to determine which applications best meet the program objectives;

(3) Develop prioritized 2020 CFRP project funding recommendations for the Secretary; and

(4) Discuss the proposal review process used by the Panel to identify what went well and what could be improved.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by September 4, 2020, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Ian Fox, Designated Federal Officer, USDA Forest Service, Region 3 Regional Office, 333 Broadway Bouleveard Southwest, Albuqueque, New Mexico 87102; or by email to *ian.fox@usda.gov.*

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Dated: August 27, 2020.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2020–19319 Filed 9–1–20; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–580–910, C–821–827]

Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the Republic of Korea and the Russian Federation: Postponement of Preliminary Determinations in the Countervailing Duty Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable September 2, 2020.

FOR FURTHER INFORMATION CONTACT: Caitlin Monks at (202) 482–2670 (the Russian Federation (Russia)); Moses Song or Natasia Harrison at (202) 482–7885 or (202) 482–1240, respectively (the Republic of Korea (Korea)), AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On July 28, 2020, the Department of Commerce (Commerce) initiated countervailing duty (CVD) investigations of imports of seamless carbon and alloy steel standard, line, and pressure pipe (seamless pipe) from Russia and Korea.[1] Currently, the preliminary determinations are due no later than October 1, 2020.

Postponement of Preliminary Determinations

Section 703(b)(1) of the Tariff Act of 1930, as amended (the Act), requires the Department to issue the preliminary determination in a countervailing duty investigation within 65 days after the date on which Commerce initiated the investigation. However, section 703(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 130 days after the date on which Commerce initiated the investigation if: (A) The petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On August 18, 2020, the petitioner submitted a timely request that Commerce postpone the preliminary CVD determinations.[2] According to the petitioner, additional time is necessary because the current preliminary determination is scheduled ''just 10 days after the current deadline for complete initial responses to Sections II and III of Commerce's questionnaire'' and ''to allow Commerce to fully analyze respondents' questionnaire responses, and any other filings such as new subsidy allegations and benchmark factual information, prior to the preliminary determination.'' [3]

In accordance with 19 CFR 351.205(e), the petitioner has stated the reasons for requesting a postponement of the preliminary determination, and Commerce finds no compelling reason to deny the request. Therefore, in accordance with section 703(c)(1)(A) of the Act, Commerce is postponing the deadline for the preliminary determinations to no later than 130 days after the date on which these investigations were initiated, *i.e.,* December 7, 2020.[4] Pursuant to section 705(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations of these investigations will continue to be 75 days after the date of the preliminary determinations.

Notification to Interested Parties

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: August 27, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–19395 Filed 9–1–20; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea and the Russian Federation: Initiation of Countervailing Duty Investigations,* 85 FR 47170 (August 4, 2020) (*Initiation Notice*).

[2] The petitioner is Vallourec Star, LP (petitioner). *See* Petitioner's Letter, ''Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Korea and Russia: Request to Extend Preliminary Determinations,'' dated August 18, 2020.

[3] *Id.*

[4] Postponing the preliminary determination to 130 days after initiation would place the deadline on Saturday, December 5, 2020. Commerce's practice dictates that where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–010, C–570–011]

Crystalline Silicon Photovoltaic Products From the People's Republic of China: Preliminary Results of Changed Circumstances Reviews, and Consideration of Revocation of the Antidumping and Countervailing Duty Orders in Part

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On March 16, 2020, the Department of Commerce (Commerce) received a request for revocation, in part, of the antidumping duty (AD) and countervailing duty (CVD) orders on crystalline silicon photovoltaic products from the People's Republic of China (China) with respect to certain off-grid portable small panels. We preliminarily find that producers accounting for substantially all of the domestic production of the products to which the *Solar Products Orders* pertain lack interest in the relief provided by those orders with respect to certain off-grid portable small panels; therefore, we intend to revoke, in part, the *Solar Products Orders* with respect to such panels. Interested parties are invited to comment on these preliminary results.

DATES: Applicable September 2, 2020.

FOR FURTHER INFORMATION CONTACT: Thomas Hanna, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0835.

SUPPLEMENTARY INFORMATION:

Background

On February 18, 2015, Commerce published AD and CVD orders on certain crystalline silicon photovoltaic products from China.[1] On March 16, 2020, Memory Experts Inc., dba PowerTraveller (Memory Experts), an importer of the subject merchandise, requested, through changed circumstances reviews, revocation of the *Solar Products Orders* with respect to certain off-grid portable small panels pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.216(b).[2]

On June 12, 2020, we published the *Initiation Notice* for these changed circumstances reviews in the **Federal Register**.[3] We invited interested parties to submit comments concerning industry support for the revocation, in part, of the *Solar Products Orders,* as well as comments and/or factual information regarding these changed circumstances reviews. We received no comments.

Scope of the Solar Products Orders

The merchandise covered by these orders is modules, laminates and/or panels consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including building integrated materials. For purposes of these orders, subject merchandise includes modules, laminates and/or panels assembled in China consisting of crystalline silicon photovoltaic cells produced in a customs territory other than China.

Subject merchandise includes modules, laminates and/or panels assembled in China consisting of crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Excluded from the scope of these orders are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS). Also excluded from the scope of these orders are modules, laminates and/or panels assembled in China, consisting of crystalline silicon photovoltaic cells, not exceeding 10,000 mm^2 in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cells. Where more than one module, laminate and/or panel is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all modules, laminates and/or panels that are integrated into the consumer good.

Further, also excluded from the scope of these orders are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, laminates and/or panels, from China.[4]

Additionally, excluded from the scope of these orders are solar panels that are: (1) Less than 300,000 mm^2 in surface area; (2) less than 27.1 watts in power; (3) coated across their entire surface with a polyurethane doming resin; and (4) joined to a battery charging and maintaining unit (which is an acrylonitrile butadiene styrene (ABS) box that incorporates a light emitting diode (LED)) by coated wires that include a connector to permit the incorporation of an extension cable. The battery charging and maintaining unit utilizes high-frequency triangular pulse waveforms designed to maintain and extend the life of batteries through the reduction of lead sulfate crystals. The above-described battery charging and maintaining unit is currently available under the registered trademark ''SolarPulse.''

Merchandise covered by these orders is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 8501.61.0000, 8507.20.8030, 8507.20.8040, 8507.20.8060, 8507.20.8090, 8541.40.6015, 8541.40.6020, 8541.40.6030, 8541.40.6035 and 8501.31.8000. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of these orders is dispositive.[5]

Preliminary Results of Changed Circumstances Reviews and Intent To Revoke the Solar Products Orders, in Part

Section 782(h)(2) of the Act gives Commerce the authority to revoke an order if producers accounting for substantially all of the production of the domestic like product have expressed a lack of interest in the order. Section 351.222(g) of Commerce's regulations provides that Commerce will conduct a changed circumstances review under 19 CFR 351.216, and may revoke an order

[1] *See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 80 FR 8592 (February 18, 2015) (*Solar Products Orders*).

[2] *See* Memory Experts' Letter, ''Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China; Memory Experts Inc., dba PowerTraveller's Request for a Changed Circumstances Review,'' dated March 16, 2020 (Memory Experts' Request).

[3] *See Crystalline Silicon Photovoltaic Products from the People's Republic of China: Notice of Initiation of Changed Circumstances Reviews, and Consideration of Revocation of the Antidumping and Countervailing Duty Orders in Part,* 85 FR 35902 (June 12, 2020) (*Initiation Notice*).

[4] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 77 FR 73018 (December 7, 2012); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Countervailing Duty Order,* 77 FR 73017 (December 7, 2012).

[5] *See Solar Products Orders.*

(in whole or in part), if it concludes that: (i) Producers accounting for substantially all of the production of the domestic like product to which the order pertains have expressed a lack of interest in the relief provided by the order, in whole or in part; or (ii) if other changed circumstances sufficient to warrant revocation exist. Thus, both the Act and Commerce's regulations require that ''substantially all'' domestic producers express a lack of interest in the order for Commerce to revoke the order, in whole or in part.[6] Commerce has interpreted ''substantially all'' to represent producers accounting for at least 85 percent of U.S. production of the domestic like product.[7]

Hanwha Q CELL USA, Inc. (Q CELL USA) and SunPower Manufacturing Oregon, LLC (SPMOR) submitted statements of lack of interest in the continued application of the *Solar Products Orders* with respect to certain off-grid portable small panels described below. However, these statements did not confirm that Q CELL USA and SPMOR account for substantially all domestic production of certain crystalline silicon photovoltaic products.[8] Thus, Commerce did not determine at the time it initiated this changed circumstances review whether producers accounting for substantially all of the production of the domestic like product lacked interest. In the *Initiation Notice,* Commerce invited interested parties to comment on the issue of domestic industry support for a partial revocation of the *Solar Products Orders* with respect to such panels. Commerce received no comments.

In light of Memory Experts' Request, Q CELL USA and SPMOR's statement of lack of interest, and the absence of any interested party comments received during the comment period, we preliminarily conclude that producers accounting for substantially all of the production of the domestic like product to which the *Solar Products Orders* pertain lack interest in the relief provided by the *Solar Products Orders* with respect to certain off-grid portable small panels that are the subject of Memory Experts' Request. Thus, we determine that changed circumstances warrant revocation of the *Solar Products Orders,* in part, with respect to such panels.

Accordingly, we are notifying the public of our intent to revoke the *Solar Products Orders,* in part, with respect to the following off-grid portable small panels:

(1) Off-grid crystalline silicon photovoltaic panels without a glass cover with the following characteristics:

(a) Total power output of 500 watts or less per panel;

(b) Maximum surface area of 8,000 cm^2 per panel;

(c) Unit does not include a built-in inverter;

(d) Unit has visible parallel grid collector metallic wire lines every 2–40 millimeters across each solar panel (depending on model);

(e) Solar cells are encased in laminated frosted PET material without stitching;[9]

(f) The panel is encased in polyester fabric with visible stitching which includes a Velcro-type storage pocket and unit closure, or encased within a Neoprene clamshell (depending on model);

(g) Includes LED indicator.

We will consider comments from interested parties on these preliminary results before issuing the final results of this review.[10]

Public Comment

Interested parties are invited to comment on these preliminary results in accordance with 19 CFR 351.309(c)(1)(ii). Written comments may be submitted no later than 14 days after the date of publication of these preliminary results. Rebuttals to written comments, limited to issues raised in such comments, may be filed no later than seven days after the due date for comments. All submissions must be filed electronically using Enforcement and Compliance's AD and CVD Centralized Electronic Service System (ACCESS).[11] An electronically filed document must be received successfully in its entirety by ACCESS, by 5 p.m. Eastern Time on the due dates set forth in this notice. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[12]

Commerce will issue the final results of these changed circumstances reviews, which will include its analysis of any written comments, no later than 270 days after the date on which this review was initiated.

If, in the final results of these reviews, Commerce continues to determine that changed circumstances warrant the revocation of the *Solar Products Orders,* in part, we will instruct U.S. Customs and Border Protection to liquidate without regard to antidumping or countervailing duties, and to refund any estimated antidumping or countervailing duties on all unliquidated entries of the merchandise covered by the revocation that are not covered by the final results of an administrative review or automatic liquidation.

The current requirement for cash deposits of estimated antidumping and countervailing duties on all entries of subject merchandise will continue unless until they are modified pursuant to the final results of these changed circumstances reviews.

These preliminary results of reviews and notice are in accordance with sections 751(b) and 777(i) of the Act and 19 CFR 351.216, 19 CFR 351.221(c)(3), and 19 CFR 351.222.

Dated: August 27, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–19393 Filed 9–1–20; 8:45 am]

BILLING CODE 3510–DS–P

[6] *See* Section 782(h) of the Act and 19 CFR 351.222(g).

[7] *See Honey from Argentina; Antidumping and Countervailing Duty Changed Circumstances Reviews; Preliminary* Intent to Revoke Antidumping and Countervailing Duty Orders, 77 FR 67790, 67791 (November 14, 2012)(*Honey Preliminary CCR Results*), unchanged in *Honey from Argentina; Final Results of Antidumping and Countervailing Duty Changed Circumstances Reviews; Revocation of Antidumping and Countervailing Duty Orders,* 77 FR 77029 (December 31, 2012).

[8] *See Initiation Notice.*

[9] Although the polyester material has stitching on the perimeter of the unit, the cells are not stitched into the PET material.

[10] *See, e.g., Honey Preliminary CCR Results,* 77 FR 67790, 67791 (November 14, 2012); *Aluminum Extrusions from the People's Republic of China: Preliminary Results of Changed Circumstances Reviews, and Intent to Revoke Antidumping and Countervailing Duty Orders in Part,* 78 FR 66895 (November 7, 2013); and 19 CFR 351.222(g)(3)(v).

[11] *See generally* 19 CFR 351.303.

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 29615 (May 18, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

DEPARTMENT OF COMMERCE

International Trade Administration

[C–714–001, C–821–825]

Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Postponement of Preliminary Determinations in the Countervailing Duty Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable September 2, 2020.

FOR FURTHER INFORMATION CONTACT: Bob Palmer at (202) 482–9068 (the Kingdom of Morocco (Morocco)) or George Ayache at (202) 482–2623 (the Russian

Federation (Russia)), AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On July 16, 2020, the Department of Commerce (Commerce) initiated countervailing duty (CVD) investigations of imports of phosphate fertilizers from Morocco and Russia.[1] Currently, the preliminary determinations are due no later than September 21, 2020.[2]

Postponement of Preliminary Determinations

Section 703(b)(1) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in a CVD investigation within 65 days after the date on which Commerce initiated the investigation. However, section 703(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 130 days after the date on which Commerce initiated the investigation if: (A) The petitioner[3] makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On August 20, 2020, the petitioner submitted a timely request that Commerce postpone the preliminary CVD determinations.[4] The petitioner stated that it requests postponement as ''additional time is needed for {Commerce} to analyze fully the questionnaire responses, issue supplemental questionnaires as appropriate, and prepare an accurate preliminary determination.''[5]

In accordance with 19 CFR 351.205(e), the petitioner has stated the reasons for requesting a postponement of the preliminary determination, and Commerce finds no compelling reason to deny the request. Therefore, in accordance with section 703(c)(1)(A) of the Act, Commerce is postponing the deadline for the preliminary determinations to no later than 130 days after the date on which these investigations were initiated, *i.e.,* November 23, 2020. Pursuant to section 705(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations of these investigations will continue to be 75 days after the date of the preliminary determinations.

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: August 28, 2020.

Joseph A. Laroski Jr.,

Deputy Assistant Secretary for Policy and Negotiations.

[FR Doc. 2020–19410 Filed 9–1–20; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Phosphate Fertilizers from the Kingdom of Morocco and the Russian Federation: Initiation of Countervailing* Duty Investigations, 85 FR 44505 (July 23, 2020) (*Initiation Notice*).

[2] The current deadline for the preliminary determination falls on September 19, 2020, which is a Saturday. Commerce's practice dictates that where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day, which is Monday, September 21, 2020. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

[3] The petitioner in these proceedings is the Mosaic Company.

[4] *See* Petitioner's Letters, ''Phosphate Fertilizers from Morocco: Petitioner's Request for Postponement of the Preliminary Determination,'' dated August 20, 2020; and ''Phosphate Fertilizers from Russia: Petitioner's Request for Postponement of the Preliminary Determination,'' dated August 20, 2020.

[5] *Id.*

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–938]

Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Results of the Expedited Second Five-Year Sunset Review of the Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of this sunset review, the Department of Commerce (Commerce) finds that revocation of the countervailing duty (CVD) order on citric acid and certain citrate salts (citric acid) from the People's Republic of China (China) would be likely to lead to continuation or recurrence of countervailable subsidies, at the levels indicated in the ''Final Results of Sunset Review'' section of this notice.

DATES: Applicable September 2, 2020.

FOR FURTHER INFORMATION CONTACT: Ian Hamilton, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4798.

SUPPLEMENTARY INFORMATION:

Background

On May 29, 2009, Commerce published in the **Federal Register** a notice of the CVD order on citric acid from China.[1] On May 1, 2020, Commerce published the notice of initiation of the second sunset review of the *Order,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On May 18, 2020, Commerce received a complete notice of intent to participate in the sunset review of the *Order* from domestic interested parties[3] within the deadline specified in 19 CFR 351.218(d)(1)(i).[4] The domestic interested parties claimed interested party status pursuant to section 771(9)(C) of the Act as manufacturers in the United States of the domestic like product.[5]

On June 1, 2020, the domestic interested parties filed an adequate substantive response within the deadline specified in 19 CFR 351.218(d)(3)(i).[6] Commerce did not receive substantive responses from any other interested parties with respect to the *Order* covered by this sunset review. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce is conducting an expedited (120-day) sunset review of the *Order.*

Scope of the Order

The scope of the *Order* includes all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid,

[1] *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Notice of Countervailing Duty Order,* 74 FR 25705 (May 29, 2009) (*Order*).

[2] *See Initiation of Five-Year (Sunset) Review,* 85 FR 25386 (May 1, 2020).

[3] The domestic interested parties are Archer Daniels Midland Company; Cargill, Incorporated; and Tate & Lyle Ingredients Americas LLC (collectively, domestic interested parties).

[4] *See* Domestic Interested Parties' Letter, ''Second Five-Year (''Sunset'') Review of Antidumping And Countervailing Duty Orders On Citric Acid And Certain Citrate Salts from the People's Republic of China: Domestic Industry's Notice Of Intent To Participate,'' dated May 18, 2020.

[5] *Id.* at 2.

[6] *See* Domestic Interested Parties' Letter, ''Second Five-Year (''Sunset'') Review of The Countervailing Duty Order On Citric Acid And Certain Citrate Salts from the People's Republic of China: Domestic Industry's Substantive Response,'' dated June 1, 2020.

sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend. The scope of the *Order* also includes all forms of crude calcium citrate, including dicalcium citrate monohydrate, and tricalcium citrate tetrahydrate, which are intermediate products in the production of citric acid, sodium citrate, and potassium citrate. The scope of the *Order* does not include calcium citrate that satisfies the standards set forth in the United States Pharmacopeia and has been mixed with a functional excipient, such as dextrose or starch, where the excipient constitutes at least 2 percent, by weight, of the product. The scope of the *Order* includes the hydrous and anhydrous forms of citric acid, the dihydrate and anhydrous forms of sodium citrate, otherwise known as citric acid sodium salt, and the monohydrate and monopotassium forms of potassium citrate. Sodium citrate also includes both trisodium citrate and monosodium citrate, which are also known as citric acid trisodium salt and citric acid monosodium salt, respectively.

Citric acid and sodium citrate are classifiable under 2918.14.0000 and 2918.15.1000 of the Harmonized Tariff Schedule of the United States (HTSUS), respectively. Potassium citrate and crude calcium citrate are classifiable under 2918.15.5000 and 3824.90.9290 of the HTSUS, respectively. Blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.90.9290 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

Analysis of Comments Received

A complete discussion of all issues raised in this sunset review, including the likelihood of continuation or recurrence of subsidization in the event of revocation of the *Order* and the countervailable subsidy rates likely to prevail if the *Order* were to be revoked, is provided in the Issues and Decision Memorandum. A list of the topics discussed in the Issues and Decision Memorandum is attached as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://enforcement.trade.gov/frn/.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Final Results of Sunset Review

Pursuant to sections 751(c)(1) and 752(b) of the Act, we determine that revocation of the *Order* on citric acid from China would be likely to lead to continuation or recurrence of countervailable subsidies at the following net countervailable subsidy rates:

Manufacturers/producers/exporters	Net countervailable subsidy (percent)
TTCA Co., Ltd	60.07
Yixing Union Biochemical Co., Ltd. and Yixing Union Cogeneration Co., Ltd	52.22
Anhui BBCA Biochemical Co., Ltd	166.34
All Others	55.53

Administrative Protective Order (APO)

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under an APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials, or conversion to judicial protective orders, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing the final results and this notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act, and 19 CFR 351.218(f)(3).

Dated: August 27, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. History of the Order
V. Legal Framework
VI. Discussion of the Issues
  1. Likelihood of Continuation or Recurrence of a Countervailable Subsidy
  2. Net Countervailable Subsidy Rates Likely to Prevail
  3. Nature of the Subsidies
VII. Final Results of Sunset Review
VIII. Recommendation

[FR Doc. 2020–19394 Filed 9–1–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the U.S. Naval Academy Board of Visitors

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: Notice of partially closed meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the U.S. Naval Academy Board of Visitors, hereafter ''Board,'' will take place.

DATES: Open to the public, September 14, 2020, from 10 a.m. to 12 p.m. Closed to the public, September 14, 2020, from 12 p.m. to 1 p.m.

ADDRESSES: This a virtual meeting that will be broadcasted live from the United States Naval Academy in Annapolis, MD. Escort is not required.

FOR FURTHER INFORMATION CONTACT: Major Raphael Thalakottur, USMC, Executive Secretary to the Board of Visitors, Office of the Superintendent, U.S. Naval Academy, Annapolis, MD 21402–5000, 410–293–1503, *thalakot@usna.edu,* or visit *https://www.usna.edu/PAO/Superintendent/bov.php.*

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), the General Services Administration's (GSA) Federal Advisory Committee Management Final Rule (41 CFR part 102–3).

Purpose of Meeting: The U.S. Naval Academy Board of Visitors will meet to make such inquiry, as the Board deems necessary, into the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, and academic methods of the Naval Academy.

Agenda

Proposed meeting agenda for September 14, 2020.

0930–1000 Assemble/Members log on (Broadcasted to Public)
1000 Call to Order (Broadcasted to Public)
1000–1155 Business Session (Broadcasted to Public)

1155–1200 Break (Broadcasted to Public)
1200–1300 Executive Session (Closed to Public)

Current details on the board of visitors may be found at *https://www.usna.edu/PAO/Superintendent/bov.php.*

The executive session of the meeting from 12:00 p.m. to 1:00 p.m. on September 14, 2020, will consist of discussions of new and pending administrative or minor disciplinary infractions and non-judicial punishments involving midshipmen attending the Naval Academy to include but not limited to, individual honor or conduct violations within the Brigade, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. For this reason, the executive session of this meeting will be closed to the public, as the discussion of such information cannot be adequately segregated from other topics, which precludes opening the executive session of this meeting to the public. Accordingly, the Secretary of the Navy, in consultation with the Department of the Navy General Counsel, has determined in writing that the meeting shall be partially closed to the public because the discussions during the executive session from 12 p.m. to 1 p.m. will be concerned with matters protected under sections 552b(c)(5), (6), and (7) of title 5, United States Code.

Authority: 5 U.S.C. 552b

Meeting Accessibility: Pursuant to FACA and 41 CFR 102–3.140, this meeting is virtually open to the public. This meeting will be broadcasted live from the United States Naval Academy to include audio and video. The broadcast will be close captioned for the duration of the public portion of the meeting. The link to view the meeting will be posted at *https://www.usna.edu/PAO/Superintendent/bov.php* forty-eight hours prior to the meeting. Due to expected health directives in light of COVID–19, the public cannot be accommodated to attend the meeting in person.

Written Statements: Per Section 10(a)(3) of the FACA and 41 CFR 102–3.105(j) and 102–3.140, interested persons may submit a written statement for consideration at any time, but should be received by the Designated Federal Officer at least 15 business days prior to the meeting date so that the comments may be made available to the Board for their consideration prior to the meeting. Written statements should be submitted via mail to 121 Blake Rd, Annapolis MD 21402. Please note that since the Board operates under the provisions of the FACA, as amended, all submitted comments and public presentations will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the board website.

Dated: August 27, 2020.

D.J. Antenucci,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2020–19336 Filed 9–1–20; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0101]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Protection and Advocacy of Individual Rights Program Assurances

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before October 2, 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 Samuel Pierre, 202–245–6488.

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: Protection and Advocacy of Individual Rights Program Assurances.

OMB Control Number: 1820–0625.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local and Tribal Governments.

Total Estimated Number of Annual Responses: 57.

Total Estimated Number of Annual Burden Hours: 9.

Abstract: Section 509 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended by the Title IV of Workforce Innovation and Opportunity Act (WIOA) and its implementing Federal Regulations at 34 CFR part 381, require the PAIR grantees to submit an application to the RSA Commissioner in order to receive assistance under Section 509 of the Rehabilitation Act. The Rehabilitation Act requires that the application contain Assurances to which the grantees must comply. Section 509(f) of the Rehabilitation Act specifies the Assurances. All 57 PAIR grantees are required to be part of the protection and advocacy system in each State established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 6041 *et seq.*).

Dated: August 28, 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. 2020–19392 Filed 9–1–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: 1850–0631]

Agency Information Collection Activities; Comment Request; 2020/22 Beginning Postsecondary Students (BPS:20/22) Field Test

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before November 2, 2020.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2020–SCC–0142. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208B, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

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: 2020/22 Beginning Postsecondary Students (BPS:20/22) Field Test.

OMB Control Number: 1850–0631.

Type of Review: A new information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 7,568.

Total Estimated Number of Annual Burden Hours: 1,226.

Abstract: The 2020/22 Beginning Postsecondary Students Field Test (BPS:20/22) is conducted by the National Center for Education Statistics, part of the Institute of Education Sciences, within the Department of Education, and is part of the Beginning Postsecondary Students Longitudinal Study data collection program at *https://nces.ed.gov/surveys/bps/.* The Sample Collection will begin 03/01/21 and end 06/30/21.

BPS is designed to follow a cohort of students who enroll in postsecondary education for the first time during the same academic year, irrespective of the date of high school completion. The study collects data on students' persistence in and completion of postsecondary education programs; their transition to employment; demographic characteristics; and changes over time in their goals, marital status, income, and debt, among other indicators. Data from BPS are used to help researchers and policymakers better understand how financial aid influences persistence and completion, what percentages of students complete various degree programs, what are the early employment and wage outcomes for certificate and degree attainers, and why students leave school.

BPS:20/22 will be a nationally-representative sample of approximately 37,000 students who were first-time beginning students during the 2019–20 academic year. The BPS:20/22 field test will include approximately 3,700 students who first began in the 2018–19 academic year. These students will be asked to complete a survey and administrative data will also be collected for them. Administrative data matching will be conducted with sources including the National Student Loan Data System (NSLDS), containing federal loan and grant files; the Central Processing System (CPS), which houses and processes data contained in the Free Application for Federal Student Aid (FAFSA) forms; the National Student Clearinghouse (NSC) which provides enrollment and degree verification; vendors of national undergraduate, graduate, and professional student admission tests; and possible other administrative data sources such as the Veterans Benefits Administration (VBA). These data will be obtained through file matching/downloading.

This submission covers BPS:20/22 field test materials and procedures required for conducting the student survey and for matching data to administrative records. Following the field test study in 2021, NCES will provide the Office of Management and Budget (OMB) with a memorandum summarizing any changes planned for the full-scale data collection, and a revised OMB package. The materials that will be used in the BPS:20/22 full-scale study will be based upon the field test materials included in this submission. Additionally, this submission is designed to adequately justify the need for and overall practical utility of the full study, presenting the overarching plan for all of the phases of the data collection and providing as much detail about the measures to be used as is available at the time of this submission. As part of this submission, NCES is publishing a notice in the **Federal Register** allowing first a 60- and then a 30-day public comment period. Field test materials, procedures, and results will inform the full-scale study. After completion of the field test, NCES will publish a notice in the **Federal Register** allowing additional 30-day public comment period on the final details of the BPS:20/22 full-scale study.

Dated: August 28, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–19423 Filed 9–1–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Reopening; Applications for New Awards; Education Research and Special Education Research Grant Programs

AGENCY: Institute of Education Sciences, Department of Education.

ACTION: Notice.

SUMMARY: On May 4, 2020, we published in the **Federal Register** a notice inviting applications (NIA) for the fiscal year (FY) 2021 Education Research and Special Education Research Grant Programs competitions, Catalog of Federal Domestic Assistance (CFDA) numbers 84.305A, 84.305B, 84.305C, 84.305R, 84.324A, 84.324B, 84.324P, and 84.324R. The NIA established a deadline date of August 20, 2020, for the transmittal of applications. This notice reopens the competition until September 8, 2020, for certain prospective eligible applicants described elsewhere in this notice.

DATES: *Deadline for Transmittal of Applications:* September 8, 2020.

FOR FURTHER INFORMATION CONTACT: For the contact person associated with a particular research competition, please refer to the chart published in the **Federal Register** on May 4, 2020 (85 FR 26445) and available at *www.govinfo.gov/app/details/FR-2020-05-04/2020-09446,* as well as in the relevant Request for Application (available at *https://ies.ed.gov/funding/*) and application package.

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 May 4, 2020, we published the NIA for the FY 2021 Education Research and Special Education Research Grant Programs competitions in the **Federal Register** (85 FR 26445). We are reopening this competition in order to allow applicants, including personnel that are critical to the preparation and submission of applications, more time to prepare and submit applications that were delayed by the severe storm disaster declaration in Iowa or the wildfire disaster declarations in California, Nevada, Oregon, and Washington.

Eligibility: The extension of the application deadline date in this notice applies to eligible applicants under the FY 2021 Education Research and Special Education Research Grant Programs competitions, CFDA numbers 84.305A, 84.305B, 84.305C, 84.305R, 84.324A, 84.324B, 84.324P, and 84.324R, that are affected by Fire Management Assistance Declarations in California (FEMA Disaster designations 5331, 5332, 5329), Nevada (FEMA Disaster designation 5328), Oregon (FEMA Disaster designation 5327), and Washington (FEMA Disaster designation 5330) and a Major Disaster Declaration in Iowa (FEMA Disaster designation 4557). See *www.fema.gov/disasters/.*

Each application submitted under this Notice must include an assurance that the applicant meets the eligibility requirements for the jurisdictions covered by the FEMA designations noted above. The assurance may either be based on (1) the location of the applicant institution or (2) the location(s) of the essential staff, in which case the explanation should include the name(s) and remote work location(s) for the personnel or consultants key to the preparation of the application.

Applicants that are eligible for an extension under this notice (because they are located in, or have personnel or consultants that are critical to the timely development and submission of applications who are located in, one of the areas described in the preceding paragraph) and have already timely submitted applications under the FY 2021 Education Research and Special Education Research Grant Programs competitions may resubmit applications but are not required to do so. If a new application is not submitted, the Department will use the application that was submitted by the original deadline. If a new application is submitted, the Department will consider the application that is last submitted and timely received. Applications that did not meet the original deadline must use the application package for the reopened competition, available at *grants.gov*, to be considered for review.

Note: All information in the NIA for this competition remains the same, except for the deadline for the transmittal of applications.

Program Authority: 20 U.S.C. 9501 *et seq.*

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Mark Schneider,

Director, Institute of Education Sciences.

[FR Doc. 2020–19391 Filed 9–1–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

President's Board of Advisors on Historically Black Colleges and Universities

AGENCY: Office of Undersecretary, President's Board of Advisors on Historically Black Colleges and Universities, U.S. Department of Education.

ACTION: Announcement of an open meeting.

SUMMARY: This notice sets forth the agenda for the September 23, 2020, meeting of the President's Board of Advisors on Historically Black Colleges and Universities (PBA) and provides information to members of the public about the meeting. Notice of the meeting is required by Section 10(a)(2) of the Federal Advisory Committee Act (FACA) and is intended to notify the public of its opportunity to attend.

DATES: The PBA meeting will be held on Wednesday, September 23, 2020 from 9 a.m. to 11:00 a.m. E.D.T. The meeting will be a virtual meeting via webinar. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Sedika Franklin, Designated Federal Official, U.S. Department of Education, White House Initiative on Historically Black Colleges and Universities, 400 Maryland Avenue SW, Washington, DC 20202; telephone: (202) 453–5630, or email *sedika.franklin@ed.gov.*

SUPPLEMENTARY INFORMATION:

PBA's Statutory Authority and Function: The PBA is established by Executive Order 13779 (February 28, 2017) and is continued by Executive Order 13889 (September 27, 2019). The

PBA is also governed by the provisions of the FACA (5 U.S.C. App. 2), which sets forth standards for the formation and use of advisory committees. The purpose of the PBA is to advise the President, through the White House Initiative on Historically Black Colleges and Universities (Initiative), on all matters pertaining to strengthening the educational capacity of Historically Black Colleges and Universities (HBCUs).

The PBA shall advise the President, through the Initiative, on all matters pertaining to strengthening the educational capacity of HBCUs, in particular, in the following areas: (i) Improving the identity, visibility, and distinctive capabilities and overall competitiveness of HBCUs; (ii) engaging the philanthropic, business, government, military, homeland-security, and education communities in a national dialogue regarding new HBCU programs and initiatives; (iii) improving the ability of HBCUs to remain fiscally secure institutions that can assist the nation in reaching its goal of having the highest proportion of college graduates by 2020; (iv) elevating the public awareness of HBCUs; and (v) encouraging public-private investments in HBCUs.

Meeting Agenda: The meeting agenda will include welcome remarks; an update from the U.S. Department of Education; a presentation on *The Future of Higher Education and U.S. Competitiveness*; an update from the White House Initiative on HBCU; and member discussion. The public comment period will begin immediately following these agenda items. The final agenda will be posted on the PBA page at: *https://sites.ed.gov/whhbcu/commissioners-profile/presidents-board-of-advisors-on-historically-black-colleges-and-universities-2018-to-present/meetings-and-minutes/*.

Members of the public who wish to attend the webinar meeting must follow the instructions noted below. RSVPs must be received by 5 p.m. on September 21, 2020. A RSVP should include the name(s), title, organization/affiliation, and email address, of the person(s) requesting to attend.

Submission of Requests to Participate in Public Comment: The PBA agenda will include a public comment period for the public to submit questions or comments to the PBA. The public comment period will start at 10:30 a.m. on Wednesday, September 23, 2020 and will not exceed ten minutes. Comments will be taken via the chat function on a first-come, first-served basis by the call moderator and will be limited to two minutes per person.

Members of the public who wished to submit a question or comment to be addressed during the public comment period of the meeting but could not be accommodated on the agenda, and those who were unable to attend the meeting via webinar, are invited to submit written statements pertaining to the work of the PBA. All written statements should be directed to by email to the PBA Designated Federal Official, Sedika Franklin, *Sedika.franklin@ed.gov.*

All written statements and questions or comments made during the public comment period will become part of the official record of the PBA.

Admittance Instructions: All participants will be attending via webinar and must register at: *https://ems8.intellor.com/?do=register&t=1&p=830751* by 5 p.m. Eastern Time, September 21, 2020.

Access to Records of the Meeting: The Department will post the official transcript of the meeting on the PBA website 90 days after the meeting at *www.ed.gov.* Pursuant to FACA, the public may also inspect the materials at 400 Maryland Avenue SW, Washington, DC, by emailing *oswhi-hbcu@ed.gov* or by calling (202) 453–5634 to schedule an appointment.

Reasonable Accommodations: The webinar meeting is accessible to individuals with disabilities. If you will need an auxiliary aid or service to participate in the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in **FOR FURTHER INFORMATION CONTACT** section of this notice by September 6, 2020. We will attempt to meet all requests received by the due date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

Electronic Access to this Document: The official version of this document is the document published in the **Federal Register**. Free internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* 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 Adobe 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.

Authority: Executive Order 13779, Continued by Executive Order 13889.

Diane Auer Jones,

Principal Deputy Under Secretary delegated the duties of Under Secretary.

[FR Doc. 2020–19320 Filed 9–1–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0144]

Agency Information Collection Activities; Comment Request; Evaluation of the Innovative Assessment Demonstration Authority Pilot Program-Survey Data Collection

AGENCY: Institute for Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before November 2, 2020.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2020–SCC–0144. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208B, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Thomas Wei, 202–341–0626.

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: Evaluation of the Innovative Assessment Demonstration Authority Pilot Program-Survey Data Collection.

OMB Control Number: 1850–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: State, Local and Tribal Governments.

Total Estimated Number of Annual Responses: 762.

Total Estimated Number of Annual Burden Hours: 375.

Abstract: This study will meet the Congressional mandate to evaluate the Innovative Assessment Demonstration Authority Pilot Program (IADA). The program (Title I, Section 1204 of the Every Student Succeeds Act, or ESSA) allows the U.S. Department of Education to exempt a handful of states from certain testing requirements if they agree to pilot new types of assessments. The study will produce a ''Progress Report'' and a ''Best Practices Report,'' as mandated by Congress. The Progress Report will be based on existing documents from pilot states. The subsequent Best Practices Report will add, via surveys, the perspectives of district leaders, principals, and teachers on the development, implementation, and outcomes of IADA assessments. These reports will help the Department appropriately target its technical assistance to tackle the largest barriers to adequate progress in pilot states and provide a valuable guide for other states that may want to develop a new assessment in the future.

Dated: August 28, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–19421 Filed 9–1–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0038]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; High School and Beyond 2021 (HS&B:21) Base-Year Full-Scale Study Data Collection

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision to an existing information collection.

DATES: Interested persons are invited to submit comments on or before October 2, 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 Carrie Clarady, 202–245–6437.

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: High School and Beyond 2021 (HS&B:21) Base-Year Full-Scale Study Data Collection.

OMB Control Number: 1850–0944.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local and Tribal Governments.

Total Estimated Number of Annual Responses: 121,952.

Total Estimated Number of Annual Burden Hours: 50,361.

Abstract: The High School and Beyond 2021 study (HS&B:21) will be the sixth in a series of longitudinal studies at the high school level conducted by the National Center for Education Statistics (NCES), within the Institute of Education Sciences (IES) of the U.S. Department of Education. HS&B:21 will follow a nationally representative sample of ninth grade students from the start of high school in the fall of 2021 to the spring of 2024 when most will be in twelfth grade. A field test will be conducted one year prior to the full-scale study. The study sample will be freshened in 2024 to create a nationally representative sample of twelfth-grade students. A high school transcript collection and additional follow-up data collections beyond high school are also planned.

In preparation for the HS&B:21 Base-Year Full-Scale study (BYFS), scheduled to take place in the fall of 2021, the Office of Management and Budget (OMB) approved (OMB #1850–0944 v.1–5) a request to conduct the HS&B:21 Base-Year Field Test (BYFT) and the BYFS sampling and state, school district, school, and parent recruitment activities, both of which began in the fall of 2019. These activities include collecting student rosters and selecting the BYFS sample.

BYFT activities ended in December 2019.

The study initially planned to conduct its BYFS data collection in the fall of 2020 and published all materials for a 60D review in February 2020. Due to the COVID–19 pandemic, it was decided to postpone this collection for one year and pause the review after the 60D period was completed in April 2020. OMB provided approval to adjust the schedule in June 2020 (OMB #1850–0944 v.6). This submission for 30D review is to request approval for the Fall 2021 BYFS study data collection. A document describing all changes between the documents presented in the 60D review and those presented in the 30D review is attached to this package.

Part A of this submission presents information on the basic design of HS&B:21. Part B discusses the statistical methods employed. Part C presents justification for the questionnaire content. Appendix A provides the communication materials to be used during state, school district, school, and parent BYFS recruitment and data collection activities. Appendix B provides the full-scale data collection instruments. The primary contractor to NCES for this study is RTI International (Contract #919900–18–R0018).

Dated: August 28, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–19420 Filed 9–1–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0143]

Agency Information Collection Activities; Comment Request; Study of Financial Aid Supports for GEAR UP Students

AGENCY: Institute for Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before November 2, 2020.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2020–SCC–0143. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208B, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Daphne Garcia, 202–245–6592.

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: Study of Financial Aid Supports for GEAR UP Students.

OMB Control Number: 1850–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: State, Local and Tribal Governments.

Total Estimated Number of Annual Responses: 42.

Total Estimated Number of Annual Burden Hours: 95.

Abstract: This is a congressionally-mandated evaluation of the scholarship component of the Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) program. Established in the 1998 Higher Education Act (HEA), GEAR UP provides competitive, multi-year grants to states and local partnerships to prepare students attending high-poverty middle and high schools for college enrollment and success. State grantees must use at least half of their funds to provide college scholarships to GEAR UP students, unless they receive a waiver from the U.S. Department of Education (ED).

How GEAR UP grantees provide scholarships to support students' enrollment and persistence in college is of interest for several reasons. First, this component distinguishes GEAR UP from other federal college access programs that serve primarily low-income students or those from high need schools. Second, the 2008 HEA reauthorization gave state grantees flexibility in how they implement and fund the scholarships. While program statute requires states to set aside at least half of their GEAR UP funds to provide scholarships (states that do are referred to as ''set-aside states''), states may be granted a waiver to devote all of their GEAR UP funds to other activities (referred to as ''waiver states'') if they can ensure that GEAR UP students have access to alternative scholarship funds—such as those that are state-funded. The reauthorization also changed other aspects of the scholarship component, such as the minimum amount and which students must be eligible to receive this financial aid.

The data collection for this study will examine the scholarship practices of all states that received a GEAR UP grant since fiscal year 2011, the first year the scholarship changes went into effect. ED plans to use the study results to inform program improvement, both current efforts and in the future through the upcoming reauthorization of the HEA.

Dated: August 28, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–19422 Filed 9–1–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open virtual meeting.

SUMMARY: This notice announces an online virtual meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act requires that public notice of this conference call be announced in the **Federal Register**.

DATES: Wednesday, September 23, 2020; 1:00 p.m.—4:00 p.m.

ADDRESSES: This meeting will be held virtually via Webex. To attend, please contact Menice Santistevan by email, *Menice.Santistevan@em.doe.gov, no later than 5:00 p.m. MDT on Thursday, September 17, 2020.*

To Sign Up For Public Comment: Please contact Menice Santistevan by email, *Menice.Santistevan@em.doe.gov, no later than 5:00 p.m. MDT on Thursday, September 17, 2020.*

FOR FURTHER INFORMATION CONTACT:

Menice Santistevan, Northern New Mexico Citizens' Advisory Board (NNMCAB), 94 Cities of Gold Road, Santa Fe, NM 87506. Phone (505) 995–0393; Fax (505) 989–1752 or Email: *Menice.Santistevan@em.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

- Call to Order
- Welcome and Introductions
- Roll Call
- Approval of Agenda
- Approval of July 22, 2020 Conference Call Minutes
- Update from NNMCAB Deputy Designated Federal Officer
- Old Business
  - Report from NNMCAB Chair and Vice Chair
  - Report from Committee Chairs
  - Report from Nominating Committee
- New Business
  - Election of Officers for Fiscal Year 2021
  - Other Items
- Update from EM Los Alamos Field Office
- Update from New Mexico Environment Department
- Update on DP Road
- Public Comment Period
- Wrap-Up and Comments from NNMCAB Members
- Adjourn

Public Participation: The online virtual meeting is open to the public. Written statements may be filed with the Board either before or after the meeting by sending them to Menice Santistevan at the aforementioned email address. The Deputy Designated Federal Officer is empowered to conduct the conference call in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or telephone number listed above. Minutes and other Board documents are on the internet at: *https://www.energy.gov/em/nnmcab/meeting-materials.*

Signed in Washington, DC on August 28, 2020.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2020–19354 Filed 9–1–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Amended Record of Decision for the Site-Wide Environmental Impact Statement for the Continued Operation of Los Alamos National Laboratory, Los Alamos, NM

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Amended record of decision.

SUMMARY: The National Nuclear Security Administration (NNSA), a semi-autonomous agency within the U.S. Department of Energy (DOE), is announcing this amendment to the September 26, 2008 Record of Decision (ROD) for the Site-Wide Environmental Impact Statement (SWEIS) for the Continued Operation of Los Alamos National Laboratory (LANL), Los Alamos, NM (2008 LANL SWEIS ROD). In this Amended ROD, NNSA announces its decision to implement elements of the 2008 LANL SWEIS Expanded Operations Alternative needed to produce a minimum of 30 war reserve pits per year during 2026 for the national pit production mission and to implement surge efforts to exceed 30 pits per year to meet Nuclear Posture Review (NPR) and national policy. NNSA has previously evaluated this action at the programmatic level in the Complex Transformation SPEIS and at the site-specific level in the LANL Sitewide Environmental Impact Statement (SWEIS), and recently completed a review of those prior analyses in a separate Supplement Analysis (SA) for each document.

FOR FURTHER INFORMATION CONTACT: For further information on this Amended ROD or the 2020 LANL SA, contact: Kristen Dors, NEPA Compliance Manager, U.S. Department of Energy, National Nuclear Security Administration, Los Alamos Field Office, 3747 W. Jemez Road, Los Alamos, NM 87544; phone: (505) 667–5491; or via email at *lanlsweissa@nnsa.doe.gov.* This Amended ROD, the 2020 LANL SA, and related NEPA documents are available at *https://www.energy.gov/nnsa/nnsa-nepa-reading-room.*

SUPPLEMENTARY INFORMATION:

Background

Pit production, at a level of 80 pits per year at LANL, has been analyzed in two programmatic environmental impact statements (EISs) and two LANL site-wide EISs, including the 1999 *Site-Wide Environmental Impact Statement for the Continued Operation of the Los Alamos National Laboratory* (1999 LANL SWEIS) (DOE/EIS–0238), and the 2008 *Final Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory* (2008 LANL SWEIS) (DOE/EIS–0380). As national policy and national defense needs have evolved, NNSA prepared a supplement analysis (SA) to the 2008 LANL SWEIS (2020 LANL SA) (DOE/EIS–380–SA–06). The 2020 LANL SA re-evaluates the potential environmental impacts of producing a minimum of 30 pits per year at LANL and of implementing surge efforts to exceed 30 pits per year to determine if there have been substantial changes to NNSA's proposed implementation of increased pit production or significant new circumstances or information relevant to environmental concerns, within the meaning of the National Environmental Policy Act (NEPA). After preparing and considering the 2020 LANL SA, NNSA has determined that no further NEPA analysis is needed prior to issuing this

Amended ROD. NNSA has a statutory mission to maintain and enhance the safety, reliability, and performance of the U.S. nuclear weapons stockpile including the ability to design, produce, and test, in order to meet national security requirements. The purpose and need for the continued operation of LANL is to provide support for NNSA's core missions as directed by Congress and the President (2008 LANL SWEIS). Congress and the President have directed that during 2026 LANL will produce a minimum of 30 war reserve pits per year for the national pit production mission and implement surge efforts to exceed 30 pits per year to meet NPR and national policy (50 U.S.C. 2538a; Pub. L. 115–232, Section 3120). To meet this direction, NNSA must now implement previously analyzed elements of the Expanded Operations Alternative from the 2008 LANL SWEIS.

The environmental impacts of pit production at LANL have been analyzed at a both programmatic and site-specific level several times. The first programmatic EIS in the post-Cold War era was the 1996 *Programmatic Environmental Impact Statement for Stockpile Stewardship and Management* (SSM PEIS) (DOE/EIS–0236). The SSM PEIS evaluates pit production of 80 pits per year at LANL. In December 1996, NNSA issued a ROD announcing a decision setting pit production at LANL at 20 pits per year (61 FR 68014; December 26, 1996). Tiering from the SSM PEIS, the site-specific 1999 LANL SWEIS also evaluates pit production levels of 80 pits per year at LANL. In the 1999 LANL ROD, NNSA confirmed its decision for pit production at LANL at 20 pits per year (64 FR 50797; Sept 20, 1999).

In 2008, NNSA prepared the *Complex Transformation Supplemental Programmatic Environmental Impact Statement—Operations Involving Plutonium, Uranium, and the Assembly and Disassembly of Nuclear Weapons* (Complex Transformation SPEIS) (DOE/EIS–0236–S4). The Complex Transformation SPEIS evaluates, among other things, alternatives for producing 10–200 pits per year at different site alternatives, including LANL. In the 2008 Programmatic ROD, NNSA did not make any new decisions related to pit production capacity beyond 20 pits per year at LANL (73 FR 77644 December 19, 2008). Tiering from the Complex Transformation SPEIS, the 2008 LANL SWEIS analyzed three alternatives: A Reduced Operations Alternative, a No Action Alternative (20 pits per year), and an Expanded Operations Alternative (80 pits per year). Under the Expanded Operations Alternative, NNSA analyzed existing space at LANL in the Plutonium Facility and other infrastructure to support production of up to 80 pits per year. In the 2008 LANL SWEIS ROD and subsequent RODs, NNSA selected a No Action Alternative (continuation of existing operations) with some elements of an Expanded Operations Alternative, which maintained NNSA's decision for pit production levels of 20 pits per year at LANL (73 FR 55833 September 26, 2008; 74 FR 33232 July 10, 2009; and 76 FR 40352 July 8, 2011).

Both federal law and national security policy now require pit production rates of a minimum of 30 pits per year at LANL during 2026, and not less than 80 pits per year nationally during 2030 (50 U.S.C. 2538a; Pub. L. 115–232). Because operations involving SNM are complex, implementing changes in operations such as pit production take several years. To these ends, NNSA is issuing an Amended ROD to the Complex Transformation SPEIS announcing its programmatic decision to implement elements of a Modified Distributed Centers of Excellence (DCE) Alternative whereby LANL will produce a minimum of 30 war reserve pits per year for the national pit production mission during 2026 and implement surge efforts to exceed 30 pits per year as needed. Prior to issuing that Amended ROD, NNSA prepared an SA of the Complex Transformation SPEIS to determine if the existing Complex Transformation SPEIS should be supplemented, a new EIS should be prepared, or that no further NEPA analysis would be required. Based on the analysis presented in the 2019 SPEIS SA, NNSA determined that no further NEPA analysis was needed at a programmatic level.

NNSA is now issuing an Amended ROD to the 2008 LANL SWEIS. Prior to issuing this Amended ROD, NNSA prepared the 2020 LANL SA to determine if the existing 2008 LANL SWEIS should be supplemented, a new EIS should be prepared, or that no further NEPA analysis would be required. Based on the analysis presented in the 2020 SA, NNSA determined that no further NEPA analysis was needed prior to issuing this Amended ROD.

Changes Since Issuance of the 2008 LANL SWEIS RODs

NNSA has not implemented all aspects of the 2008 LANL SWEIS Expanded Operations Alternative that were anticipated for producing more than 20 pits per year. One primary element that has changed is that a specific facility that NNSA previously analyzed, the Chemistry and Metallurgy Research Replacement Nuclear Facility (CMRR–NF), was not constructed at LANL. The CMRR–NF was a planned support facility for pit production and was not itself to be a pit production facility. Many support operations for pit production have been historically located in the Chemistry and Metallurgy Research (CMR) Facility, and CMRR–NF had been thought necessary to replace CMR. The support operations housed in CMR have been or can be relocated to other facilities at LANL, and a new CMRR–NF is no longer required to meet current mission needs. NNSA remains committed to the closure of the CMR Facility and has made upgrades to existing plutonium facilities, constructed new support facilities, and made administrative changes that have leveraged the use of existing LANL facilities.

Another change since issuance of the SWEIS RODs is that NNSA has made substantial facility upgrades to address previous technical and seismic concerns related to LANL's pit production facility, the Plutonium Facility. In the 2009 Amended ROD to the 2008 LANL SWEIS, NNSA issued a decision on certain elements of an Expanded Operations Alternative at LANL that authorized upgrades to the Plutonium Facility. Over the past ten years, NNSA has been implementing these upgrade projects. Separately, there was a three-year operational pause in LANL's Plutonium Facility but operations have resumed. The Plutonium Facility is again operational and pit production activities have resumed. The NNSA pit production mission at LANL is operating below the level of 20 pits per year that was identified in previous NNSA decisions.

The United States has emphasized the need to eventually produce 80 pits per year and while the drivers and the requirement for pit production have remained relatively unchanged there have been specific changes in the law and national policy regarding pit production since issuance of the 2008 LANL SWEIS. Since 2014, federal law has required the nuclear security enterprise to produce not less than 30 war reserve plutonium pits during 2026. Federal law now requires that the nuclear security enterprise produce not less than 80 war reserve plutonium pits during 2030 (50 U.S.C. 2538a).

In addition, on January 27, 2017, the President directed the Department of Defense (DoD) to conduct an NPR which was issued in 2018. The 2018 NPR echoed the need for pit production and articulated a national policy that is consistent with Congressional and Presidential direction, stating that the United States will pursue initiatives to ensure the necessary capability, capacity, and responsiveness of the nuclear weapons infrastructure and the needed skill of the workforce, including providing the enduring capability and capacity to produce plutonium pits at a rate of no fewer than 80 pits per year during 2030. The 2018 NPR also details the evolving and uncertain nuclear threat environment facing the United States. Concurrent with the 2018 NPR, DOE conducted an Analysis of Alternatives (AoA) to identify and assess alternatives across DOE sites that could deliver the infrastructure to meet the sustained plutonium pit requirements of 80 pits per year. To achieve the required annual pit production rate, the AoA report considered the construction of new facilities and the refurbishment of existing facilities and identifies SRS and LANL as the two preferred alternatives to meet pit production requirements.

In 2018, Congress and the President also directed that LANL will produce a minimum of 30 pits per year for the national pit production mission and directed it be capable of surge efforts to exceed 30 pits per year to meet NPR and national policy (Pub. L. 115–232, Section 3120). To these ends, the DoD Under Secretary of Defense for Acquisition and Sustainment and the NNSA Administrator issued a Joint Statement on May 10, 2018, describing NNSA's recommended alternative to pursue a two-prong approach—50 pits per year produced at SRS and a minimum of 30 pits per year produced at LANL. In addition to improving the resiliency, flexibility, and redundancy of our Nuclear Security Enterprise by reducing reliance on a single production site, this approach enables the capability to allow for enhanced warhead safety and security to meet DoD and NNSA requirements; deliberate, methodical replacement of older existing plutonium pits with newly manufactured pits as risk mitigation against plutonium aging; and response to changes in deterrent requirements driven by renewed great power competition.

Before the recent Congressional and Presidential direction concerning specific pit production requirements at LANL, NNSA prepared the 2018 *Supplement Analysis of the 2008 Site-Wide Environmental Impact Statement for the Continued Operation of Los Alamos National Laboratory* (2018 LANL SWEIS SA) (DOE/EIS–0380–SA–04). The 2018 LANL SWEIS SA considered changes from 2008 through 2017 to programs, projects, and operations and it considered changes from 2018 through 2022 to new/modified plans, projects, and operations. The 2018 LANL SWEIS SA compared the projected environmental impacts of ongoing operations, new/modified projects, and site operation modifications from 2018 through 2022 to the environmental impacts that were analyzed in the 2008 LANL SWEIS. The key areas considered include: Land resources; visual environment; geology and soils; water resources; air quality; noise; ecological resources; human health and worker health/safety; cultural resources; socioeconomics; infrastructure; waste management; traffic and transportation; environmental justice; environmental remediation; facility accidents; climate trends and greenhouse gases; forest health and wildland fire preparedness; and mitigations. Based on the 2018 LANL SWEIS SA, NNSA determined ongoing operations, new/modified projects, and site operation modifications do not constitute a substantial change in the actions previously analyzed in the 2008 LANL SWEIS, and that there are no significant new circumstances or information relevant to environmental concerns, and that no further NEPA documentation was required for the continued operation of LANL.

NEPA Process for Amending the ROD

NNSA prepared this Amended ROD to the 2008 LANL SWEIS pursuant to the regulations of the Council on Environmental Quality (CEQ) for implementing NEPA (40 CFR parts 1500–1508) and DOE's NEPA implementing procedures (10 CFR part 1021). This Amended ROD is based on federal law and NNSA's mission, information and analysis in the 1999 LANL SWEIS (DOE/EIS–0238) and public comments received; the 2008 LANL SWEIS (DOE/EIS–0380) and public comments received; the Complex Transformation SPEIS (DOE/EIS–0236–S4) and public comments received; the 2019 SPEIS SA (DOE/EIS–0236–SA–02) and public comments received; the 2020 LANL SA (DOE/EIS–0380–SA–06) and public comments received; other NEPA analysis and public comments as noted in the 2020 LANL SA.

The Draft 2008 LANL SWEIS included a robust public participation process. NNSA received comments from Federal agencies; state, local, and tribal governments; public and private organizations; and individuals. In addition, during the three public meetings that NNSA held, in Santa Fe, Española and Los Alamos, on the Draft 2008 LANL SWEIS, more than 100 speakers made oral comments and nearly 2100 public comment documents were received. NNSA reviewed and considered all comments received on the Draft 2008 LANL SWEIS, including those received after the comment period ended, before finalizing the 2008 LANL SWEIS and issuing associated RODs.

On June 28, 2019, NNSA provided a *Notice of Availability of the Draft Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement* (Draft Complex Transformation SPEIS SA) (84 FR 31055) and invited public comment. NNSA prepared the Final Complex Transformation SPEIS SA to determine whether, prior to implementing a Modified DCE Alternative for plutonium operations to enable producing plutonium pits at a rate of no fewer than 80 pits per year by 2030, the existing Complex Transformation SPEIS should be supplemented, a new environmental impact statement be prepared, or that no further NEPA analysis was required. On January 9, 2020, after considering all comments and modifying the draft Complex Transformation SPEIS SA as appropriate, NNSA provided a *Notice of Availability of the Final Complex Transformation Supplemental Programmatic Environmental Impact Statement* (Final Complex Transformation SPEIS SA) (DOE/EIS–0236–SA–02) (85 FR 887). The Final Complex Transformation SPEIS SA included NNSA's determination that no further NEPA documentation at a programmatic level was required, but affirmed NNSA's decision to prepare site-specific documentation for the proposal to authorize expanding pit production beyond 20 pits per year at LANL. Concurrent with this Amended ROD, NNSA is issuing an Amended ROD to the Complex Transformation SPEIS, announcing the programmatic decision to implement elements of a Modified DCE Alternative that authorizes LANL to produce not fewer than 30 war reserve pits per year during 2026 for the national pit production mission and implement surge efforts to exceed 30 pits per year as needed.

At the site-specific level, NNSA prepared the 2020 LANL SA (DOE/EIS–0380–SA–06) to re-evaluate site-specific environmental impacts. In March 2020, NNSA posted the *Draft Supplement Analysis of the 2008 Site-Wide Environmental Impact Statement for Continued Operations of Los Alamos National Laboratory* to the online NNSA NEPA Reading Room and noticed interested parties via GovDelivery, inviting public comment for a 45-day period which was extended for an additional 15 days. Although pertinent regulations do not require public review and comment on an SA, NNSA decided to invite public comment in the SA to ensure fully informed decision-making. NNSA received approximately 140 comment documents on the Draft 2020 LANL SA. Many comments received on the Draft 2020 LANL SA were similar in nature to the comments NNSA received on the Draft 2019 Complex Transformation SPEIS SA. In addition to Draft 2020 LANL SA comments, NNSA reviewed all comment documents received during the public scoping process for the site-specific Savanah River Site (SRS) pit production EIS for relevance to the 2020 LANL SA.

Comments received generally centered on the following topic areas: (1) Validity of the Draft 2020 LANL SA determination; (2) the purpose and need for NNSA's project; (3) NEPA process/ requests for an extension to the comment period; (4) the two-prong approach to pit production; (5) new information or changed circumstances related to NNSA operations and/or environmental conditions; (6) questions about the technical aspects of the impact analyses; (7) general opposition to, or support for the proposal; and (8) comments about nuclear weapon policies or new weapon designs.

After considering all comments and modifying the Draft 2020 LANL SA as appropriate, NNSA completed the *Final Supplement Analysis of the 2008 Site-Wide Environmental Impact Statement for Continued Operations of Los Alamos National Laboratory* (Final 2020 LANL SA). NNSA prepared the Final 2020 LANL SA to determine whether, prior to implementing additional elements of the Expanded Operations Alternative for producing a minimum of 30 pits per year at LANL and implementing surge efforts to exceed 30 pits per year, the 2008 LANL SWEIS should be supplemented, a new environmental impact statement be prepared, or that no further NEPA analysis was required. The Final 2020 LANL SA included NNSA's determination that no further NEPA documentation was required before issuing an Amended ROD.

Summary of Impacts

NNSA has been directed by Congress and the President to implement pit production at LANL to meet NPR and national policy, and NNSA determined in its discretion to prepare an SA of the 2008 LANL SWEIS to re-evaluate adopting the Expanded Operations Alternative as needed. The 2020 LANL SA analyzed the potential impacts of pit production beyond 20 pits per year on land use, visual resources, geology and soils, water resources, air quality, noise, ecological resources, cultural resources, infrastructure, facility accidents, intentional destructive acts, human health, socioeconomics, environmental justice, waste management, and transportation. Table 3–1 of the 2020 LANL SA presents information in a comparative fashion for resource areas considered to have minor or negligible impacts. Environmental resource areas that may have environmental impacts related to pit production beyond 20 pits per year or require additional analysis or to address public concerns were reviewed in more detail in Section 3.3 of the 2020 LANL SA and Section 4.0 analyzed the cumulative impacts.

NNSA's conclusion based on the 2020 LANL SA was that the potential environmental impacts of the proposed action would not be different, or would not be significantly different, than impacts in existing NEPA analyses. NNSA has determined that pit production at LANL as planned (previously analyzed limits), and that meets NPR and national policy, does not constitute a substantial change from actions analyzed previously and that while there are new circumstances or information relevant to environmental concerns these new circumstances and information do not rise to a level of significance within the meaning of NEPA. As a result, NNSA has determined that preparation of a supplemental or new EIS is not warranted at this time.

Environmentally Preferable Alternative

The analyses in the 2008 LANL SWEIS of the environmental impacts associated with operating LANL identified only minor differences among the three alternatives across natural and cultural resource areas. Within each of the alternatives there are actions that could result in negative impacts, as well as those that would produce positive environmental effects. Considering the many environmental facets of the alternatives analyzed in the SWEIS, and looking out over the long term, the Expanded Operations Alternative is still the environmentally preferred alternative because that is the alternative that includes projects that support environmental remediation at LANL. Facilitating the cleanup of the site with new or expanded waste management facilities, and replacing older laboratory and production facilities with new buildings that incorporate modern safety, security, and efficiency standards, would also improve LANL's ability to protect human health and the environment while allowing LANL to continue to fulfill its national security missions. Increasing operational levels and performing various demolition activities would use additional resources and generate additional waste, but under the Expanded Operations Alternative NNSA would also undertake actions to modernize and replace older facilities with more energy efficient and environmentally-protective facilities and implement waste control and environmental practices to minimize impacts.

Amended Decision

NNSA has decided to implement elements of the Expanded Operations Alternative in the 2008 LANL SWEIS, as needed, to produce a minimum of 30 war reserve pits per year during 2026 for the national pit production mission and to implement surge efforts to exceed 30 pits per year up to the analyzed limit to meet NPR and national policy. NNSA will implement the following actions: (1) Remove legacy equipment and install new equipment; (2) hire and train approximately 400 additional staff; (3) upgrade existing support facilities and construct new support facilities; (4) repackage and dispose of mixed-oxide fuel fabrication facility fuel rods; (5) implement Replacement Office Buildings Project; (6) implement elements of the Security-Driven Traffic Modifications Project; (7) management and disposition of additional wastes generated; and (8) transport additional materials, parts, and waste.

Basis for Decision

In making these decisions, NNSA considered the 2020 LANL SA, the 2008 LANL SWEIS, the 2008 Complex Transformation SPEIS, the 2019 Complex Transformation SPEIS SA, and other referenced NEPA analyses, and its statutory responsibilities to support the nuclear weapons stockpile. Federal law and national security policies continue to require NNSA to maintain a safe, secure, and reliable nuclear weapons stockpile and to create a responsive nuclear weapons infrastructure that are cost-effective and have adequate capacity to meet reasonably foreseeable national security requirements. This Amended ROD will enable NNSA to continue meeting federal law and national security requirements.

Mitigation Measures

As described in the 2008 LANL SWEIS (DOE/EIS–0380) and the 2008 LANL SWEIS ROD (74 FR 55833), LANL operates in compliance with environmental laws, regulations, and policies within a framework of contractual requirements; many of these requirements mandate actions to control and mitigate potential adverse environmental effects. Examples of mitigation measures include site security and threat protection plans, emergency plans, land use plans, Integrated Safety Management Systems, an Environmental Management System, pollution prevention and waste minimization programs, cultural resource and protected species management plans, and energy and water conservation programs. NNSA will continue to implement the mitigation measures identified in the 2008 LANL SWEIS ROD.

Signing Authority

This document of the Department of Energy was signed on August 24, 2020, by Lisa E. Gordon-Hagerty, Under Secretary for Nuclear Security and Administrator, NNSA, 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 28, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–19349 Filed 9–1–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE) has submitted an information collection request to the OMB for extension under the provisions of the Paperwork Reduction Act of 1995. The information collection requests a three-year extension of its Energy Priorities and Allocations System, OMB Control Number 1910–5159. The proposed collection will be used to allow persons to request special priorities assistance from DOE to fill a rated order issued in accordance with the Defense Production Act (DPA) and DOE's implementing regulations. DOE published a **Federal Register** notice on May 4, 2020 soliciting 60 days of public comment. DOE received one comment on that notice.

DATES: Comments regarding this collection must be received on or before October 2, 2020. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at 202–395–4718.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Christopher A. Lawrence, U.S. Department of Energy, at *Christopher.Lawrence@hq.doe.gov* or 202–586–5260.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) *OMB No.:* 1910–5159; (2) *Information Collection Request Title:* Energy Priorities and Allocations System; (3) *Type of Request:* Extension; (4) *Purpose:* To meet requirements of the Defense Production Act (DPA) priorities and allocations authority necessary or appropriate to promote the national defense. Data supplied will be used to evaluate applicants requesting special priorities assistance to fill a rated order issued in accordance with the DPA and DOE's implementing regulations. 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 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 respondents, including through the use of automated collection techniques or other forms of information technology. This data will also be used to conduct audits and for enforcement purposes. This collection will only be used if the Secretary of Energy determines that his authority under the DPA is necessary to prevent or address an energy shortage or energy reliability concern. The last collection by DOE under this authority was in 2001; (5) *Annual Estimated Number of Respondents:* 10, as this collection is addressed to a substantial majority of the energy industry; (6) *Annual Estimated Number of Burden Hours:* 32 minutes per response; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $381.57.

One comment was received on DOE's sixty-day notice (Kubitz, No 1). The commenter requested that companies provide information about current production of oil, maximum available oil production, and costs of incremental energy production, in order to information Defense Production Act decisions or orders. *Id.* The commenter stated that knowing the capacity of the industry as a whole by aggregating potential production from various companies would aid in allocation and prioritization of any necessary energy production under the Defense Production Act. *Id.* This information is already being collected by the Energy Information Administration within DOE to track the nation's petroleum supply. EIA surveys collect data on petroleum refinery operations, blending, biofuels production, natural gas liquids production, inventory levels, imports, inter-regional movements, and storage capacity for crude oil, petroleum, products, and biofuels. Information regarding EIA's work on petroleum supply can be found at *https://www.eia.gov/petroleum/*. DOE can review the information provided to EIA through its surveys to evaluate applicants submitting Form DOE F 544. Therefore, to avoid duplication, DOE will not be revising Form DOE F 544.

Statutory Authority: Defense Production Act of 1950 as amended (50 U.S.C. 4501, *et seq.*); Executive Order 13603.

Signing Authority

This document of the Department of Energy was signed on August 27, 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 27, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–19321 Filed 9–1–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Savannah River Site

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open virtual meeting.

SUMMARY: This notice announces an online virtual meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act requires that public notice of this online virtual meeting be announced in the **Federal Register**.

DATES: Monday, September 21, 2020; 1:00 p.m.–4:00 p.m.

ADDRESSES: Online Virtual Meeting. To attend, please send an email to: *srscitizensadvisoryboard@gmail.com* by no later than 4:00 p.m. EDT on Friday, September 18, 2020.

To Submit Public Comments: Public comments will be accepted via email prior to and after the meeting. Comments received by no later than 4:00 p.m. EDT on Friday, September 18, 2020 will be read aloud during the virtual meeting. Comments will also be accepted after the meeting, by no later than 4:00 p.m. EDT on Monday, September 28, 2020. Please submit comments to *srscitizensadvisoryboard@gmail.com.*

FOR FURTHER INFORMATION: Amy Boyette, Office of External Affairs, U.S. Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC, 29802; Phone: (803) 952–6120; email: *amy.boyette@srs.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

—Meeting Rules and Agenda Review
—Opening and Chair Update
—Agency Updates
—Break
—Committee Round Robin:
  ○ Facilities Disposition & Site Remediation Committee
  ○ Nuclear Materials Committee
  ○ Strategic & Legacy Management Committee
  ○ Waste Management Committee
  ○ Administrative & Outreach Committee
—Break
—Draft Recommendation Discussion
—Reading of Public Comments
—Voting on Draft Recommendation
—Adjourn

Public Participation: The online virtual meeting is open to the public. Written statements may be filed with the Board either before or after the meeting as there will not be opportunities for live public comment during this online virtual meeting. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to submit public comments should email them as directed above.

Minutes: Minutes will be available by writing or calling Amy Boyette at the address or telephone number listed above. Minutes will also be available at the following website: *https://cab.srs.gov/srs-cab.html.*

Signed in Washington, DC on August 28, 2020.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2020–19353 Filed 9–1–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open virtual meeting.

SUMMARY: This notice announces an online virtual meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act requires that public notice of this online virtual meeting be announced in the **Federal Register**.

DATES: Wednesday, September 23, 2020; 4:00 p.m.–7:00 p.m.

ADDRESSES: Online Virtual Meeting. To attend, please send an email to: *nssab@emcbc.doe.gov* by no later than 4:00 p.m. PST on Monday, September 21, 2020.

To Submit Public Comments: Public comments will be accepted via email prior to and after the meeting. Comments received by no later than 4:00 p.m. PST on Monday, September 21, 2020 will be read aloud during the virtual meeting. Comments will also be accepted after the meeting, by no later than 4:00 p.m. PST on Friday, October 9, 2020. Please submit comments to *nssab@emcbc.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Barbara Ulmer, Board Administrator, by Phone: (702) 523–0894 or Email: *nssab@emcbc.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

1. Fiscal Year 2021 Work Plan Development
2. Election of Officers
3. Recommendation Development for Engine Maintenance Assembly and Disassembly Path Forward—Work Plan Item #6

Public Participation: The online virtual meeting is open to the public. Written statements may be filed with the Board either before or after the meeting as there will not be opportunities for live public comment during this online virtual meeting. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to submit public comments should email them as directed above.

Minutes: Minutes will be available by writing or calling Barbara Ulmer, NSSAB Administrator, U.S. Department of Energy, EM Nevada Program, 100 North City Parkway, Suite 1750, Las Vegas, NV 89106; Phone: (702) 523–0894. Minutes will also be available at the following website: *http://www.nnss.gov/NSSAB/pages/MM_FY20.html.*

Signed in Washington, DC on August 28, 2020.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2020–19352 Filed 9–1–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Amended Record of Decision for the Complex Transformation Supplemental Programmatic Environmental Impact Statement

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Amended record of decision.

SUMMARY: The National Nuclear Security Administration (NNSA), a semi-autonomous agency within the U.S. Department of Energy (DOE), is announcing this amendment to the December 19, 2008, Record of Decision (ROD) for the Complex Transformation Supplemental Programmatic Environmental Impact Statement—Operations Involving Plutonium, Uranium, and the Assembly and Disassembly of Nuclear Weapons (Complex Transformation SPEIS—2008 Programmatic ROD). In this Amended ROD, NNSA announces its programmatic decision to implement elements of a Modified Distributed Centers of Excellence (DCE) Alternative whereby Los Alamos National Laboratory (LANL) will produce a minimum of 30 war reserve pits per year for the national pit production mission during 2026 and implement surge efforts to exceed 30 pits per year as needed. NNSA will implement this decision without construction of the Chemistry and Metallurgy Research and Replacement Nuclear Facility (CMRR–NF). NNSA has previously evaluated this action at the programmatic level in the Complex Transformation SPEIS and at the site-specific level in the LANL Sitewide Environmental Impact Statement (SWEIS), and recently completed a review of those prior analyses in a separate Supplement Analysis (SA) for each document. Pit production alternatives were previously analyzed in the Complex Transformation SPEIS.

FOR FURTHER INFORMATION CONTACT: For further information on this Amended ROD or the 2019 SPEIS SA, contact: Mr. James R. Sanderson, Office of NEPA Policy and Compliance, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585–0119; phone: (202) 586–1402; or email to: *Jim.Sanderson@hq.doe.gov.* This Amended ROD, the 2019 SPEIS SA, and related NEPA documents are available on the internet at *https://www.energy.gov/nnsa/nnsa-nepa-reading-room.*

SUPPLEMENTARY INFORMATION:

Background

As national policy and national defense needs have evolved, NNSA prepared an SA to the Complex Transformation SPEIS (2019 SPEIS SA) (DOE/EIS–0236–SA–02). The 2019 SPEIS SA evaluates whether since issuing the Complex Transformation SPEIS there have been substantial changes to NNSA's proposed implementation of expanded pit production in the U.S. or significant new circumstances or information relevant to environmental concerns, within the meaning of the National Environmental Policy Act (NEPA). NNSA has re-evaluated the single-site pit production strategy announced in the 2008 Programmatic ROD but will not announce any further decisions on pit production until completion of a site-specific Environmental Impact Statement (EIS) for pit production at the Savannah River Site (SRS).

NNSA has a statutory mission to maintain and enhance the safety, reliability, and performance of the U.S. nuclear weapons stockpile, including the ability to design, produce, and test, in order to meet national security requirements. In the Complex Transformation SPEIS, NNSA considered how to configure facilities that hold Category I and Category II quantities of Special Nuclear Material (SNM) across the nuclear weapons complex (Complex), including the three functional areas of plutonium, uranium operations, and assembly/disassembly/high explosives in various ways. These alternatives were broadly categorized into a Distributed Centers of Excellence (DCE) Alternative, a Consolidated Centers of Excellence (CCE) Alternative, and Capability-Based Alternative. The Complex Transformation SPEIS also analyzed a No Action Alternative. Pit production levels of up to 200 pits per year at a single site were analyzed in the DCE and CCE Alternatives, and nominal pit production levels of up to 50 pits per year were analyzed under the Capability-Based Alternative. With respect to plutonium operations and pit production, the 2008 Programmatic ROD continued NNSA's prior decision to produce 20 pits per year at LANL until completion of a future Nuclear Posture Review (NPR).

Both federal law and national security policy now require pit production rates of a minimum of 30 pits per year at LANL during 2026 and not less than 80 pits per year nationally during 2030. (50 U.S.C. 2538a; Pub. L. 115–232). Because operations involving SNM are complex, implementing changes in operations such as pit production takes several years. NNSA is issuing this Amended ROD on those aspects of the national pit production mission at LANL that have been analyzed at both the programmatic and site-specific level by final environmental impact statements. NNSA may issue additional Amended RODs, as appropriate, on other aspects of the national pit production mission upon completion of further site-specific analysis at SRS. Prior to issuing this Amended ROD, NNSA prepared the 2019 SPEIS SA to determine if the existing Complex Transformation SPEIS should be supplemented, a new EIS should be prepared, or that no further NEPA analysis would be required. Based on the analysis presented in the 2019 SPEIS SA, NNSA determined that no further NEPA analysis was needed prior to issuing this Amended ROD. The scope of this Amended ROD is limited to plutonium operations related to pit production to sustain NNSA's pit production capability and fulfill NNSA's requirements under federal law and national policy. All other activities conducted pursuant to decisions announced in the 2008 Programmatic ROD are outside the scope of this decision.

Synopsis of the Programmatic EIS and the Supplemental Programmatic EIS Related to Plutonium Operations and the Associated Records of Decision

During the Cold War, the U.S. maintained a pit production capacity of approximately 2,000 pits per year (actual production numbers are classified) but lost this large-scale production capability in the late 1980s. In 1996, the environmental effects of a production rate of up to 80 pits per year at the Savannah River Site (SRS) in South Carolina and at LANL were analyzed in the *Programmatic Environmental Impact Statement for Stockpile Stewardship and Management* (DOE/EIS–0236) (SSM PEIS). In December 1996, NNSA issued a ROD announcing a decision setting pit production at LANL at 20 pits per year (61 FR 68014; December 26, 1996). Tiering from the SSM PEIS, the 1999 LANL SWEIS (DOE/EIS–0283) provided site-specific analysis for pit production levels at LANL of up to 80 pits per year. In the 1999 LANL ROD, NNSA confirmed its decision for pit production at LANL at 20 pits per year. Various supplements to and re-evaluations of the SSM PEIS were completed over the next several years.

In 2008, NNSA prepared the Complex Transformation SPEIS, which analyzes the potential environmental impacts of alternatives for transforming the Complex in a manner consistent with national policy. Acknowledging the shifting needs of national security policy, the Complex Transformation SPEIS was prepared to provide NNSA with a flexible programmatic EIS that could be tiered from when the United States faced the need to implement changes to operations such as pit production. As it relates to plutonium operations, the Complex Transformation SPEIS evaluates the potential impacts of alternatives for structuring the Complex including the DCE Alternative, CCE Alternative, and Capability-Based Alternative, and each of these alternatives have several sub-alternatives. The 2008 LANL SWEIS again provided site-specific analysis for pit production levels at LANL of up to 80 pits per year. In the 2008 LANL SWEIS ROD and subsequent RODs, NNSA selected a No Action Alternative (continuation of existing operations) with some elements of an Expanded Operations Alternative, which maintained NNSA's decision for pit production levels of 20 pits per year at LANL. In 2019, NNSA published its first site-specific analysis for pit production at SRS, the *Draft Environmental Impact Statement (EIS) for Plutonium Pit Production at the Savannah River Site (SRS) in South Carolina* (DOE/EIS–0541), but at this time that site-specific analysis for SRS has not been finalized.

The Complex Transformation SPEIS considered a wide range of alternatives to provide NNSA with sufficient flexibility in the continued transformation of the Complex. Some of the specific elements of different alternatives and sub-alternatives in the Complex Transformation SPEIS include an analysis of the impacts associated with construction of a new pit production facility to produce 125 pits per year, with surge capacity to produce 200 pits per year. Sites that the Complex Transformation SPEIS evaluates for this level of pit production include LANL, SRS, the Pantex Plant (Pantex) in Texas, the Y–12 National Security Complex (Y–12) in Tennessee, and the Nevada National Security Site in Nevada. At LANL, the Complex Transformation SPEIS also includes an analysis of two distinct upgrades to existing facilities, rather than construction of a new facilities, including one to support production of 125 pits per year (with surge capacity to produce 200 pits per year) and one to support production of 50–80 pits per year. At SRS, the Complex Transformation SPEIS evaluated a pit production facility that would use the planned Mixed-Oxide Fuel Fabrication Facility (MFFF) and Pit Disassembly and Conversion Facility infrastructure. The alternative selected in the 2008 Programmatic ROD was a combination of the DCE Alternative and a Capability-Based Alternative in which, with respect to plutonium operations, NNSA did not make any new decisions related to pit production capacity beyond 20 pits per year at LANL. In the 2008 Programmatic ROD, NNSA envisioned constructing a new facility—the Chemistry and Metallurgy Research and Replacement Nuclear Facility (CMRR–NF)—as a replacement for portions of an older facility at LANL called the Chemistry and Metallurgy Research (CMR) Facility.

Changes Since Issuance of the Complex Transformation 2008 Programmatic ROD

NNSA has implemented many, but not all, aspects of the 2008 Programmatic ROD with respect to plutonium operations. The primary change is that the CMRR–NF was not constructed. CMRR–NF was always planned as a support facility for pit production and was not itself to be a pit production facility. Many support operations for pit production have been historically located in CMR. While NNSA remains committed to the closure of the CMR Facility, NNSA has made upgrades to existing plutonium facilities, constructed new support facilities, and made administrative changes that have enabled more efficient use of newer existing LANL facilities. Capabilities once housed in CMR can be relocated to other facilities at LANL, and a new CMRR–NF is no longer required to meet mission needs.

Another change since issuance of the Complex Transformation SPEIS is that NNSA has made substantial facility upgrades to address previous technical and seismic concerns related to LANL's pit production facility, the Plutonium Facility. In the 2009 Amended ROD to the 2008 LANL SWEIS, NNSA issued a decision on certain elements of an Expanded Operations Alternative at LANL that authorized upgrades to the Plutonium Facility. Over the past ten years, NNSA has been implementing these upgrade projects. Separately, there was a three-year operational pause in LANL's Plutonium Facility but operations have resumed. The Plutonium Facility is again operational and pit production activities have resumed.

The United States has emphasized the need to eventually produce 80 pits per year and while the drivers and the requirement for pit production have remained relatively unchanged there have been specific changes in the law and national policy regarding pit production since issuance of the Complex Transformation SPEIS. Since 2014, federal law has required the nuclear security enterprise to produce not less than 30 war reserve plutonium pits during 2026. Federal law now requires that the nuclear security enterprise produces not less than 80 war reserve plutonium pits during 2030 (50 U.S.C. 2538a).

In addition, on January 27, 2017, the President directed the Department of Defense (DoD) to conduct an NPR which was issued in 2018. The 2018 NPR echoed the need for pit production and articulated a national policy that is consistent with Congressional and Presidential direction, stating that the United States will pursue initiatives to ensure the necessary capability, capacity, and responsiveness of the nuclear weapons infrastructure and the needed skill of the workforce, including providing the enduring capability and capacity to produce plutonium pits at a rate of no fewer than 80 pits per year during 2030. The 2018 NPR also details the evolving and uncertain nuclear threat environment facing the United States. Concurrent with the 2018 NPR, DOE conducted an Analysis of Alternatives (AoA) to identify and assess alternatives across DOE sites that could deliver the infrastructure to meet the sustained plutonium pit requirements of 80 pits per year. To achieve the required annual pit production rate, the AoA report considered the construction of new facilities and the refurbishment of existing facilities and identifies SRS and LANL as the two preferred alternatives to meet pit production requirements.

In 2018, Congress and the President also directed that LANL will produce a minimum of 30 pits per year for the national pit production mission and directed it be capable of surge efforts to exceed 30 pits per year to meet NPR and national policy (Public Law 115–232, Section 3120). To these ends, the DoD Under Secretary of Defense for Acquisition and Sustainment and the NNSA Administrator issued a Joint Statement on May 10, 2018, describing NNSA's recommended alternative to pursue a two-prong approach—50 pits per year produced at SRS and a minimum of 30 pits per year produced at LANL. In addition to improving the resiliency, flexibility, and redundancy of our Nuclear Security Enterprise by reducing reliance on a single production site, this approach enables the capability to allow for enhanced warhead safety and security to meet DoD and NNSA requirements; deliberate, methodical replacement of older existing plutonium pits with newly manufactured pits as risk mitigation against plutonium aging; and response to changes in deterrent requirements driven by renewed great power competition. Finally, since issuance of the 2008 Programmatic ROD, a significant portion of the MFFF at SRS has been constructed. At the time that the Complex Transformation SPEIS was being completed, construction of the MFFF had just begun. The MFFF was built to produce mixed oxide fuel from surplus plutonium for use in commercial nuclear reactors. For a variety of reasons NNSA issued a Notice of Termination to the MFFF construction contractor on October 10, 2018, cancelling the contract for the facility. The constructed portion of MFFF was built to current safety and security standards and contains three floors and more than 400,000 square feet of available space. The potential availability of this facility is, in part, why NNSA has reevaluated a single pit production site at the programmatic level and is currently conducting a site-specific NEPA analysis for pit production at SRS.

NEPA Process for Amending the ROD

NNSA prepared this Amended ROD pursuant to the regulations of the Council on Environmental Quality (CEQ) for implementing NEPA (40 CFR parts 1500–1508) and DOE's NEPA implementing procedures (10 CFR part 1021). This Amended ROD is based on information and analysis in the Complex Transformation SPEIS (DOE/EIS–0236–S4) issued on October 24, 2008 (73 FR 63460) and public comments received; the 2019 SPEIS SA (DOE/EIS–0236–SA–02) and public comments received; other NEPA analysis and public comments as noted in the 2019 SPEIS SA; and other factors including federal law and NNSA's mission.

The Draft Complex Transformation SPEIS included a robust public participation process. NNSA received comments from Federal agencies; state, local, and tribal governments; public and private organizations; and individuals. In addition, during the 20 public meetings that NNSA held on the Draft Complex Transformation SPEIS, more than 600 speakers made oral comments. NNSA reviewed and considered all comments received on the Draft Complex Transformation SPEIS before issuing the 2008 Programmatic ROD.

NNSA prepared the 2019 SPEIS SA to determine whether, prior to proceeding with the effort to produce plutonium pits at a rate of not less than 80 pits per year during 2030, the existing Complex Transformation SPEIS should be supplemented, a new environmental impact statement be prepared, or that no further NEPA analysis is required. Although pertinent regulations do not require public comment on an SA, NNSA decided, in its discretion, that public comment in this instance would be helpful. NNSA issued the Draft 2019 SPEIS SA for public review on June 28, 2019 (84 FR 31055). NNSA considered all comments received during the public comment period. NNSA also reviewed all comment documents received during the public scoping process for the site-specific SRS Pit Production EIS for relevance to the 2019 SPEIS SA. NNSA included a comment response document as Appendix A to the Final 2019 SPEIS SA. After preparing and considering the 2019 SPEIS SA, NNSA has determined that no further NEPA analysis is needed prior to issuing this Amended ROD.

Summary of Impacts

In Section 2.3 of the 2019 SPEIS SA, NNSA discusses environmental changes at LANL that have occurred since publication of the Complex Transformation SPEIS and that are relevant to the analysis in the 2019 SPEIS SA. The 2019 SPEIS SA analyzes the potential impacts of the Proposed Action on land resources, visual resources, noise, air quality, water resources, geology and soils, ecological resources, cultural resources, socioeconomics, environmental justice, infrastructure, health and safety for normal operations, accidents and intentional destructive acts, waste management, and transportation and traffic. Section 3.2 of the 2019 SPEIS SA provides (1) a summary of the potential environmental impacts from the Complex Transformation SPEIS, (2) the estimate of potential impacts specific to the Proposed Action, and (3) a more detailed analysis of potential impacts for those NEPA resource areas where NNSA determined that there might be potentially significant new circumstances or information relevant to environmental concerns. Tables 3–1 and 3–2 of the 2019 SPEIS SA present information in a comparative fashion for each resource area. Table 3–3 addresses the combined impacts, to the extent that they are known at this time, from pit production at both SRS and LANL. Table 3–4 addresses Complex-wide transportation impacts. Section 4.0 of the 2019 SPEIS SA analyzes cumulative impacts at both a programmatic level and site-specific level.

NNSA's conclusion based on the Final 2019 SPEIS SA is that complex-wide impacts of adopting a Modified DCE Alternative for plutonium operations for all resource areas would not be different, or would not be significantly different, than impacts in existing NEPA analyses. NNSA has determined that that the proposed action does not constitute a substantial change from actions analyzed previously and there are no significant new circumstances or information relevant to environmental concerns. While no further NEPA documentation is required at a programmatic level and NNSA may amend the existing Complex Transformation SPEIS ROD, to implement the proposed action NNSA is preparing a site-specific EIS for actions at SRS and has prepared a site-specific SA for actions at LANL. The site-specific SA that formally re-evaluates the SWEIS at LANL is now final. Thus, consistent with 10 CFR 1021.315(e), the existing 2008 Programmatic ROD for the Complex Transformation SPEIS can be amended at this time to document NNSA's decision on pit production at LANL and cancel NNSA's prior commitment to construct the CMRR–NF support facility. NNSA may issue an additional Amended ROD after the site-specific EIS for actins at SRS is completed.

Environmentally Preferable Alternative

The analyses in the Complex Transformation SPEIS of the environmental impacts associated with the programmatic alternatives indicated that the No Net Production/Capability Based Alternative is environmentally preferable. Under this alternative NNSA would maintain capabilities to continue surveillance of the weapons stockpile, produce limited life components, and dismantle weapons, but would not add new types or increased numbers of weapons to the stockpile. This alternative would result in the minimum infrastructure demands, produce the least amount of wastes, reduce worker radiation doses, and require the fewest employees. Almost all of these reductions in potential impacts result from the reduced production levels assumed for this alternative. The environmentally preferable alternative for programmatic alternatives accounts for actions across the complex at multiple sites. This determination may not apply to site-specific determinations where other factors are considered in the analysis.

Amended Decision

NNSA has decided at a programmatic level to implement aspects of a Modified DCE Alternative. LANL will implement actions to produce a minimum of 30 war reserve pits per year during 2026 for the national pit production mission and implement surge efforts to exceed 30 pits per year up to the analyzed limit as necessary. Pit production at these levels will take place without construction of CMRR–NF. Prior to implementing this decision, NNSA will issue a site-specific Amended ROD for the LANL SWEIS, as appropriate. NNSA will continue to re-evaluate the single-site pit production strategy announced in the 2008 Programmatic ROD and complete the site-specific SRS EIS prior to announcing further decisions on pit production.

These decisions continue the transformation of the Complex following the end of the Cold War and the cessation of nuclear weapons testing, particularly decisions announced in the 1996 ROD for the SSM PEIS (DOE/EIS–0236) (61 FR 68014; Dec. 26, 1996) and the 2008 Programmatic Alternatives ROD for the Complex Transformation SPEIS. This Amended ROD modifies only the plutonium operations aspects of the 2008 Programmatic ROD related to pit production at LANL. NNSA has made no proposals to, and there are no changes to, NNSA's decisions on other aspects of the 2008 Programmatic ROD.

Basis for Decision

In making these decisions, NNSA considered the 2019 SPEIS SA, the Complex Transformation SPEIS, other referenced NEPA analyses, and its statutory responsibilities to support the nuclear weapons stockpile. Federal law and national security policies continue to require NNSA to maintain a safe, secure, and reliable nuclear weapons stockpile and create a responsive nuclear weapons infrastructure that are cost-effective and have adequate capacity to meet reasonably foreseeable national security requirements. This Amended ROD will enable NNSA to continue meeting federal law and national security requirements.

Mitigation Measures

As described in the Complex Transformation SPEIS and the 2008 Programmatic ROD, NNSA operates in compliance with environmental laws, regulations, and policies within a framework of contractual requirements; many of these requirements mandate actions to control and mitigate potential adverse environmental effects.

Examples of mitigation measures include site security and threat protection plans, emergency plans, Integrated Safety Management Systems, pollution prevention and waste minimization programs, cultural resource and protected species programs, and energy and water conservation programs. Any additional site-specific mitigation actions would be identified in site-specific NEPA documents.

Signing Authority

This document of the Department of Energy was signed on August 24, 2020, by Lisa E. Gordon-Hagerty, Under Secretary for Nuclear Security and Administrator, NNSA, 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 28, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–19348 Filed 9–1–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF20–6–000]

Southeastern Power Administration; Notice of Filing

Take notice that on August 21, 2020, Southeastern Power Administration submitted tariff filing per: 300.10: Cumberland 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 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19380 Filed 9–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16–10–000]

Mountain Valley Pipeline, LLC; Notice of Request for Extension of Time

Take notice that on August 25, 2020, Mountain Valley Pipeline, LLC (Mountain Valley) requested that the Federal Energy Regulatory Commission (Commission) grant an extension of time, until October 13, 2022, to complete the Mountain Valley Pipeline Project (Project), as authorized in the February 19, 2019 Order Issuing Certificates and Granting Abandonment (Certificate Order).[1]

[1] *Mountain Valley Pipeline, LLC,* 161 FERC 61,043 (2017), *order on reh'g,* 163 FERC 61,197

Continued

Mountain Valley states it has not completed Project construction due to unforeseen litigation and permitting delays outside of Mountain Valley's control. This includes litigation directly challenging Project permits and authorizations as well as litigation associated with other infrastructure projects. These challenges have affected, directly or indirectly, Project permits and authorizations from the U.S. Forest Service, Bureau of Land Management, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, and the National Park Service. Because of these permitting challenges, Mountain Valley states it will not be able to complete construction and make the Project facilities available for service by October 13, 2020.

This notice establishes a 15-calendar day intervention and comment period deadline. Any person wishing to comment on Mountain Valley's request for an extension of time may do so. No reply comments or answers will be considered. If you wish to obtain legal status by becoming a party to the proceedings for this request, you should, on or before the comment date stated below, file a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10).[2]

As a matter of practice, the Commission itself generally acts on requests for extensions of time to complete construction for Natural Gas Act facilities when such requests are contested before order issuance. For those extension requests that are contested,[3] the Commission will aim to issue an order acting on the request within 45 days.[4] The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension.[5] The Commission will not consider arguments that re-litigate the issuance of the certificate order, including whether the Commission properly found the project to be in the public convenience and necessity and whether the Commission's environmental analysis for the certificate complied with the National Environmental Policy Act.[6] At the time a pipeline requests an extension of time, orders on certificates of public convenience and necessity are final and the Commission will not re-litigate their issuance.[7] The OEP Director, or his or her designee, will act on all of those extension requests that are uncontested.

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.* 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.

Comment Date: 5:00 p.m. Eastern Time on September 11, 2020.

Dated: August 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19376 Filed 9–1–20; 8:45 am]

BILLING CODE 6717–01–P

(2018) (Certificate Order), *aff'd sub. nom., Appalachian Voices* v. *FERC,* No. 17–1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019).

[2] Only motions to intervene from entities that were party to the underlying proceeding will be accepted. *Algonquin Gas Transmission, LLC,* 170 FERC 61,144, at P 39 (2020).

[3] Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 CFR 385.2201(c)(1) (2019).

[4] *Algonquin Gas Transmission, LLC,* 170 FERC 61,144, at P 40 (2020).

[5] *Id.* at P 40.

[6] Similarly, the Commission will not re-litigate the issuance of an NGA section 3 authorization, including whether a proposed project is not inconsistent with the public interest and whether the Commission's environmental analysis for the permit order complied with NEPA.

[7] *Algonquin Gas Transmission, LLC,* 170 FERC 61,144, at P 40 (2020).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14227–003]

Nevada Hydro Inc.; Notice of Anticipated Schedule for Lake Elsinore Advanced Pumped Storage Project

On October 2, 2017, Nevada Hydro Inc. filed an application requesting authorization to construct and operate the Lake Elsinore Advanced Pumped Storage Project. The project would be located on Lake Elsinore and San Juan Creek near the town of Lake Elsinore in Riverside and San Diego Counties, California. The project would occupy about 845 acres of federal land administered by the U.S. Forest Service.

The application will be processed according to the following revised schedule.

Notice of Ready for Environmental Analysis: *December 11, 2020*

Draft Environmental Impact Statement: *July 9, 2021*

Final Environmental Impact Statement: *December 10, 2021*

In addition, in accordance with Title 41 of the Fixing America's Surface Transportation Act, enacted on December 4, 2015, agencies are to publish completion dates for all federal environmental reviews and authorizations. This notice identifies the Commission's anticipated schedule for issuance of the final order for the project, which is based on the anticipated date of issuance of the final Environmental Impact Statement. Accordingly, we currently anticipate issuing a final order for the project no later than:

Issuance of Final Order *March 17, 2022*

If a schedule change becomes necessary, an additional notice will be provided so that interested parties and government agencies are kept informed of the project's progress.

Dated: August 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19384 Filed 9–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–510–000]

Equitrans, L.P.; Notice of Request Under Blanket Authorization

Take notice that on August 19, 2020, Equitrans, L.P. (Equitrans), 2200 Energy Drive, Canonsburg, Pennsylvania 15317, filed a prior notice application pursuant to sections 157.205, 157.213(b), and 157.216(b) of the Federal Energy Regulatory Commission's (Commission) regulations under the Natural Gas Act (NGA), and Equitrans' blanket certificate issued in Docket No. CP96–532–000. Equitrans proposes to convert the Tepe 3900 injection/withdrawal storage well to an observation well, remove the associated drip, and abandon-in-place 385 feet of six-inch-diameter natural gas pipeline. Equitrans states that the cause for converting the Tepe 3900 well is to mitigate future safety concerns due to a recent hill slip in the vicinity of the well. Equitrans states that conversion of the well will not impact the operational capability of the Tepe Storage Field. Equitrans states the total cost for the abandonment is 27,000 dollars. The Tepe 3900 storage well is part of Equitrans' Tepe Storage Field located in Allegheny County, Pennsylvania, all as more fully set forth in the application, which is open to the public for inspection.

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 FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding this application should be directed to Matthew Eggerding, Assistant General Counsel, Equitrans, L.P., 2200 Energy Drive, Canonsburg, PA 15317, or phone (412) 553–5786, or by email *MEggerding@equitransmidstream.com.*

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenter will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments 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 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19378 Filed 9–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12766–007]

Green Mountain Power Corporation; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New License for Transmission Line Project.

b. *Project No.:* 12766–007.

c. *Date filed:* November 22, 2019.

d. *Applicant:* Green Mountain Power Corporation (Green Mountain Power).

e. *Name of Project:* Clay Hill Road Line 66 Transmission Project (Clay Hill Project).

f. *Location:* The Clay Hill Project is located along Clay Hill Road in Windsor County, Vermont. The Clay Hill Project does not occupy any federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* John Greenan, Green Mountain Power Corporation, 2152 Post Road, Rutland, VT 05701; Phone at (802) 770–2195, or email at *John.Greenan@greenmountainpower.com.*

i. *FERC Contact:* Bill Connelly, (202) 502–8587 or *william.connelly@ferc.gov.* Deadline for filing motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions: 60 days from the issuance date of this notice;

reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

j. This application has been accepted for filing and is ready for environmental analysis at this time.

k. *Project Description:* The existing Clay Hill Project consists of: (1) A 2.3-mile-long, 12.5-kV, three-phase electrical line mounted on top of Green Mountain Power's regional distribution line (Line 66) along Clay Hill Road from Pole 115 to 62x; and (2) appurtenant facilities. The project serves as a primary transmission line for the North Hartland Hydroelectric Project No. 2816. Green Mountain Power is not proposing any changes to project facilities or operation.

l. In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (*e.g.,* license application) 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 (P–12766). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19) issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3673 or (202) 502–8659 (TTY).

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

m. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must: (1) Bear in all capital letters the title PROTEST, MOTION TO INTERVENE, COMMENTS, REPLY COMMENTS, RECOMMENDATIONS, TERMS AND CONDITIONS, or PRESCRIPTIONS; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

n. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

o. Procedural Schedule:

The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Filing of interventions, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions.	October 2020.
Commission issues Environmental Assessment	May 2021.
Comments on Environmental Assessment	June 2021.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

Dated: August 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19383 Filed 9–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–511–000]

Gulf South Pipeline Company, LLC; Notice of Request Under Blanket Authorization

Take notice that on August 21, 2020, Gulf South Pipeline Company, LLC (Gulf South), 9 Greenway Plaza, Suite 2800, Houston, Texas 77046, filed a prior notice application pursuant to sections 157.205 and 157.216(b) of the Federal Energy Regulatory Commission's (Commission) regulations under the Natural Gas Act, and Gulf South's blanket certificate issued in Docket No. CP82–430–000. Gulf South proposes to abandon in-place four, 1,000 horsepower compressor units, various buildings, yard and station piping, and appurtenant auxiliary facilities located at its Koran Compressor Station in Bossier and Webster parishes, Louisiana, all as more fully set forth in the application, which is open to the public for inspection.

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 FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding this application should be directed to Juan Eligio, Jr., Supervisor of Regulatory Affairs, Gulf South Pipeline Company, LLC, 9 Greenway Plaza, Houston, Texas 77046, at (713) 479–3480 or by email to *juan.eligio@bwpipelines.com.* Questions may also be directed to Payton Barrientos, Sr. Regulatory Analyst, Gulf South Pipeline Company, LLC, 9 Greenway Plaza, Houston, Texas, 77046, at (713) 479–8157 or by email to *payton.barrientos@bwpipelines.com.*

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment EA and place it into the Commission's public record (eLibrary) for this proceeding or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the environmental assessment (EA) for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenter will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

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 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19379 Filed 9–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–487–000]

Northern Natural Gas Company; Notice of Schedule for Environmental Review of the South Sioux City to Sioux Falls A-Line Replacement Project

On June 29, 2020, Northern Natural Gas Company (Northern) filed an application in Docket No. CP20–487–000 requesting a Certificate of Public Convenience and Necessity pursuant to 7(b) and 7(c) of the Natural Gas Act to abandon, construct, and operate certain natural gas facilities. The proposed project is known as the South Sioux City to Sioux Falls A-Line Replacement Project (Project) and Northern states that the Project would ensure safe and efficient operation of its existing pipeline system in Nebraska and South Dakota by replacing mechanical joints with modern welded steel pipeline.

On July 14, 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 FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA—January 5, 2021
90-day Federal Authorization Decision Deadline—April 5, 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

Northern proposes the following activities: (1) Abandon in-place 79.2 miles of its 14- and 16-inch-diameter M561 A-Line and replace the pipeline with 82.2 miles of 12-inch-diameter pipeline in Dakota and Dixon Counties, Nebraska, and Lincoln and Union Counties, South Dakota; (2) install an approximately 3.15-mile-long, 12-inch-diameter tie-over pipeline in Lincoln County, South Dakota; (3) abandon in-place the existing 0.16-mile-long, 2-inch-diameter Ponca branch pipeline and replace it with a 1.9-mile-long, 3-inch-diameter pipeline in Dixon

County, Nebraska; (4) abandon in-place the existing 0.06-mile-long, 2-inch-diameter Jackson branch pipeline in Dakota County, Nebraska; and (5) construct, modify, or remove appurtenant facilities, including pig launchers and receivers, two new metering facilities, regulators, tie-overs, and associated piping and valves. Northern states that after Commission approval of the Project, portions of the abandoned pipeline would be purchased and removed by a third-party salvage company.

Background

On July 23, 2019, the Commission staff granted Northern's request to use FERC's pre-filing environmental review process and assigned the Project Docket No. PF19–8–000. On November 22, 2019, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Planned South Sioux City to Sioux Falls A-Line Replacement Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Sessions* (NOI). The NOI was issued during the pre-filing review of the Project and was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers.

In response to the NOI, the Commission received comments from the National Park Service, the Nebraska Department of Natural Resources, and four landowners. The primary issues raised by the commentors were impacts on water quality, visual resources, the Missouri National Recreational River and the Lewis and Clark National Historic Trail, ground water and surface water resources, floodplains, agriculture and grazing, residential areas in close proximity to the pipeline, and impacts from soil erosion, contamination, and landform degradation. All substantive comments will be addressed in the EA.

The U.S. Army Corps of Engineers is a cooperating agency in the preparation of the EA.

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.,* CP20–487), 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 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19377 Filed 9–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2816–050]

North Hartland, LLC; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2816–050.

c. *Date filed:* November 26, 2019.

d. *Applicant:* North Hartland, LLC (North Hartland).

e. *Name of Project:* North Hartland Hydroelectric Project (North Hartland Project).

f. *Location:* The North Hartland Project is located on the Ottauquechee River in Windsor County, Vermont. The North Hartland Project occupies 20.8 acres of land managed by the U.S. Army Corps of Engineers (Corps).

g. *Filed Pursuant To:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Andrew J. Locke, President, Essex Hydro Associates, LLC, 55 Union Street, Boston, MA 02108; Phone at (617) 367–0032, or email at *alocke@essexhydro.com.*

i. *FERC Contact:* Bill Connelly, (202) 502–8587 or *william.connelly@ferc.gov.*

j. *Deadline for filing motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions:* 60 Days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is ready for environmental analysis at this time.

l. *Project Description:* The existing North Hartland Project consists of: (1) A steel-lined intake structure in the Corps' North Hartland Dam that is equipped with trashracks with 2-inch clear bar spacing; (2) a 470-foot-long, 12-foot-diameter steel penstock that provides flow to a 4.0-megawatt (MW) adjustable blade, vertical shaft turbine-generator unit located inside of a 59-foot-long, 40-foot-wide concrete powerhouse; (3) a 12-foot-diameter bypass conduit that branches off of the 12-foot-diameter penstock about 100 feet before the powerhouse, and that empties into a 60-foot-long concrete-lined channel through a bypass control gate; (4) a 30-inch-diameter steel penstock that branches off of the 12-foot-diamater bypass conduit about 50 feet upstream of the bypass control gate, and that provides flow to a 0.1375–MW fixed geometry, horizontal pump turbine-generator unit located on a raised platform outside of the southern wall of the powerhouse*;* (5) a 400-foot-long, 50 to 150-foot-wide tailrace channel; (6) a transmission line that comprises an approximately 600-foot-long, 12.5 kilovolt (kV) underground segment, and a 4,000-foot-long, 12.5-kV overhead segment that connect the generators to Green Mountain Power Corporation's Clay Hill Road Line 66 Transmission Project No. 12766; and (9) appurtenant facilities.

The project is managed to meet daily peak electrical system demand, as needed using the available head and reservoir outflow from the Corps' North Hartland dam. The current license requires North Hartland to release a continuous minimum flow of 23 cubic feet per second (cfs) from July 1 through October 31, and 40 cfs during the remainder of the year (or inflow to the reservoir, whichever is less), for the purpose of protecting and enhancing aquatic resources in the Ottauquechee River. The project has an average annual generation of approximately 13,991,990 kilowatt-hours from 2014 through 2018.

North Hartland proposes to release the following minimum and maximum flows, respectively, to the downstream reach: (1) 60 and 700 cfs from October 1 through March 31; (2) 160 and 835 cfs from April 1 through April 31; (3) 160 and 550 cfs from May 1 through May 31; (4) 140 and 450 cfs from June 1 through June 30; and (5) 60 and 300 cfs from July 1 through September 30.

m. In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (*e.g.,* license application) 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 (P–2816). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19) issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3673 or (202) 502–8659 (TTY).

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must: (1) Bear in all capital letters the title PROTEST, MOTION TO INTERVENE, COMMENTS, REPLY COMMENTS, RECOMMENDATIONS, TERMS AND CONDITIONS, or PRESCRIPTIONS; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. *A license applicant must file no later than 60 days following the date of issuance of this notice:* (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

p. *Procedural Schedule:* The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Filing of interventions, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions.	October 2020.
Commission issues Environmental Assessment.	May 2021.
Comments on Environmental Assessment.	June 2021.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

Dated: August 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19382 Filed 9–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF20–7–000]

Western Area Power Administration; Notice of Filing

Take notice that on August 25, 2020, Southeastern Power Administration submitted tariff filing per: 300.10: CRSP_SLCAIP_WAPA190–20200825 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 24, 2020.

Dated: August 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19381 Filed 9–1–20; 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: ER05–1056–010.
Applicants: Bonneville Power Administration.
Description: Bonneville Power Administration submits tariff filing per 35.19a(b): Refund Report_Vistra Intermediate Company, LLC to be effective N/A.
Filed Date: 8/26/20.
Accession Number: 20200826–5150.
Comments Due: 5 p.m. ET 9/16/20.

Docket Numbers: ER20–2751–000.
Applicants: PPL Electric Utilities Corporation, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: PPL Electric submits CESF SA No. 5750 to be effective 8/31/2020.
Filed Date: 8/26/20.
Accession Number: 20200826–5141.
Comments Due: 5 p.m. ET 9/16/20.

Docket Numbers: ER20–2752–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3618R1 Little Blue Wind Project, LLC GIA to be effective 7/29/2020.
Filed Date: 8/27/20.
Accession Number: 20200827–5067.
Comments Due: 5 p.m. ET 9/17/20.

Docket Numbers: ER20–2753–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3435R1 Magnet Wind Farm GIA Cancellation to be effective 7/30/2020.
Filed Date: 8/27/20.
Accession Number: 20200827–5069.
Comments Due: 5 p.m. ET 9/17/20.

Docket Numbers: ER20–2754–000.
Applicants: AEP Texas Inc.
Description: § 205(d) Rate Filing: AEPTX-Sparta Solar Generation Interconnection Agreement to be effective 8/14/2020.
Filed Date: 8/27/20.
Accession Number: 20200827–5082.
Comments Due: 5 p.m. ET 9/17/20.

Docket Numbers: ER20–2755–000.
Applicants: Caithness Long Island, LLC.
Description: Compliance Filing: New eTariff Baseline Filing to be effective 7/1/2020.
Filed Date: 8/27/20.
Accession Number: 20200827–5124.
Comments Due: 5 p.m. ET 9/17/20.

Docket Numbers: ER20–2756–000.
Applicants: Arizona Public Service Company.
Description: § 205(d) Rate Filing: Rate Schedule No. 302—PNM Pseudo-Tie Agreement to be effective 10/27/2020.
Filed Date: 8/27/20.
Accession Number: 20200827–5146.
Comments Due: 5 p.m. ET 9/17/20.

Docket Numbers: ER20–2757–000.
Applicants: PacifiCorp.
Description: § 205(d) Rate Filing: UMPA TSOA Rev 5 to be effective 10/26/2020.
Filed Date: 8/27/20.
Accession Number: 20200827–5182.
Comments Due: 5 p.m. ET 9/17/20.

Docket Numbers: ER20–2758–000.
Applicants: Public Service Company of New Mexico.
Description: § 205(d) Rate Filing: PIA with Pattern and Duran Mesa to be effective 10/26/2020.
Filed Date: 8/27/20.
Accession Number: 20200827–5183.
Comments Due: 5 p.m. ET 9/17/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–19375 Filed 9–1–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0720; FRL–10012–56]

Pesticide Registration Review; Draft Human Health and/or Ecological Risk Assessments for Strychnine; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's draft human health and/or ecological risk assessments for the registration review of strychnine.

DATES: Comments must be received on or before November 2, 2020.

ADDRESSES: Submit your comments, to the docket identification (ID) number for the specific pesticide of interest provided in the Table in Unit IV, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

• *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

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

FOR FURTHER INFORMATION CONTACT:

For pesticide specific information contact: The Chemical Review Manager for the pesticide of interest identified in the Table in Unit IV.

For general questions on the registration review program, contact: Melanie Biscoe, Pesticide Re-Evaluation

Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 305–7106; email address: *biscoe.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager identified in the Table in Unit IV.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Background

Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. As part of the registration review process, the Agency has completed comprehensive draft human health and/or ecological risk assessments for all pesticides listed in the Table in Unit IV. After reviewing comments received during the public comment period, EPA may issue a revised risk assessment, explain any changes to the draft risk assessment, and respond to comments and may request public input on risk mitigation before completing a proposed registration review decision for the pesticides listed in the Table in Unit IV. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

III. Authority

EPA is conducting its registration review of the chemicals listed in the Table in Unit IV pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

IV. What action is the Agency taking?

Pursuant to 40 CFR 155.58, this notice announces the availability of EPA's human health and/or ecological risk assessments for the pesticides shown in the following table and opens a 60-day public comment period on the risk assessments.

TABLE—DRAFT RISK ASSESSMENTS BEING MADE AVAILABLE FOR PUBLIC COMMENT

Registration review case name and No.	Docket ID No.	Chemical review manager and contact information
Strychnine, Case 3133	EPA–HQ–OPP–2015–0754	Srijana Shrestha, *shrestha.srijana@epa.gov*, (703) 305–6471.

Pursuant to 40 CFR 155.53(c), EPA is providing an opportunity, through this notice of availability, for interested parties to provide comments and input concerning the Agency's draft human health and/or ecological risk assessments for the pesticides listed in the Table in Unit IV. The Agency will consider all comments received during the public comment period and make changes, as appropriate, to a draft human health and/or ecological risk assessment. EPA may then issue a revised risk assessment, explain any changes to the draft risk assessment, and respond to comments.

Information submission requirements. Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

• To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.

• The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audio-graphic or video-graphic record. Written material may be submitted in paper or electronic form.

• Submitters must clearly identify the source of any submitted data or information.

• Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

Authority: 7 U.S.C. 136 *et seq.*

Dated: July 23, 2020.

Mary Reaves,

Acting Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2020–19388 Filed 9–1–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0720; FRL–10012–59]

Pesticide Registration Review; Draft Human Health and/or Ecological Risk Assessments for Several Pesticides; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's draft human health and/or ecological risk assessments for the registration review of 10,10'-oxybisphenoxarsine (OBPA), amicarbazone, aminopyralid, dimethenamid/dimethenamid-p, endothall, fluoxastrobin, folpet, ipconazole, iprodione, metconazole, polixetonium chloride, prothioconazole, sodium pyrithione.

DATES: Comments must be received on or before November 2, 2020.

ADDRESSES: Submit your comments, to the docket identification (ID) number for the specific pesticide of interest provided in the Table in Unit IV, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

• *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

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

FOR FURTHER INFORMATION CONTACT:

For pesticide specific information contact: The Chemical Review Manager for the pesticide of interest identified in the Table in Unit IV.

For general questions on the registration review program, contact: Melanie Biscoe, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 305–7106; email address: *biscoe.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager identified in the Table in Unit IV.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Background

Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. As part of the registration review process, the Agency has completed comprehensive draft human health and/or ecological risk assessments for all pesticides listed in the Table in Unit IV. After reviewing comments received during the public comment period, EPA may issue a revised risk assessment, explain any changes to the draft risk assessment, and respond to comments and may request public input on risk mitigation before completing a proposed registration review decision for the pesticides listed in the Table in Unit IV. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

III. Authority

EPA is conducting its registration review of the chemicals listed in the

Table in Unit IV pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

IV. What action is the Agency taking?

Pursuant to 40 CFR 155.58, this notice announces the availability of EPA's human health and/or ecological risk assessments for the pesticides shown in the following table and opens a 60-day public comment period on the risk assessments.

TABLE—DRAFT RISK ASSESSMENTS BEING MADE AVAILABLE FOR PUBLIC COMMENT

Registration review case name and No.	Docket ID No.	Chemical review manager and contact information
10,10'-oxybisphenoxarsine, (OBPA), Case 0044	EPA–HQ–OPP–2009–0618.	Megan Snyderman, *snyderman.megan@epa.gov*, (703) 347–0671.
Amicarbazone, Case 7262	EPA–HQ–OPP–2015–0400.	Samantha Thomas, *thomas.samantha@epa.gov*, (703) 347–0514.
Aminopyralid, Case 7267	EPA–HQ–OPP–2013–0749.	Veronica Dutch, *dutch.veronica@epa.gov*, 703–308–8585.
Dimethenamid/Dimethenamid-p, Case 7223	EPA–HQ–OPP–2015–0803.	Lauren Weissenborn, *weissenborn.lauren@epa.gov*, (703) 347–8601.
Endothall, Case 2245	EPA–HQ–OPP–2015–0591.	Robert Little, *little.robert@epa.gov*, (703) 347–8156.
Fluoxastrobin, Case 7044	EPA–HQ–OPP–2015–0295.	Rachel Fletcher, *fletcher.rachel@epa.gov*, (703) 347–0512.
Folpet, Case 0630	EPA–HQ–OPP–2012–0859.	Christina Scheltema, *scheltema.christina@epa.gov*, (703) 308–2201.
Ipconazole (eco only), Case 7041	EPA–HQ–OPP–2015–0590.	Lauren Bailey, *bailey.lauren@epa.gov*, (703) 347–0734.
Iprodione, Case 2335	EPA–HQ- OPP–2012–0392.	Rachel Fletcher, *fletcher.rachel@epa.gov*, (703) 347–0512.
Metconazole, Case 7049	EPA–HQ–OPP–2015–0013.	Jordan Page, *page.jordan@epa.gov*, (703) 347–0467.
Polixetonium chloride (Busan 77), Case 3034	EPA–HQ–OPP–2015–0256.	Peter Bergquist, *bergquist.peter@epa.gov*, (703) 347–8563.
Prothioconazole, Case 7054	EPA–HQ–OPP–2015–0474.	Rachel Eberius, *eberius.rachel@epa.gov*, (703) 347–0492.
Sodium pyrithione, Case 0209	EPA–HQ–OPP–2011–0611.	Kendall Ziner, *ziner.kendall@epa.gov*, (703) 347–8829.

Pursuant to 40 CFR 155.53(c), EPA is providing an opportunity, through this notice of availability, for interested parties to provide comments and input concerning the Agency's draft human health and/or ecological risk assessments for the pesticides listed in the Table in Unit IV. The Agency will consider all comments received during the public comment period and make changes, as appropriate, to a draft human health and/or ecological risk assessment. EPA may then issue a revised risk assessment, explain any changes to the draft risk assessment, and respond to comments.

Information submission requirements. Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audio-graphic or video-graphic record. Written material may be submitted in paper or electronic form.
- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

Authority: 7 U.S.C. 136 *et seq.*

Dated: July 23, 2020.

Mary Reaves,

Acting Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2020–19371 Filed 9–1–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2019–0565; FRL–10003–30]

Notice of Intent To Suspend Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice, pursuant the Federal Insecticide, Fungicide and

Rodenticide Act (FIFRA), publishes a Notice of Intent to Suspend certain pesticide registrations issued by EPA. The Notice of Intent to Suspend was issued following the Agency's issuance of a Data Call-In Notice (DCI), which required the registrant of the affected pesticide products containing a certain pesticide active ingredient to take appropriate steps to secure certain data, and following the registrant's failure to submit these data or to take other appropriate steps to secure the required data. The subject data were determined to be required to maintain in effect the existing registrations of the affected products. Failure to comply with the data requirements of a DCI is a basis for suspension of the affected registrations under FIFRA.

DATES: The Notice of Intent to Suspend included in this **Federal Register** notice will become a final and effective suspension order automatically by operation of law 30 days after the date of the registrant's receipt of the mailed Notice of Intent to Suspend or, if the mailed Notice of Intent to Suspend is returned to the EPA Administrator as undeliverable, if delivery is refused, or if the EPA Administrator otherwise is unable to accomplish delivery to the registrant after making reasonable efforts to do so, the Notice of Intent to Suspend becomes effective 30 days after the date of publication of this notice in the **Federal Register**, unless, during that time, a timely and adequate request for a hearing is made by a person adversely affected by the Notice of Intent to Suspend, or the registrant has satisfied the EPA Administrator that the registrant has complied fully with the requirements that served as a basis for the Notice of Intent to Suspend. Unit IV. explains what must be done to avoid suspension under this notice (*i.e.,* how to request a hearing or how to comply fully with the requirements that served as a basis for the Notice of Intent to Suspend).

FOR FURTHER INFORMATION CONTACT: Erin Dandridge, Antimicrobial Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001, telephone number: (703) 347–0185, email: *dandridge.erin@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, farm worker and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2019–0565, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), William Jefferson Clinton West Building., Room. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. Registrant Issued Notice of Intent To Suspend Active Ingredient, Product(s) Affected, and Date(s) Issued

The registrant and products subject to this Notice of Intent to Suspend are listed in Table 1. A Notice of Intent to Suspend was sent to the registrant of the affected products via the U.S. Postal Service, first class mail, return receipt requested.

TABLE 1—LIST OF REGISTRANT AND PRODUCTS SUBJECT TO SUSPENSION

Registrant affected	Active ingredient	EPA registration No.	Product name	Date EPA issued notice of intent to suspend
Qualco, Inc.	Dialkyl*methyl benzyl ammonium chloride *(60%C14, 30% C16, 5% C18, 5% C12).	3525–22	Utikem Algaesan Multi-Purpose Algaecide.	July 27, 2020.
Qualco, Inc.	Dialkyl*methyl benzyl ammonium chloride *(60%C14, 30% C16, 5% C18, 5% C12).	3525–78	Algae Destroyer.	July 27, 2020.
Qualco, Inc.	Alkyl*dimethyl benzyl ammonium chloride* (60%C14, 30%C16, 5%C18, 5%C12).	3525–94	Coastal Pool Aid Powder Surface Sanitizer.	July 27, 2020.
Qualco, Inc.	Alkyl* dimethyl benzyl ammonium chloride *(60%C14, 25%C12, 15%C16).	3525–97	Winter Aid	July 27, 2020.
Qualco, Inc.	Alkyl* dimethyl benzyl ammonium chloride *(60%C14, 25%C12, 15%C16).	3525–99	Coastal Pool Deodor.	July 27, 2020.
Qualco, Inc.	Alkyl* dimethyl benzyl ammonium chloride *(60%C14, 25%C12, 15%C16).	3525–100	Winter Tablets "G".	July 27, 2020.
Qualco, Inc.	Alkyl* dimethyl benzyl ammonium chloride *(60%C14, 25%C12, 15%C16).	3525–103	Cal Jet Algaecide Liquid.	July 27, 2020.
Qualco, Inc.	Alkyl* dimethyl benzyl ammonium chloride *(95%C14, 3%C12, 2%C16).	3525–104	Iso Clor "C" Super Stabilized Chlorinating Powder.	July 27, 2020.
Qualco, Inc.	Dialkyl*methyl benzyl ammonium chloride *(60%C14, 30% C16, 5% C18, 5% C12).	3525–106	Liquid Algaecide.	July 27, 2020.

TABLE 1—LIST OF REGISTRANT AND PRODUCTS SUBJECT TO SUSPENSION—Continued

Registrant affected	Active ingredient	EPA registration No.	Product name	Date EPA issued notice of intent to suspend
Qualco, Inc.	Dialkyl*methyl benzyl ammonium chloride *(60%C14, 30% C16, 5% C18, 5% C12).	3525–118	Coastal Concentrate 50.	July 27, 2020.

III. Basis for Issuance of Notice of Intent To Suspend; Requirement List

The registrant failed to submit the data or information required by the Data Call-In Notice, or to take other appropriate steps to secure the required data for their pesticide products listed in Table 2 of this unit.

While the Agency did not receive a certified mail return receipt from Ms. Schaub, the agent for Qualco, Inc., or from Qualco, Inc. for the Product Specific Data Call-In (PDCI) Notice requiring data generation and submission for EPA Reg. Nos. 3525–22, 3525–78, 3525–94, 3524–97, 3525–99, 3525–100, 3525–103, 3525–104, 3525–106, and 3525–118, the agency has correspondence from the company's representative after the PDCI Notices were issued evidencing that Ms. Schaub and thus Qualco, Inc. received the PDCIs and were aware of the data requirements.

TABLE 2–A—LIST OF REQUIREMENTS FOR EPA REGISTRATION NUMBER 3525–94

Guideline No. as listed in applicable DCI	Requirement name	Date EPA issued DCI	Date registrant received DCI	Final data due date	Reason for notice of intent to suspend*
830.1550	Product Identity and Composition	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.1600	Description of Materials Used to Produce the Product.	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.1620	Description of Production Process	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.1650	Description of Formulation Process	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.1670	Discussion of Formation of Impurities.	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.1700	Preliminary Analysis	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.1750	Certified Limits	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.1800	Enforcement Analytical Method	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.6302	Color	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.6303	Physical State	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.6304	Odor	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.6313	Stability to Normal and Elevated Temperatures,Metals, and Metal.	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.6314	Oxidizing or Reducing Action	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.6315	Flammability	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.6316	Explodability	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.6317	Storage Stability	3/11/2015	Confirmation through Correspondence.	07/09/2016	2 & 4
830.6319	Miscibility	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.6320	Corrosion Characteristics	3/11/2015	Confirmation through Correspondence.	07/09/2016	2 & 4
830.6321	Dielectric Breakdown Voltage	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7000	pH	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7050	UV/Visible Absorption	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7100	Viscosity	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7200	Melting Point/Melting Range	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7220	Boiling Point/Boiling Range	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4

TABLE 2–A—LIST OF REQUIREMENTS FOR EPA REGISTRATION NUMBER 3525–94—Continued

Guideline No. as listed in applicable DCI	Requirement name	Date EPA issued DCI	Date registrant received DCI	Final data due date	Reason for notice of intent to suspend*
830.7300	Density/Relative Density	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7370	Dissociation Constants in Water	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7550	Partition Coefficient (n-octanol/water), Shake Flask Method.	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7560	Partition Coefficient (n-octanol/water, Generator Column Method.	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7570	Partition Coefficient (n-octanol/water, Estimation by Liquid Chromatography.	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7840	Water Solubility: Column Elution Method, Shake Flask Method.	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830.7860	Water Solubility, Generator Column Method.	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
830. 7950	Vapor Pressure	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
870.1100	Acute Oral Toxicity	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
870.1200	Acute Dermal Toxicity	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
870.1300	Acute Inhalation Toxicity	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
870.2500	Acute Dermal Irritation	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
870.2600	Skin Sensitization	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
870.2400	Acute Eye Irritation	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
810.2100	Sterilants	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
810.2200	Disinfectants for Use on Hard Surfaces.	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
810.2300	Sanitizers for Use on Hard Surfaces	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
810.2400	Disinfectants and Sanitizers for Use on Fabrics and Textiles.	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
810.2500	Air Sanitizers	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4
810.2600	Disinfectants for Use in Water	3/11/2015	Confirmation through Correspondence.	11/09/2015	2 & 4

*Table Notes:
[1] No 90-day response received.
[2] Inadequate 90-day response received.
[3] No data received.
[4] Inadequate data received.

TABLE 2–B—LIST OF REQUIREMENTS FOR EPA REGISTRATION NUMBERS: 3525–22; 3525–78; 3525–97; 3525–99; 3525–100; 3525–103; 3525–106; AND 3525–118

Guideline No. as listed in applicable DCI	Requirement name	Date EPA issued DCI	Date registrant received DCI	Final data due date	Reason for notice of intent to suspend*
830.1550	Product Identity and Composition	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.1600	Description of Materials Used to Produce the Product.	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.1620	Description of Production Process	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.1650	Description of Formulation Process	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.1670	Discussion of Formation of Impurities.	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.1700	Preliminary Analysis	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.1750	Certified Limits	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4

TABLE 2–B—LIST OF REQUIREMENTS FOR EPA REGISTRATION NUMBERS: 3525–22; 3525–78; 3525–97; 3525–99; 3525–100; 3525–103; 3525–106; AND 3525–118—Continued

Guideline No. as listed in applicable DCI	Requirement name	Date EPA issued DCI	Date registrant received DCI	Final data due date	Reason for notice of intent to suspend *
830.1800	Enforcement Analytical Method	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.6302	Color	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.6303	Physical State	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.6304	Odor	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.6313	Stability to Normal and Elevated Temperatures, Metals, and Metal.	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.6314	Oxidizing or Reducing Action	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.6315	Flammability	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.6316	Explodability	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.6317	Storage Stability	3/06/2015	Confirmation through Correspondence.	07/04/2016	2 & 4
830.6319	Miscibility	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.6320	Corrosion Characteristics	3/06/2015	Confirmation through Correspondence.	07/04/2016	2 & 4
830.6321	Dielectric Breakdown Voltage	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7000	pH	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7050	UV/Visible Absorption	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7100	Viscosity	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7200	Melting Point/Melting Range	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7220	Boiling Point/Boiling Range	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7300	Density/Relative Density	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7370	Dissociation Constants in Water	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7550	Partition Coefficient (n-octanol/water), Shake Flask Method.	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7560	Partition Coefficient (n-octanol/water, Generator Column Method.	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7570	Partition Coefficient (n-octanol/water, Estimation by Liquid Chromatography.	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7840	Water Solubility: Column Elution Method, Shake Flask Method.	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7860	Water Solubility, Generator Column Method.	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
830.7950	Vapor Pressure	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
870.1100	Acute Oral Toxicity	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
870.1200	Acute Dermal Toxicity	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
870.1300	Acute Inhalation Toxicity	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
870.2500	Acute Dermal Irritation	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
870.2600	Skin Sensitization	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
870.2400	Acute Eye Irritation	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
810.2100	Sterilants	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
810.2200	Disinfectants for Use on Hard Surfaces.	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4

TABLE 2–B—LIST OF REQUIREMENTS FOR EPA REGISTRATION NUMBERS: 3525–22; 3525–78; 3525–97; 3525–99; 3525–100; 3525–103; 3525–106; AND 3525–118—Continued

Guideline No. as listed in applicable DCI	Requirement name	Date EPA issued DCI	Date registrant received DCI	Final data due date	Reason for notice of intent to suspend*
810.2300	Sanitizers for Use on Hard Surfaces	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
810.2400	Disinfectants and Sanitizers for Use on Fabrics and Textiles.	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
810.2500	Air Sanitizers	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4
810.2600	Disinfectants for Use in Water	3/06/2015	Confirmation through Correspondence.	11/04/2015	2 & 4

*Table Notes:
[1] No 90-day response received.
[2] Inadequate 90-day response received.
[3] No data received.
[4] Inadequate data received.

TABLE 2–C—LIST OF REQUIREMENTS FOR EPA REGISTRATION NUMBER 3525–104

Guideline No. as listed in applicable DCI	Requirement name	Date EPA issued DCI	Date registrant received DCI	Final data due date	Reason for notice of intent to suspend*
830.1550	Product Identity and Composition	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.1600	Description of Materials Used to Produce the Product.	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.1620	Description of Production Process	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.1650	Description of Formulation Process	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.1670	Discussion of Formation of Impurities.	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.1700	Preliminary Analysis	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.1750	Certified Limits	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.1800	Enforcement Analytical Method	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.6302	Color	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.6303	Physical State	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.6304	Odor	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.6313	Stability to Normal and Elevated Temperatures, Metals, and Metal.	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.6314	Oxidizing or Reducing Action	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.6315	Flammability	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.6316	Explodability	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.6317	Storage Stability	3/04/2015	Confirmation through Correspondence.	07/02/2016	1 & 3
830.6319	Miscibility	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.6320	Corrosion Characteristics	3/04/2015	Confirmation through Correspondence.	07/02/2016	1 & 3
830.6321	Dielectric Breakdown Voltage	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7000	pH	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7050	UV/Visible Absorption	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7100	Viscosity	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7200	Melting Point/Melting Range	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3

TABLE 2–C—LIST OF REQUIREMENTS FOR EPA REGISTRATION NUMBER 3525–104—Continued

Guideline No. as listed in applicable DCI	Requirement name	Date EPA issued DCI	Date registrant received DCI	Final data due date	Reason for notice of intent to suspend *
830.7220	Boiling Point/Boiling Range	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7300	Density/Relative Density	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7370	Dissociation Constants in Water	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7550	Partition Coefficient (n-octanol/water), Shake Flask Method.	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7560	Partition Coefficient (n-octanol/water), Generator Column Method.	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7570	Partition Coefficient (n-octanol/water), Estimation by Liquid Chromatography.	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7840	Water Solubility: Column Elution Method, Shake Flask Method.	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7860	Water Solubility, Generator Column Method.	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
830.7950	Vapor Pressure	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
870.1100	Acute Oral Toxicity	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
870.1200	Acute Dermal Toxicity	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
870.1300	Acute Inhalation Toxicity	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
870.2500	Acute Dermal Irritation	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
870.2600	Skin Sensitization	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
870.2400	Acute Eye Irritation	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
810.2100	Sterilants	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
810.2200	Disinfectants for Use on Hard Surfaces.	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
810.2300	Sanitizers for Use on Hard Surfaces	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
810.2400	Disinfectants and Sanitizers for Use on Fabrics and Textiles.	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
810.2500	Air Sanitizers	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3
810.2600	Disinfectants for Use in Water	3/04/2015	Confirmation through Correspondence.	11/02/2015	1 & 3

* Table Notes:
[1] No 90-day response received.
[2] Inadequate 90-day response received.
[3] No data received.
[4] Inadequate data received.

IV. Attachment III Suspension Report—Explanatory Appendix

1. The letter sent to the registrant contains an Attachment III—Explanatory Appendix. This Explanatory Appendix also follows below and provides provides a discussion of the basis for the Notice of Intent to Suspend issued herewith.

A. Aklyl Dimethyl Benzyl Ammonium Chloride (ADBAC)

On March 4, 2015, March 6, 2015, and March 11, 2015, the Agency issued the Reregistration Eligibility Decision Document (RED) PDCI Notices numbered: 069184–30960, 069137–30946, 069119–30941, and 069104–30932 pursuant to FIFRA section 4(g)(2)(B), which required the registrants of products containing ADBAC used as an active ingredient to develop and submit certain data. The data/information were determined to be necessary to satisfy the reregistration requirements of FIFRA section 4(g). Failure to comply with the requirements of the RED PDCI is a basis for suspension under FIFRA section 3(c)(2)(B).

The Agency sent PDCIs: 069184–30960, 069137–30946, 069119–30941, and 069104–30932 on March 4, 6, and 11, 2015 to Qualco, Inc. via the email address provided to the Agency for Ms. Debbie Schaub, who was the designated company representative. A Microsoft Outlook server response email for PDCI–069104–30932 was received on March 11, 2015 by the Agency to indicate delivery to Ms. Schaub was complete. Subsequently, the PDCIs were re-sent on March 27, 2015 to an alternative Qualco, Inc. email address for Ms. Schaub because no response was received after email delivery to the original email address.

Following a DCI issuance, registrants are required to submit a 90-day response electing how they will satisfy the DCI data requirements. Qualco, Inc. failed to submit a 90-day response electing how it would satisfy the DCI data requirements.

After three years of no response from Qualco, Inc. on May 21, 2018, the Agency sent emails to Qualco, Inc. to the attention of Ms. Schaub and Mr. Peter Ferentinos, who is another designated Qualco, Inc. representative. In the emails, the Agency discussed the severity of the PDCI response failures by Qualco, Inc. These emails also forwarded once again the originally sent PDCIs and email with attachments and instructions. The Agency received Microsoft Outlook server response emails for each PDCI (069184–30960, 069137–30946, 069119–30941, and 069104–30932) email that confirmed that delivery to both addresses had been completed on May 21, 2018.

After hearing nothing from Qualco between May 21 and October 31, 2018 the Agency emailed a Notification of Deficiency letter to Qualco, Inc. on October 31, 2018 to the attention of Ms. Schaub that warned the registrant of the pending suspension of the affected Qualco, Inc. ADBAC products. The email listed the overdue PDCIs and the attached letter noted the specific deficient data requirements for each listed PDCI, discussed the lack of an adequate 90-day response for each PDCI, described how to respond to the deficiency letter, included the list of then affected (EPA Reg. Nos.: 3525–22, 3525–78, 3525–90, 3525–92, 3525–94, 3525–97, 3525–99, 3525–100, 3525–103, 3525–104, 3525–106, and 3525–118), and stated that appropriate and adequate data to satisfy the overdue data requirements must be received by the Agency within 10 business days measured from the letter receipt by Qualco, Inc. in order to avoid issuance of Notices of Intent to Suspend. The Agency received a Microsoft Outlook server email on October 31, 2018 indicating that the email and the attached information had been received by Qualco, Inc. on October 31, 2018.

The same October 31, 2018 Notification of Deficiency letter was mailed via the US Postal Service on November 8, 2018 along with another Notification of Deficiency letter for another chemical case (Busan 77).

The Agency subsequently sent Qualco, Inc. an email to the attention of Ms. Schaub on November 20, 2018 stating that a voicemail had been left for Ms. Schaub. The November 20, 2018 email and voicemail both requested a meeting to discuss the ADBAC and Busan 77 DCIs. The Agency proposed meeting dates and times in the November 20, 2018 email. The November 20, 2018 email included the October 31, 2018 email discussed above as part of its chain of prior correspondence.

Ms. Schaub responded by email to the Agency's November 20, 2018 email on November 26, 2018. The Agency's October 31, 2018 email with the initial Notification of Deficiency warning letter was included in the chain of emails that were part of her email response. Qualco, Inc., through Ms. Schaub, suggested scheduling a November 28, 2018 meeting in her November 26, 2018 email.

An Agency email response was sent to Ms. Schaub on November 26, 2018 confirming the scheduling of a November 28, 2018 teleconference meeting at 1 p.m. On November 28, 2018 the Agency and Ms. Schaub met via teleconference to discuss the overdue data requirements of PDCIs: 069104–30932, 069119–30941, 069137–30946, 069184–30960, and the affected Qualco products (EPA Reg. Nos.: 3525–22, 3525–78, 3525–90, 3525–92, 3525–94, 3525–97, 3525–99, 3525–100, 3525–103, 3525–104, 3525–106, and 3525–118).

Ms. Schaub subsequently sent the Agency an email on December 3, 2018 to inform the Chemical Review Manager that a DCI response was being put together for ADBAC, that errors were received after an attempt to upload files to the EPA CDX, and to ask what other specific forms were required for the PDCI response.

The Agency responded by email on December 3, 2018 and attached another copy of the PDCI–069104–30932 for Ms. Schaub's reference. This PDCI was attached as a representative DCI to illustrate what needed to be done by Qualco to adequately respond to all issued PDCIs. The Agency once again stated that instructions and required forms for Qualco's response are explained in the PDCI. The CDX helpdesk contact information was provided for Ms. Schaub's reference. However, the Agency requested that Qualco's responses be sent directly by email to the Chemical Review Manager to avoid CDX errors or the product suspension process would continue. In the Agency December 3, 2018 email, a list of all the affected Qualco products pending suspension (EPA Reg. Nos.: 3525–22, 3525–78, 3525–94, 3525–97, 3525–99, 3525–100, 3525–103, 3525–104, 3525–106, and 3525–118) was attached. The December 3, 2018 email also noted that two products (3525–90 and 3525–92) originally listed in the October 31, 2018 letter had been voluntarily cancelled.

Ms. Schaub responded to the Agency's December 3, 2018 email chain by providing attachments, including data matrices, Confidential Statement of Formulas (CSF), and other forms, for 5 of the 10 products pending suspension (EPA Reg. Nos.: 3525–22, 3525–78, 3525–94, 3525–106, and 3525–118). Ms. Schaub stated in the December 3, 2018 email that additional forms and responses for the other 5 products (EPA Reg. Nos.: 3525–103, 3525–104, 3525–97, 3525–99, and 3525–100) would be submitted through a second CDX attempt.

On December 4, 2018 the Agency stated through email that the submitted ADBAC PDCI responses would be reviewed. The Agency requested that Ms. Schaub submit the remaining responses and suggested that, if some products are dormant, then Qualco may opt to voluntarily cancel those products.

On December 5, 2018, an email from the CDX system to the EPA Antimicrobials Divison Reevaluation mailbox was received. The December 5, 2018 CDX email indicated that a DCI response for only PDCI–069137–30946 had been submitted and included data matrices, citation forms, and correspondence for only EPA Registration Nos.: 3525–100, 3525–103, 3525–97, and 3525–99. No submissions were provided for EPA registration number 3525–104 by email or CDX.

The Agency sent an email on December 5, 2018 to Ms. Schaub informing Qualco that the emailed submissions were reviewed but numerous errors were found. The Agency's December 5, 2018 email requested that corrected responses be sent as soon as possible. The following list summarizes the errors.

- The ''Requirements Status & Registrant's Response'' forms listed response code 9; however, this code does not exist for PDCI responses and is not an adequate or appropriate response. This error pertains to the following products: EPA Reg. Nos.: 3525–22, 3525–78, 3525–94, 3525–106, and 3525–118.
- The ''Requirements Status & Registrant's Response'' forms were not adequately completed. This error pertains to the following products: EPA Reg. Nos.: 3525–97, 3525–99, 3525–100, and 3525–103.
- The data matrices submitted for EPA Reg. Nos.: 3525–22, 3525–78, 3525–94, 3525–97, 3525–99, 3525–100, 3525–103, and 3525–106 are missing anything to address the 810 data requirements.
- The Formulator's Exemption form for EPA Reg. No.: 3525–118 states that the product's source is EPA Reg. No.

3525–118, which is stating that the product is formulated with itself and this is neither an adequate nor appropriate response.

• Qualco, Inc. chose the option to cite another registrant's study for product specific data for the following products: EPA Reg. Nos.: 3525–22, 3525–78, 3525–97, 3525–99, 3525–100, 3525–103, and 3525–106. However, Qualco did not provide the appropriate MRID Accession number(s) or an adequately completed ''Certification with Respect to Data Compensation Requirements'' form. The submitted ''Certification with Respect to Citation of Data'' forms cannot state ''cite all'' for PDCIs unless the ''Certification with Respect to Data Compensation'' form is submitted with the appropriate MRID Accession number(s).

Qualco, Inc. has not responded to the Agency's December 5, 2018 email and has not to-date satisfied the overdue PDCI requirements for its affected products. Therefore, this Notice of Intent to Suspend is being issued for EPA Registration Nos.: 3525–22, 3525–78, 3525–94, 3525–97, 3525–99, 3525–100, 3525–103, 3525–104, 3525–106, and 3525–118.

V. How to avoid suspension under this notice?

1. You may avoid suspension under this notice if you or another person adversely affected by this notice properly request a hearing within 30 days of your receipt of the Notice of Intent to Suspend by mail or, if you did not receive the notice that was sent to you via USPS first class mail return receipt requested, then within 30 days from the date of publication of this **Federal Register** notice (see **DATES**). If you request a hearing, it will be conducted in accordance with the requirements of FIFRA section 6(d) (7 U.S.C. 136d) and the Agency's procedural regulations in 40 CFR part 164. Section 3(c)(2)(B) of FIFRA (7 U.S.C. 136a), however, provides that the only allowable issues which may be addressed at the hearing are whether you have failed to take the actions which are the bases of this notice and whether the Agency's decision regarding the disposition of existing stocks is consistent with FIFRA. Therefore, no substantive allegation or legal argument concerning other issues, including but not limited to the Agency's original decision to require the submission of data or other information, the need for or utility of any of the required data or other information or deadlines imposed, any allegations of errors or unfairness in any proceedings before an arbitrator, and the risks and benefits associated with continued registration of the affected product, may be considered in the proceeding. The Administrative Law Judge shall by order dismiss any objections which have no bearing on the allowable issues which may be considered in the proceeding. Section 3(c)(2)(B)(iv) of FIFRA provides that any hearing must be held and a determination issued within 75 days after receipt of a hearing request. This 75-day period may not be extended unless all parties in the proceeding stipulate to such an extension. If a hearing is properly requested, the Agency will issue a final order at the conclusion of the hearing governing the suspension of your products. A request for a hearing pursuant to this notice must:

• Include specific objections which pertain to the allowable issues which may be heard at the hearing.

• Identify the registrations for which a hearing is requested.

• Set forth all necessary supporting facts pertaining to any of the objections which you have identified in your request for a hearing.

If a hearing is requested by any person other than the registrant, that person must also state specifically why he/she asserts that he/she would be adversely affected by the suspension action described in this notice. Three copies of the request must be submitted to: Hearing Clerk, 1900, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

An additional copy should be sent to the person who signed this notice. The request must be received by the Hearing Clerk by the applicable 30th day deadline as measured from your receipt of the Notice of Intent to Suspend by mail or publication of this notice, as set forth in **DATES** and in Unit IV.1., in order to be legally effective. The 30-day time limit is established by FIFRA and cannot be extended for any reason. Failure to meet the 30-day time limit will result in automatic suspension of your registrations by operation of law and, under such circumstances, the suspension of the registration for your affected products will be final and effective at the close of business on the applicable 30th day deadline as measured from your receipt of the Notice of Intent to Suspend by mail or publication of this notice, as set forth in **DATES** and in Unit IV.1., and will not be subject to further administrative review. The Agency's rules of practice at 40 CFR 164.7 forbid anyone who may take part in deciding this case, at any stage of the proceeding, from discussing the merits of the proceeding *ex parte* with any party or with any person who has been connected with the preparation or presentation of the proceeding as an advocate or in any investigative or expert capacity, or with any of their representatives. Accordingly, the following EPA offices, and the staffs thereof, are designated as judicial staff to perform the judicial function of EPA in any administrative hearings on this Notice of Intent to Suspend: The Office of the Administrative Law Judges, the Office of the Environmental Appeals Board, the EPA Administrator, the EPA Deputy Administrator, and the members of the staff in the immediate offices of the EPA Administrator and EPA Deputy Administrator. None of the persons designated as the judicial staff shall have any *ex parte* communication with trial staff or any other interested person not employed by EPA on the merits of any of the issues involved in this proceeding, without fully complying with the applicable regulations.

2. You may also avoid suspension if, within the applicable 30-day deadline period as measured from your receipt of the Notice of Intent to Suspend by mail or publication of this notice, as set forth in **DATES** and in Unit IV.1., the Agency determines that you have taken appropriate steps to comply with the FIFRA section 3(c)(2)(B) DCI notice. In order to avoid suspension under this option, you must satisfactorily comply with Table 2.—List of Requirements in Unit II., for each product by submitting all required supporting data/information described in Table 2 of Unit. II. and in the Explanatory Appendix (in the docket for this **Federal Register** notice) to the following address (preferably by certified mail):

Office of Pesticide Programs, Antimicrobials Division (7510P), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

For you to avoid automatic suspension under this notice, the Agency must also determine within the applicable 30-day deadline period that you have satisfied the requirements that are the bases of this notice and so notify you in writing. You should submit the necessary data/information as quickly as possible for there to be any chance the Agency will be able to make the necessary determination in time to avoid suspension of your products. The suspension of the registrations of your company's products pursuant to this notice will be rescinded when the Agency determines you have complied fully with the requirements which were the bases of this notice. Such compliance may only be achieved by submission of the data/information described in Table 2 of Unit II.

VI. Status of Products That Become Suspended

Your product will remain suspended, however, until the Agency determines you are in compliance with the requirements which are the bases of this notice and so informs you in writing.

After the suspension becomes final and effective, the registrants subject to this notice, including all supplemental registrants of products listed in Table 1 of Unit II., may not legally distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the products listed in Table 1 of Unit II. Persons other than the registrants subject to this notice, as defined in the preceding sentence, may continue to distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the products listed in Table 1 of Unit II. Nothing in this notice authorizes any person to distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the products listed in Table 1 of Unit II. in any manner which would have been unlawful prior to the suspension.

If the registrations for your products, listed in Table 1 of Unit II., are currently suspended as a result of failure to comply with another FIFRA section 3(c)(2)(B) DCI notice or FIFRA Section 4 Data Requirements notice, this notice, when it becomes a final and effective order of suspension, will be in addition to any existing suspension, *i.e.,* all requirements which are the bases of the suspension must be satisfied before the registration will be reinstated.

It is the responsibility of the basic registrant to notify all supplementary registered distributors of a basic registered product that this suspension action also applies to their supplementary registered products. The basic registrant may be held liable for violations committed by their distributors.

Any questions about the requirements and procedures set forth in this notice or in the subject FIFRA section 3(c)(2)(B) DCI notice, should be addressed to the person listed under **FOR FURTHER INFORMATION CONTACT**.

(Authority: 7 U.S.C. 136 *et seq.*)

Dated: August 19, 2020.

Anita Pease,

Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. 2020–19370 Filed 9–1–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0750; FRL–10012–60]

Pesticide Registration Review; Proposed Interim Decisions for Several Pesticides; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's proposed interim registration review decisions and opens a 60-day public comment period on the proposed interim decisions for the following pesticides: 1, 4-Dimethylnapthalene and 2,6-Diisopropylnaphthalene, acequinocyl, *Bacillus cereus* strain BP01, cypermethrins, dithiopyr, etridiazole, fenamidone, fenbutatin-oxide, fenpropimorph, fenpyroximate, flonicamid, flumetralin, flumioxazin, hypochlorous acid, inorganic halides, MCPB, *Metarhizium anisopliae,* metolachlor/S-metolachlor, *Pantoea agglomerans* strain C9–1, *Pantoea agglomerans* strain E325, propanil, terbacil, triclopyr.

DATES: Comments must be received on or before November 2, 2020.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number for the specific pesticide of interest provided in the Table in Unit IV, by one of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: *For pesticide specific information, contact:* The Chemical Review Manager for the pesticide of interest identified in the Table in Unit IV.

For general information on the registration review program, contact: Melanie Biscoe, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 305–7106; email address: *biscoe.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager for the pesticide of interest identified in the Table in Unit IV.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at

http://www.epa.gov/dockets/comments.html.

II. Background

Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. As part of the registration review process, the Agency has completed proposed interim decisions for all pesticides listed in the Table in Unit IV. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

III. Authority

EPA is conducting its registration review of the chemicals listed in the Table in Unit IV pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

IV. What action is the agency taking?

Pursuant to 40 CFR 155.58, this notice announces the availability of EPA's proposed interim registration review decisions for the pesticides shown in the table below and opens a 60-day public comment period on the proposed interim registration review decisions.

Registration review case name and No.	Docket ID No.	Chemical review manager and contact information
1, 4-Dimethylnapthalene and 2,6-Diisopropylnaphthalene, Case Number 6029.	EPA–HQ–OPP–2012–0670	Joseph Mabon, *mabon.joseph@epa.gov*, (703) 347–0177.
Acequinocyl, Case Number 7621	EPA–HQ–OPP–2015–0203	Sergio Santiago, *santiago.sergio@epa.gov*, (703) 347–8606.
Bacillus cereus strain BP01, Case Number 6053	EPA–HQ–OPP–2011–0493	Alexandra Boukedes, *boukedes.alexandra@epa.gov*, (703) 347–0305.
Cypermethrins, Case Number 2130	EPA–HQ–OPP–2012–0167	Susan Bartow, *bartow.susan@epa.gov*, (703) 603–0065.
Dithiopyr, Case Number 7225	EPA–HQ–OPP–2013–0750	Veronica Dutch, *dutch.veronica@epa.gov*, (703) 308–8585.
Etridiazole, Case Number 0009	EPA–HQ–OPP–2014–0414	Jonathan Williams, *williams.jonathanr@epa.gov*, (703) 347–0670.
Fenamidone, Case 7033	EPA–HQ–OPP–2014–0048	Christian Bongard, *bongard.christian@epa.gov*, (703) 347–0337.
Fenbutatin Oxide, Case Number 0245	EPA–HQ–OPP–2009–0841	Lauren Weissenborn, *weissenborn.lauren@epa.gov*, (703) 347–8601.
Fenpropimorph, Case Number 5112	EPA–HQ–OPP–2014–0404	Peter Bergquist, *bergquist.peter@epa.gov*, (703) 347–8563.
Fenpyroximate, Case Number 7432	EPA–HQ–OPP–2014–0572	Carolyn Smith, *smith.carolyn@epa.gov*, (703) 347–8325.
Flonicamid, Case Number 7436	EPA–HQ–OPP–2014–0777	Alexandra Feitel, *feitel.alexandra@epa.gov*, (703) 347–8631.
Flumetralin, Case Number 4119	EPA–HQ–OPP–2015–0076	Theodore Varns, *varns.theodore@epa.gov*, (703) 347–8589.
Flumioxazin, Case Number 7244	EPA–HQ–OPP–2011–0176	Susan Bartow, *bartow.susan@epa.gov*, (703) 603–0065.
Hypochlorous Acid, Case Number 5090	EPA–HQ–OPP–2020–0244	Jessie Bailey, *bailey.jessica@epa.gov*, (703) 347–0148.
Inorganic Halides, Case Number 4051	EPA–HQ–OPP–2009–0168	Erin Dandridge, *dandridge.erin@epa.gov*, (703) 347–0185.
MCPB, Case Number 2365	EPA–HQ–OPP–2014–0181	Steven R. Peterson, *peterson.stevenr@epa.gov*, (703) 347–0755.
Metarhizium anisopliae, Case Number 6024	EPA–HQ–OPP–2009–0510	Susanne Cerrelli, *cerrelli.susanne@epa.gov*, (703) 308–8077.
Metolachlor/S-metolachlor, Case Number 0001	EPA–HQ–OPP–2014–0772	Ana Pinto, *pinto.ana@epa.gov*, (703) 347–8421.
Pantoea agglomerans strain C9–1, Case Number 6506.	EPA–HQ–OPP–2017–0172	Bibiana Oe, *oe.bibiana@epa.gov*, (703) 347–8162.
Pantoea agglomerans strain E325, Case Number 6507.	EPA–HQ–OPP–2017–0172	Bibiana Oe, *oe.bibiana@epa.gov*, (703) 347–8162.
Propanil, Case Number 0226	EPA–HQ–OPP–2015–0052	Tiffany Green, *green.tiffany@epa.gov*, (703) 347–0314.
Terbacil, Case Number 0039	EPA–HQ–OPP–2011–0054	Alexandra Feitel, *feitel.alexandra@epa.gov*, (703) 347–8631.
Triclopyr, Case Number 2710	EPA–HQ–OPP–2014–0576	Andy Muench, *muench.andrew@epa.gov*, (703) 347–8263.

The registration review docket for a pesticide includes earlier documents related to the registration review case. For example, the review opened with a Preliminary Work Plan, for public comment. A Final Work Plan was placed in the docket following public comment on the Preliminary Work Plan.

The documents in the dockets describe EPA's rationales for conducting additional risk assessments for the registration review of the pesticides included in the tables in Unit IV, as well as the Agency's subsequent risk findings and consideration of possible risk mitigation measures. These proposed interim registration review decisions are supported by the rationales included in those documents. Following public comment, the Agency will issue interim or final registration review decisions for the pesticides listed in Table 1 in Unit IV.

The registration review final rule at 40 CFR 155.58(a) provides for a minimum 60-day public comment period on all proposed interim registration review decisions. This comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the proposed interim decision. All comments should be submitted using the methods in **ADDRESSES** and must be received by EPA on or before the closing date. These comments will become part of the docket for the pesticides included in the Tables in Unit IV. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

The Agency will carefully consider all comments received by the closing date and may provide a ''Response to Comments Memorandum'' in the docket. The interim registration review decision will explain the effect that any comments had on the interim decision and provide the Agency's response to significant comments.

Background on the registration review program is provided at: *http://www.epa.gov/pesticide-reevaluation.*

Authority: 7 U.S.C. 136 *et seq.*

Dated: July 23, 2020.

Mary Reaves,

Acting Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2020–19374 Filed 9–1–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2020–0433; FRL–10014–43–OW]

Proposed Information Collection Request; Comment Request; Public Notification Requirements for Combined Sewer Overflows in the Great Lakes Basin (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''Public Notification Requirements for Combined Sewer Overflows in the Great Lakes Basin (Renewal)'' (EPA ICR No. 2562.02, OMB Control No. 2040–0293) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection. This is a proposed extension of the ICR which is currently approved through April 30, 2021. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before November 2, 2020.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OW–2020–0433, by any of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.

• *Email: Baehr.Joshua@epa.gov.* Include Docket ID No. EPA–HQ–OW–2020–0433 in the subject line of the message.

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 ''How do I submit written comments?'' 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 temporary delay in processing mail and faxes. Hand deliveries 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: Joshua Baehr, National Program Branch, Water Permits Division, OWM Mail Code: 4203M, Environmental Protection Agency, 1201 Constitution Ave. NW, Washington, DC 20460; telephone number: (202) 564–2277; email address: *Baehr.Joshua@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. How do I submit written comments?

Submit your comments, identified by Docket ID No. EPA–HQ–OW–2020–0433, 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 electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, 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 to reduce the risk of transmitting COVID–19. Written comments submitted by mail are temporarily suspended and no hand deliveries will be accepted. 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.* 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.

II. Executive Summary

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *https://www.regulations.gov.* The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *https://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: This ICR calculates the incremental increase in burden and costs associated with implementation of the Combined Sewer Overflow (CSO) public notification requirements for CSO permittees in the Great Lakes Basin approved during the Public Notice Requirements for Combined Sewer Overflow Discharges to the Great Lakes rulemaking. In 2018 EPA established public notification requirements for permittees authorized to discharge from a CSO to the Great Lakes Basin [82 FR 4233]. These requirements address: 1. Signage; 2. notification to local public health department and other potentially affected public entities; 3. notification to the public; and 4. annual notice. Additionally, permittees are required to develop a public notification plan and seek and consider input on these plans from local public health departments and other potentially affected public entities. The public notification plans also provide state permit writers with detailed information needed to write permit conditions. The rule protects public health by ensuring timely notification to the public and to public health departments, public drinking water facilities and other potentially affected public entities, including Indian tribes. It provides additional specificity beyond existing public notification requirements to ensure timely and consistent communication to the public regarding CSO discharges to the Great Lakes Basin. Timely notice may allow the public and affected public entities to take steps to reduce the public's potential exposure to pathogens associated with human sewage, which can cause a wide variety of health effects, including gastrointestinal, skin, ear, respiratory, eye, neurologic, and wound infections.

Form Numbers: None.

Respondents/affected entities: CSO permittees, Great Lakes States (Illinois, Indiana, Michigan, New York, Ohio, Pennsylvania, and Wisconsin).

Respondent's obligation to respond: Mandatory. 40 CFR 122.38.

Estimated number of respondents: 164 (157 permittees and 7 States).

Frequency of response: Responses include one-time implementation activities, such as signage, activities that occur once per year, such as providing annual notice, and initial and follow-up activities that would occur during and after CSO discharge events.

Total estimated burden: 8,694 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $426,059 (per year), includes $5,412 in annualized capital or operation & maintenance costs.

Changes in Estimates: There is an estimated net decrease of 1,607 burden hours since the prior approved ICR. The decrease in labor hours from the prior ICR is due to the completion of startup activities performed during the first year of the prior ICR. Also, one permittee (Woodville, Ohio NPDES Permit No. OH0020591) separated the city's combined sewer system and therefore, is no longer within the scope of the rule and this updated ICR. There was an increase in labor costs ($31,841) due to a projected increase in labor base wages and total compensation (*i.e.,* benefits). There was a decrease in non-labor costs ($65,039) due to a decrease in capital costs after the initial startup period during the first year of the prior ICR. Overall, total burden hours decreased by 1,607 hours and total burden cost decreased by $31,048 for the three-year period.

Dated: August 27, 2020.

Andrew D. Sawyers,

Director, Office of Wastewater Management.

[FR Doc. 2020–19350 Filed 9–1–20; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

Sunshine Act Meetings; Notice of an Open Meeting of the Board of Directors of the Export-Import Bank of the United States

TIME AND DATE: Wednesday, September 9, 2020 at 10:00 a.m.

PLACE: The meeting will be held via teleconference.

STATUS: The meeting will be open to public observation by teleconference only.

MATTERS TO BE CONSIDERED:

1. Appointment of EXIM Advisory Committee for 2020;

2. Appointment of EXIM Sub-Saharan Africa Advisory Committee for 2020.

CONTACT PERSON FOR MORE INFORMATION: Joyce Stone at *joyce.stone@exim.gov* or 202–257–4086. Members of the public who wish to attend the meeting should use the following link: *https://attendee.gotowebinar.com/register/8697049424026680843.* Individuals will be given call-in information.

Joyce B. Stone,

Assistant Corporate Secretary.

[FR Doc. 2020–19458 Filed 8–31–20; 11:15 am]

BILLING CODE 6690–01–P

FARM CREDIT ADMINISTRATION

Sunshine Act Meeting; Farm Credit Administration Board

AGENCY: Farm Credit Administration.

ACTION: Notice, regular meeting.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act, of the forthcoming regular meeting of the Farm Credit Administration Board.

DATES: The regular meeting of the Board will be held September 10, 2020, from 9:00 a.m. until such time as the Board may conclude its business. *Note: Because of the COVID–19 pandemic, we will conduct the board meeting virtually. If you would like to observe the open portion of the virtual meeting, see instructions below for board meeting visitors.*

Attendance: To observe the open portion of the virtual meeting, go to *FCA.gov*, select ''Newsroom,'' then ''Events.'' There you will find a description of the meeting and a link to ''Instructions for board meeting visitors.'' See **SUPPLEMENTARY INFORMATION** for further information about attendance requests.

FOR FURTHER INFORMATION CONTACT: Dale Aultman, Secretary to the Farm Credit Administration Board (703) 883–4009. TTY is (703) 883–4056.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public, and parts will be closed. If you wish to observe the open part, follow the instructions above in the ''Attendance'' section at least 24 hours before the meeting. If you need assistance for accessibility reasons or if you have any questions, contact Dale Aultman, Secretary to the Farm Credit Administration Board, at (703) 883–4009. The matters to be considered at the meeting are as follows:

Open Session

A. Approval of Minutes

- August 13, 2020

B. Reports

- Quarterly Report on Economic Conditions and FCS Condition and Performance

Closed Session

- Office of Examination Quarterly Report [1]

Dated: August 28, 2020.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2020–19494 Filed 8–31–20; 11:15 am]

BILLING CODE 6705–01–P

[1] Session Closed-Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1170; FRS 17042]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written comments should be submitted on or before November 2, 2020. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, and as required by the PRA of 1995 (44 U.S.C. 3501–3520), the FCC invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

OMB Control Number: 3060–1170.

Title: Improving Spectrum Efficiency Through Flexible Channel Spacing and Bandwidth Utilization for Economic Area-based 800 MHz Specialized Mobile Radio Licensees—Notice Requirement Section 90.209.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 24 respondents; 24 responses.

Estimated Time per Response: 0.5–4 hours.

Frequency of Response: On occasion reporting requirement, third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is 47 U.S.C. 151, 152, 154, 301, 302(a), 303, 307, and 308 unless otherwise noted.

Total Annual Burden: 20 hours.

Total Annual Cost: $46,000.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The information collection requirements contained in 47 CFR 90.209(b)(7) require EA-based 800 MHz SMR licensees authorized to exceed the standard channel spacing and authorized bandwidth under Section 90.209(b)(5) to provide at least 30 days written notice prior to initiating service in the 813.5–824/858.5–869 MHz band to every 800 MHz public safety licensee with a base station in the affected National Public Safety Planning Advisory Committee (NPSPAC) region, and every 800 MHz public safety licensee within 113 kilometers (70 miles) of the affected region.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2020–19365 Filed 9–1–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0264; FRS 17041]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written comments should be submitted on or before November 2, 2020. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, and as required by the PRA of 1995 (44 U.S.C. 3501–3520), the FCC invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

OMB Control Number: 3060–0264.

Title: Section 80.413, On-Board Station Equipment Records.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 1,000 respondents; 1,000 responses.

Estimated Time per Response: 2 hours.

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 154, 303, 307(e), 309 and 332 and 151–155 and sections 301–609 of the Communications Act of 1934, as amended.

Total Annual Burden: 2,000 hours.

Total Annual Cost: No cost.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission is seeking an extension of this expiring information collection in order to obtain the full three-year approval from OMB. There is no change to the recordkeeping requirement.

The information collection requirements contained in Section 80.413 require the licensee of an on-board station to keep equipment records which show:

(1) The ship name and identification of the on-board station;

(2) The number of and type of repeater and mobile units used on-board the vessel; and

(3) The date the type of equipment which is added or removed from the on-board station.

The information is used by FCC personnel during inspections and investigations to determine what mobile units and repeaters are associated with on-board stations aboard a particular vessel. If this information were not maintained, no means would be available to determine if this type of radio equipment is authorized or who is responsible for its operation. Enforcement and frequency management programs would be negatively affected if the information were not retained.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2020–19363 Filed 9–1–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, with revision, the Reports of Deposits: Report of Transaction Accounts, Other Deposits, and Vault Cash; Annual Report of Deposits and Reservable Liabilities; Report of Foreign (Non-U.S.) Currency Deposits; and Allocation of Low Reserve Tranche and Reservable Liabilities Exemption (FR 2900, FR 2910a, FR 2915, FR 2930; OMB No. 7100–0087).

DATES: Comments must be submitted on or before November 2, 2020.

ADDRESSES: You may submit comments, identified by *FR 2900; FR 2910a; FR 2915; and FR 2930,* by any of the following methods:

• *Agency website: https://www.federalreserve.gov/.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*

• *Email: regs.comments@federalreserve.gov.* Include the OMB number in the subject line of the message.

• *Fax:* (202) 452–3819 or (202) 452–3102.

• *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, if approved. These documents will also be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal under OMB Delegated Authority to Extend for Three Years, With Revision, the Following Information Collection

Report title: Reports of Deposits: Report of Transaction Accounts, Other Deposits, and Vault Cash; Annual Report of Deposits and Reservable Liabilities; Report of Foreign (Non-U.S.) Currency Deposits; and Allocation of Low Reserve Tranche and Reservable Liabilities Exemption.

Agency form number: FR 2900; FR 2910a; FR 2915; and FR 2930.

OMB control number: 7100–0087.

Frequency: Weekly, quarterly, annually, and on occasion.

Respondents: Depository institutions.

Estimated number of respondents: FR 2900 (Weekly): 1,000; FR 2900 (Quarterly): 0; FR 2910a: 0; FR 2915: 116; and FR 2930: 0.

Estimated average hours per response: FR 2900 (Weekly): 1.0; FR 2900 (Quarterly): 0; FR 2910a: 0; FR 2915: 0.5; and FR 2930: 0.

Estimated annual burden hours: FR 2900 (Weekly): 52,000; FR 2900 (Quarterly): 0; FR 2910a: 0; FR 2915: 232; and FR 2930: 0.

General description of report: Data from these mandatory reports are used by the Board for administering reserve requirements and for constructing, analyzing, and monitoring the monetary aggregates. The FR 2900 is the primary source of data for the construction and analysis of the monetary aggregates and was used for the calculation of required reserves and applied vault cash. The FR 2910a report has been a key data source for determining which depository institutions need to file the FR 2900. FR 2900 respondents that offer deposits denominated in foreign currencies at their U.S. offices file the FR 2915. Foreign currency deposits are subject to reserve requirements and, therefore, are included in the FR 2900 data. However, because foreign currency deposits are not included in the monetary aggregates, the FR 2915 data are used to net foreign currency-denominated deposits from the FR 2900 data to exclude them from measures of the monetary aggregates. The FR 2930 data are used in the calculation of reserve requirements; typically, depository institutions file this report after being informed of updates to key reserve requirement thresholds toward the end of each calendar year or upon the establishment of an office outside the home state or Federal Reserve District.

Proposed revisions: The Board proposes to take steps to reduce reporting burden associated with reserve requirements by discontinuing the collection of the FR 2910a and FR 2930, ceasing the quarterly collection of the FR 2900, and refocusing items on the weekly collection of the FR 2900 and the FR 2915 to those that support the construction and analysis of the monetary aggregates.

Legal authorization and confidentiality: The FR 2900 report and the FR 2915 report are authorized to be collected from depository institutions (commercial banks, credit unions, and savings and loan associations) pursuant to section 11(a)(2) of the Federal Reserve Act (FRA); from agreement corporations pursuant to section 25(5) and (7) of the FRA and section 604a of the FRA; from banking Edge corporations pursuant to section 25A(17) of the FRA; and from branches and agencies of foreign banks pursuant to section 7 of the International Banking Act. The FR 2900 and FR 2915 are mandatory.

The data collected under the FR 2900 is considered confidential commercial and financial information, and respondents are assured that the data being collected will be treated as confidential by the Federal Reserve (except that aggregate data, which does not identify any individual institution, may be disclosed). Accordingly, the data collected on these reports is considered confidential pursuant to exemption 4 of the Freedom of Information Act, which protects confidential commercial or financial information from public disclosure.

Board of Governors of the Federal Reserve System, August 27, 2020.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2020–19335 Filed 9–1–20; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

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 the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these 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 October 2, 2020.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *AgCom Holdings, Inc., Holstein, Iowa;* to become a bank holding company by acquiring Maxwell State Bank, Maxwell, Iowa.

Board of Governors of the Federal Reserve System, August 28, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–19405 Filed 9–1–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–P–0438]

Determination That MICRO-K LS (Potassium Chloride) Extended-Release Liquid Suspension, 20 Milliequivalents/Packet, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) has determined that MICRO-K LS (potassium chloride) extended-release liquid suspension, 20 milliequivalents (mEq)/packet, was not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for MICRO-K LS (potassium chloride) extended-release liquid suspension, 20 mEq/packet, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Sungjoon Chi, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6216, Silver Spring, MD 20993–0002, 240–402–9674, *Sungjoon.Chi@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the ''listed drug,'' which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is known generally as the ''Orange Book.'' Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

MICRO-K LS (potassium chloride) extended-release liquid suspension, 20 mEq/packet, is the subject of NDA 019561, held by KV Pharmaceutical Co., and initially approved on August 26, 1988. MICRO-K LS is indicated for the treatment of patients with hypokalemia, with or without metabolic alkalosis; in digitalis intoxication; and in patients with hypokalemic familial periodic paralysis. MICRO-K LS is also indicated for the prevention of hypokalemia in patients who would be at particular risk if hypokalemia were to develop, *e.g.,* digitalized patients or patients with significant cardiac arrhythmias, hepatic cirrhosis with ascites, states of aldosterone excess with normal renal function, potassium losing nephropathy, and certain diarrheal states.

In a letter dated October 8, 2010, KV Pharmaceutical Co. notified FDA that MICRO-K LS (potassium chloride) extended-release liquid suspension, 20 mEq/packet, was being discontinued, and FDA moved the drug product to the ''Discontinued Drug Product List'' section of the Orange Book. In the **Federal Register** of June 8, 2011 (76 FR 33310), FDA announced that it was withdrawing approval of NDA 019561, effective July 8, 2011.

Hyman, Phelps, and McNamara, P.C. submitted a citizen petition dated January 27, 2020 (Docket No. FDA–2020–P–0438), under 21 CFR 10.30, requesting that the Agency determine whether MICRO-K LS (potassium chloride) extended-release liquid suspension, 20 mEq/packet, was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that MICRO-K LS (potassium chloride) extended-release liquid suspension, 20 mEq/packet, was not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that MICRO-K LS (potassium chloride) extended-release liquid suspension, 20 mEq/packet, was withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of MICRO-K LS (potassium chloride) extended-release liquid suspension, 20 mEq/packet, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have found no information that would indicate that this drug product was withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list MICRO-K LS (potassium chloride) extended-release liquid suspension, 20 mEq/packet, in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to MICRO-K LS (potassium chloride) extended-release liquid suspension, 20 mEq/packet, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: August 27, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–19369 Filed 9–1–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1153]

Post-Marketing Pediatric-Focused Product Safety Reviews; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is establishing a public docket to collect comments related to the post-marketing pediatric-focused safety reviews of products posted between September 23, 2019, and September 1, 2020, on FDA's website but not presented at the September 15, 2020, Pediatric Advisory Committee (PAC) meeting. These reviews are intended to be available for review and comment by members of the PAC, interested parties (such as academic researchers, regulated industries, consortia, and patient groups), and the general public.

DATES: Submit either electronic or written comments by September 22, 2020.

ADDRESSES: FDA is establishing a docket for public comment on this document. The docket number is FDA–2020–N–1153. The docket will close on September 22, 2020. Submit either electronic or written comments by that date. Please note that late, untimely comments will not be considered. Electronic comments must be submitted on or before September 22, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of September 22, 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.

You may submit comments 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 make available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–N–1153 for ''Post-Marketing Pediatric-Focused Product Safety Reviews; Establishment of a Public Docket; Request for Comments.'' 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.'' FDA will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Marieann Brill, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5154, Silver Spring, MD 20993, 240–402–3838, *marieann.brill@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is responsible for protecting the public health by assuring the safety, efficacy, and security of human and veterinary drugs, biological products, medical devices, our Nation's food supply, cosmetics, and products that emit radiation. FDA also has responsibility for regulating the manufacturing, marketing, and distribution of tobacco products to protect the public health and to reduce tobacco use by minors.

FDA is establishing a public docket, Docket No. FDA–2020–N–1153, to receive input on post-marketing pediatric-focused safety reviews of products posted between September 23, 2019, and September 1, 2020, available on FDA's website at *https://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/PediatricAdvisoryCommittee/ucm510701.htm* but not presented at the September 15, 2020, PAC meeting. FDA welcomes comments by members of the PAC, as mandated by the Best Pharmaceuticals for Children Act (Pub. L. 107–109) and the Pediatric Research Equity Act of 2003 (Pub. L. 108–155), interested parties (such as academic researchers, regulated industries, consortia, and patient groups), and the general public. The docket number is FDA–2020–N–1153. The docket will open on September 1, 2020, and remain open until September 22, 2020. The post-marketing pediatric-focused safety reviews are for the following products from the following Centers at FDA:

Center for Biologics Evaluation and Research

1. AFSTYLA (antihemophilic factor (recombinant), single chain)
2. EPICEL (cultured epidermal autografts)
3. FLUCELVAX QUADRIVALENT (influenza vaccine)
4. FLUCELVAX (influenza vaccine)
5. FLULAVAL (influenza vaccine)
6. FLULAVAL QUADRIVALENT (influenza vaccine)
7. HIBERIX (Haemophilus b conjugate vaccine (tetanus toxoid conjugate))
8. KOVALTRY (antihemophilic factor (recombinant))
9. QPAN H5N1 Vaccine (Influenza A (H5N1) virus monovalent vaccine, adjuvanted)

Center for Drug Evaluation and Research

1. BUTRANS (buprenorphine transdermal system)
2. CANASA (mesalamine suppositories for rectal use)
3. DESCOVY (emtricitabine and tenofovir alafenamide)
4. DRAXIMAGE DTPA (technetium TC–99m pentetate kit) injection and inhalation
5. DYSPORT (abobotulinumtoxinA)
6. GENVOYA (elvitegravir, cobicistat, emtricitabine, and tenofovir alafenamide) oral tablets
7. LUMASON (sulfur hexafluoride lipid-type A microspheres) injectable suspension
8. LUMIFY (brimonidine tartrate) OTC
9. LUZU (luliconazole) cream, 1%
10. OMIDRIA (phenylephrine and ketorolac intraocular solution)
11. SENSIPAR (cinacalcet)
12. STELARA (ustekinumab) injection
13. SYMFI LO (efavirenz 400 milligram (mg) + lamivudine 300 mg + tenofovir disoproxil fumarate 300 mg) and SYMFI (efavirenz 600 mg + lamivudine 300 mg + tenofovir disoproxil fumarate 300 mg)
14. TRIUMEQ (abacavir, dolutegravir, and lamivudine)
15. XEPI (ozenoxacin)

Center for Devices and Radiological Health

1. CONTEGRA PULMONARY VALVED CONDUIT (Humanitarian Device Exemption (HDE))
2. ELANA SURGICAL KIT (HDE)
3. ENTERRA THERAPY SYSTEM (HDE)
4. LIPOSORBER LA–15 SYSTEM (HDE)
5. MEDTRONIC ACTIVA DYSTONIA THERAPY (HDE)
6. PLEXIMMUNE IN–VITRO DIAGNOSTIC TEST (HDE)
7. PULSERIDER ANEURYSM NECK RECONSTRUCTION DEVICE (HDE)

Dated: August 28, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–19385 Filed 9–1–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1117]

Janssen Pharmaceuticals, Inc., et al.; Withdrawal of Approval of 16 New Drug Applications; Correction

AGENCY: Food and Drug Administration, Health and Human Services (HHS).

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** on May 14, 2020. The document announced the withdrawal of approval (as of June 15, 2020) of 16 new drug applications (NDAs) from multiple applicants. The document indicated that FDA was withdrawing approval of NDA 050641, Monodox (doxycycline monohydrate) Capsules, Equivalent to (EQ) 50 milligrams (mg) base, EQ 75 mg base, and EQ 100 mg base, after receiving a withdrawal request from Aqua Pharmaceuticals, LLC, 707 Eagleview Blvd., Suite 200, Exton, PA 19341. Before FDA withdrew the approval of NDA 050641, Aqua Pharmaceuticals, LLC, informed FDA that it did not want the approval of the NDA withdrawn. Because Aqua Pharmaceuticals, LLC, timely requested that approval of the NDA not be withdrawn, the approval of NDA 050641 is still in effect.

FOR FURTHER INFORMATION CONTACT: Kimberly Lehrfeld, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6226, Silver Spring, MD 20993–0002, 301–796–3137, *Kimberly.Lehrfeld@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of May 14, 2020 (85 FR 28950), appearing on page 28950 in FR Doc. 2020–10367, the following correction is made:

On page 28951, in the table, the entry for NDA 050641 is removed.

Dated: August 27, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–19364 Filed 9–1–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Statement of Organization, Functions, and Delegations of Authority

August 27, 2020.

AGENCY: Office of the General Counsel, Office of the Secretary, Department of Health and Human Services.

This document revises the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Office of the General Counsel (OGC) as published on August 4, 2020 (85 FR 47228) to correct a typographical error and to better reflect the functions of the Office. The August 4, 2020 Statement is retracted and replaced by this document. As revised, it reflects a new component, changes in titles and order of succession, and changes in the law, and is being re-compiled so that the Statement of Organization incorporates all amendments, as may be amended herein, after the issuance of the last compiled Statement of Organization in 1973. *See* 38 FR 17032 (June 28, 1973).

SUPPLEMENTARY INFORMATION: The Office of the Secretary (OS)'s Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Office of the General Counsel (OGC), should now read as follows:

Section I. Mission

The Mission of the Office of the General Counsel and the General Counsel, who is the special advisor to the Secretary on legal matters, is to provide all legal services and advice to the Secretary, Deputy Secretary, and all subordinate organizational components of the Department.

Section II Organization

The Office of the General Counsel, under the supervision of a General Counsel, consists of:

1. The General Counsel and Immediate Office of the General Counsel
2. Divisions in the Office of the General Counsel
3. Ten Regional Offices

Subsection A. The Immediate Office of the General Counsel

1. The Immediate Office of the General Counsel. The Immediate Office of the General Counsel shall consist of the General Counsel, his or her executive assistant, a Principal Deputy General Counsel, such other Deputy General Counsel, both non-career and career, as the Secretary deems appropriate and appoints, Associate and Assistant Deputy General Counsel, Senior Counsel, and such other attorneys and assistants as the General Counsel deems appropriate, and the Office of Legal Resources (OLR).

a. The General Counsel. The General Counsel is the chief legal officer of the Department and is directly responsible to the Secretary.

b. Principal Deputy General Counsel. The Principal Deputy General Counsel shall be the second-ranking legal officer of the Department and is directly responsible to the General Counsel and the Secretary. He or she may act in the stead of the General Counsel when the General Counsel is absent or unavailable.

c. Deputy General Counsel. The Deputy General Counsel report to the General Counsel and each shall be responsible for overseeing such substantive areas as designated by the General Counsel. In certain instances, a Deputy General Counsel may be appointed by the Secretary or assigned by the General Counsel to serve as the chief counsel of an operating division.

(1) Non-Career Deputy General Counsel. Non-career Deputy General Counsel report to the General Counsel and each shall be responsible for overseeing the substantive legal areas and corresponding OGC components designated by the General Counsel.

(2) Career Deputy General Counsel. There shall be two career Deputy General Counsel who report to the General Counsel. First, a Deputy General Counsel who shall oversee OLR, the General Law Division (GLD), the ten Regional Offices, and will be generally responsible for OGC management and operations subject to the direction of the General Counsel. Second, a Deputy General Counsel who shall oversee litigation and the National Complex Litigation and Investigations Division (NCLID).

d. Associate General Counsel. Associate General Counsel either head a Division within OGC or are located in the Immediate Office. In either event, Associate General Counsel report to the General Counsel or to such Deputy General Counsel as the General Counsel may designate.

e. Associate or Assistant Deputy General Counsel to the General Counsel. The General Counsel may designate one or more attorneys to act as his or her special assistant and to carry the title of Associate Deputy General Counsel or Assistant Deputy General Counsel, all of whom shall report directly to the General Counsel or to such Deputy General Counsel as the General Counsel may designate.

f. Senior Counsel or Senior Advisor to the General Counsel. Senior Counsel or Senior Advisor to the General Counsel perform such duties as may be assigned to them by the General Counsel, Deputy General Counsel or Associate General Counsel. At least one Senior Counsel or Senior Advisor should have a security clearance of the level and type deemed appropriate by the General Counsel.

g. Office of Legal Resources. The Office of Legal Resources within the Immediate Office of the General Counsel, headed by a director, is responsible for providing personnel, budget, correspondence, and information technology support to the Office of the General Counsel.

2. Relation of Immediate Office to the Divisions and Regions. Each division and each region is under the general supervision of the General Counsel and the assigned Deputy General Counsel, unless that Division is headed by a Deputy General Counsel. Each Divisional Associate General Counsel and Regional Chief Counsel reports directly to the assigned Deputy General Counsel on substantive legal matters, litigation strategy, and other matters as directed by the General Counsel.

3. Order of Succession.

a. General Counsel Vacancy. In the event of the General Counsel's absence, or in the event of a ''vacancy'' in the position of General Counsel as a result of death, resignation, or an inability to perform the functions and duties of the office, the Principal Deputy General Counsel shall act in the General Counsel's stead, or serve as the Acting General Counsel as dictated by the Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.*

b. Principal Deputy General Counsel Vacancy. In the event of the absence of or vacancies in offices of both the General Counsel and the Principal Deputy General Counsel, the non-career Deputy General Counsel with the greatest seniority in that position shall perform the functions of or serve as the Acting General Counsel as dictated by the Vacancies Reform Act of 1998. In the event that the disabilities or vacancies extend to or include all non-career deputies, then the career Deputy General Counsel with the greatest seniority in that position shall act in or serve as the Acting General Counsel as dictated by the Vacancies Reform Act of 1998.

Subsection B. Divisions in the Office of the General Counsel

The Office of the General Counsel's nine divisions are as follows: General Law Division (GLD); the Children, Families and Aging Division (CFAD); the Ethics Division (ETHICSD); the Food and Drug Division (FDD); the Public Health Division (Ph.D.); the Legislative Division (LEGD); the Centers for Medicare & Medicaid Services Division (CMSD); the Civil Rights Division (CRD); and National Complex Litigation and Investigations Division (NCLID). Each Division shall be headed by either an Associate General Counsel or Deputy General Counsel, as determined by the General Counsel.

1. The General Law Division shall be headed by an Associate General Counsel who reports to the General Counsel through a career Deputy General Counsel. The Division consists of two branches, each headed by a Deputy Associate General Counsel reporting to the Associate General Counsel:

a. Claims and Employment Law Branch
b. Procurement, Fiscal and Information Law Branch

2. The Children, Families and Aging Division shall be headed by an Associate General Counsel who reports to the General Counsel through a designated Deputy General Counsel.

3. The Ethics Division shall be headed by an Associate General Counsel who reports to the General Counsel. The Division consists of two branches, each headed by a Deputy Associate General Counsel reporting to the Associate General Counsel:

a. Ethics Advice and Policy Branch
b. Ethics Program Administration Branch

The Associate General Counsel and Deputy Associate for Ethics Advice and Policy simultaneously serve by secretarial delegation as the Department's Designated Agency Ethics Official and Alternate Designated Agency Ethics Official, respectively.

4. The Food and Drug Division shall be headed by a Chief Counsel who shall be either a Deputy General Counsel or Associate General Counsel. In the event that the Chief Counsel is an Associate General Counsel, he or she shall report to the General Counsel through a designated Deputy General Counsel. The Division consists of two major branches, each of which is headed by a Deputy Associate General Counsel who reports to the Chief Counsel, as follows:

a. Litigation Branch
b. Program Review Branch, divided into the following three sub-branches:
(1) Foods & Veterinary Medicine
(2) Drugs and Biologics
(3) Tobacco & Devices

5. The Public Health Division shall be headed by an Associate General Counsel who reports to the General Counsel through a designated Deputy General Counsel. The Division is divided into four branches, each of which is headed by a Deputy Associate General Counsel reporting to the Associate General Counsel:

a. Indian Health Service Branch
b. Centers for Disease Control and Prevention Branch
c. National Institutes of Health Branch
d. Public Health and Science Branch

6. The Legislation Division shall be headed by an Associate General Counsel who reports to the General Counsel through a designated Deputy General Counsel.

7. The Centers for Medicare & Medicaid Services Division shall be headed by a Chief Legal Officer who shall be either a Deputy General Counsel or an Associate General Counsel. The Division consists of three major organizational groups, each of which is headed by a Deputy Associate General Counsel reporting to the Associate General Counsel or the Deputy General Counsel through an Associate General Counsel, as follows:

a. Litigation Group
b. Program Review Group
c. Program Integrity Group

8. The Civil Rights Division shall be headed by an Associate General Counsel who reports to the General Counsel through a designated Deputy General Counsel, and by a Deputy Associate General Counsel who reports to the Associate General Counsel.

9. The National Complex Litigation and Investigations Division (NCLID) has an Associate General Counsel who reports to General Counsel through a career Deputy General Counsel. In addition, NCLID has a Deputy Associate General Counsel for E-Discovery reporting to the Associate General Counsel.

Subsection C. Regional Offices

There are ten regional offices. Each regional office has a Chief Counsel who reports to the General Counsel through a designated career Deputy General Counsel. Regional offices may also have one or more Deputy Chief Counsel who report to the Chief Counsel. The regional offices are located in the following cities and provide legal services to the Department in the following states and territories:

1. Region I—Boston (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont)
2. Region II—New York City (New York, New Jersey, Puerto Rico, Virgin Islands)
3. Region III—Philadelphia (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, District of Columbia)
4. Region IV—Atlanta (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee)
5. Region V—Chicago (Illinois, Indiana, Ohio, Michigan, Minnesota, Wisconsin)
6. Region VI—Dallas (Arkansas, Louisiana, New Mexico, Oklahoma, Texas)
7. Region VII—Kansas City, MO (Iowa, Kansas, Missouri, Nebraska)
8. Region VIII—Denver (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming)
9. Region IX—San Francisco (Arizona, California, Hawaii, Nevada, Guam, American Samoa, Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, the Republic of Palau)
10. Region X—Seattle (Alaska, Idaho, Oregon, Washington)

Section III. Functions

A. General Counsel and Immediate Office of the General Counsel

1. The General Counsel. The General Counsel is authorized to promulgate such directives and issue such legal opinions as may be necessary to carry out the responsibilities of the Office. The General Counsel directly (or through attorneys in the Office of the General Counsel), undertakes the following activities unless an applicable statute provides otherwise or the General Counsel has delegated the responsibility elsewhere:

a. Furnishes all legal services and advice to the Secretary, Deputy Secretary, and all offices, branches, or units of the Department in connection with the operations and administration of the Department and its programs, except with respect to functions expressly delegated by statute to the Inspector General.

b. Furnishes legal services and advice on such other matters as may be submitted by the Secretary, the Deputy Secretary, any other senior leaders, and other persons authorized by the Secretary to request such service or advice.

c. Represents the Department in all litigation when such direct representation is not precluded by law, and in other cases, making and supervising all contacts with attorneys responsible for the conduct of such litigation.

d. Acts as the Department's sole representative in communicating with the Department of Justice, including all United States Attorneys, on all civil matters and on all criminal matters, other than those criminal matters referred to the Department of Justice by the Inspector General.

e. Acts as the Department's sole representative in communicating with Office of White House Counsel or the Offices of General Counsel for any other Department or Agency.

f. Performs all liaison functions in connection with legal matters involving the Department, and formulating or reviewing requests for formal opinions or rulings by the Attorney General and the Comptroller General.

g. Issues pre-enforcement rulings or advisory opinions to the public on questions of law, except to the extent that that such authority has previously been delegated to the Inspector General under section 1128D of the Social Security Act.

h. Authorizes indemnification, as appropriate, pursuant to 45 CFR part 36.

i. Conducts internal investigations at the request of the Secretary or Deputy Secretary, or for matters that could lead to litigation.

j. Drafts all proposals for legislation originating in the Department and reviewing all proposed legislation submitted to the Department or to any operating agency of the Department for comment; preparing reports and letters to congressional committees, the Office of Management and Budget, and others on proposed legislation; and prescribing procedures to govern the routing and review, within the Department, of material relating to proposed Federal legislation.

k. Performs liaison functions with the Office of the Federal Register, National Archives and Records Service.

l. Reviews and approves all administrative complaints and enforcement actions by any agency within the Department before those complaints are filed or transmitted, or enforcement actions instituted to ensure that the complaint or enforcement action is legally sound.

m. Leads all negotiations on behalf of any agency within the Department.

n. Supervises all legal activities of the Department and its operating agencies.

o. Ensures that no one in the Department, other than those in OGC or expressly authorized by statute to do so, provides any legal advice to anyone in the Department or uses any title that implies that they are functioning as a departmental lawyer.

2. Principal Deputy General Counsel. The Principal Deputy General Counsel is the second ranking legal officer in the Department and performs the functions of the General Counsel in his or her absence or disability, including recusal, and, unless otherwise noted, oversees for the General Counsel all litigation involving the Department, its officers, inferior officers, and employees.

3. Deputy General Counsel. The Deputy General Counsel assist the General Counsel in carrying out his or her responsibilities and performs such duties as the General Counsel or Principal Deputy General Counsel may assign. The Associate General Counsel for a Division shall report to the General Counsel through one or more Deputy General Counsel, as may be assigned by the General Counsel. Regional Chief Counsel shall report to the General Counsel through a career Deputy General Counsel.

B. Functions, Authorities and Responsibilities of the Divisions

The Divisions within OGC provide legal counsel to their clients, as described below, subject to the professional supervision and control of the General Counsel and assigned Deputy General Counsel.

1. *General Law Division.* The General Law Division, acting through its Associate General Counsel, performs the following:

a. Provides legal services on business management activities and administrative operations throughout the Department, including employment, compensation, personnel, appropriations, real and personal property (including National Environmental Policy Act), procurement, information, travel, and certain claims by and against the Department.

b. Represents the Department in all aspects of administrative litigation before the Merit Systems Protection Board (MSPB), Equal Employment Opportunity Commission (EEOC), and in labor arbitrations, as needed. Acts as agency counsel in support of the Department of Justice on employment cases filed in federal court.

c. Represents the Department in bid protests filed before the Comptroller General and contract disputes filed before the Civilian Board of Contract Appeals. Acts as agency counsel in support of the Department of Justice in bid protests and contract disputes filed before the U.S. Court of Federal Claims and appealed to the Federal Circuit.

d. Provides legal services to Department Freedom of Information Act (FOIA) Officers on the disclosure of agency records requested under FOIA, and communicates with the Department of Justice on the administration of the Freedom of Information Act.

e. Provides legal services to the Department on the Privacy Act of 1974, as amended, the Paperwork Reduction Act, the Federal Records Act, and the Government in the Sunshine Act.

f. Provides all legal services with respect to the formation, maintenance, and administration of the advisory committees under the Federal Advisory Committee Act.

g. Acts as the Department Claims Officer, responsible for adjudicating all administrative claims filed under the Federal Tort Claims Act, approval of claims filed under the Federal Medicare Recovery Claims Act in amounts of at least $20,000 but not exceeding $300,000, tort liability claims under the U.S. Constitution and other laws under which claims for money damages may be filed with the Department, as provided by 5 U.S.C. 5584, 10 U.S.C. 2774, except for claims arising under the Social Security Act. Also responsible for making final determinations on legally enforceable non tax debts owed to the United States government arising from HHS programs under the Federal Claims Collection Act, as amended, 31 U.S.C. 3711 *et seq.*, on the compromise of, and the suspension or termination of collection activities for, claims in amounts of $100,000 or less, exclusive of interest, and on the waiver of interest.

2. *Children, Families, and Aging Division.* The Children, Families, and Aging Division Provides legal services to the Administration for Children and Families and its various agencies including the Office of Refugee Resettlement and Administration for Community Living.

3. *Ethics Division.* The Ethics Division administers and oversees Department-wide implementation of comprehensive government ethics program requirements under the Ethics in Government Act of 1978, as amended, Executive Order 12731, and implementing regulations at 5 CFR part 2638. The Division, without limitation, performs the following:

a. Provides legal advice and policy guidance on interpretation and compliance issues involving the criminal conflict of interest statutes, 18 U.S.C. 210–219, political activity restrictions, anti-lobbying provisions, outside activity limitations, travel reimbursement guidelines, procurement integrity rules, financial disclosure obligations, and standards of ethical conduct matters including gifts between employees and from outside sources, conflicting financial interests and impartiality concerns, misuse of position and agency resources, and outside employment, fundraising, testimony, and teaching, speaking or writing, to Department officials, agency personnel, advisory committees and others.

b. Reviews executive branch public financial disclosure reports submitted by Presidential nominees/appointees subject to Senate confirmation, non-career SES and Schedule C political appointees, OGC career SES officials, and Op/Staff Division ethics officials (DECs) to assess potential violations of applicable laws or regulations, ensure transparency through accurate reporting, provide counseling on the avoidance of conflicts, and, if necessary, recommending appropriate corrective action, including drafting waivers, disqualification statements, ethics agreements, and certificate of divestiture materials; ensuring identical review and counseling responsibilities with respect to both the public and confidential financial disclosure forms filed by career employees are performed Department-wide by the DECs.

c. Plans, develops, and provides initial ethics orientation for new employees, annual ethics training for employees who file financial disclosure forms and others occupying certain sensitive positions, initial and annual ethics training for members of federal advisory committees, and specialized, topic-specific training on post-employment restrictions, political activity restrictions, insider trading, and procurement integrity rules.

d. Monitors component ethics programs and reviewing compliance with core ethics program elements, including advice, financial disclosure, outside activities, conflict of interest waivers, ethics agreements and travel payments from non-federal sources.

e. Communicates on matters related to government ethics with the Office of Counsel to the President, the Office of Government Ethics, the Office of Special Counsel, the Office of the Inspector General, Special Investigations Unit, the Office of Personnel Management, and the General Services Administration.

f. Develops component-specific conduct regulations and implementing procedures.

4. *Food and Drug Division.* The Food and Drug Division acts as the Commissioner's legal advisor and provides legal services to FDA. FDD, for example, performs the following:

a. Represents the FDA in connection with judicial and administrative proceedings involving programs administered by the FDA. Provides legal advice and policy guidance for programs administered by the FDA.

b. Acts as the Department and FDA's sole liaison to the Department of Justice and other Federal Departments for programs administered by FDA; all criminal prosecutions, investigations, and civil matters may only be referred to the Department of Justice through the Chief Counsel.

c. Drafts or reviews all proposed and final regulations and **Federal Register** notices prepared by FDA.

d. Performs legal research and gives legal opinions on regulatory issues, actions, and petitions submitted to FDA.

e. Reviews proposed legislation affecting FDA that originates in the Department or on which Congress requests the views of the Department.

f. Provides legal advice and assistance to the Office of the Secretary on matters within the expertise of the Chief Counsel.

5. *Public Health Division.* The Public Health Division provides legal services to all Public Health Service agencies (except to the Food and Drug Administration) and their programs, including the Office of the Surgeon General and the Commissioned Corps of the U.S. Public Health Service. Represented Public Health Service agencies include, but are not limited to the (i) the Office of the Assistant Secretary for Health, and its various programs, (ii) the Office of the Secretary's Office of Minority Health, (iii) the Centers for Disease Control and Prevention, (iv) the National Institutes of Health, (v) the Health Resources and Services Administration, (vi) the Indian Health Service, (vii) the Substance Abuse and Mental Health Services Administration, (viii) the Agency for Healthcare Research and Quality, and (ix) the Office of the Assistant Secretary for Preparedness and Response. In addition, the Public Health Service Division serves as the lead office within the Office of the General Counsel for grants-related and intellectual property issues, other than federal court or PTAB litigation.

6. *Legislation Division.* The Legislation Division performs the following:

a. Drafts all proposed legislation originating in the Department, reviewing specifications for such proposed legislation, and reviewing all proposed legislation submitted to the Department or to any constituent unit of the Department for comment.

b. Prepares or reviews reports and letters to Congressional Committees, the Office of Management and Budget, and others on proposed legislation.

c. Reviews proposed testimony of Department officials before Congressional Committees relating to pending or proposed legislation.

d. Acts as Department liaison with the Office of Management and Budget on legislative matters.

e. Prescribes procedures to govern the routing and review, within the Department, of material relating to proposed Federal legislation.

7. *Centers for Medicare & Medicaid Services Division.* The Centers for Medicare & Medicaid Services Division, acting through the Deputy General Counsel serving as the CMS Chief Legal Officer or an Associate General Counsel,

a. Acts as the CMS Administrator's legal advisor.

b. Represents CMS and the Office of the National Coordinator for Health Information Technology (''ONC'') in court proceedings and administrative hearings with respect to programs administered by CMS or ONC.

c. Provides legal advice and policy guidance for programs administered by CMS and ONC.

d. Acts as the Department's and CMS's and ONC's liaison to the Department of Justice and other Federal Departments for programs administered by those operating divisions.

e. Drafts or reviews all proposed and final regulations and **Federal Register** notices prepared by CMS, ONC, and other agencies.

f. Performs legal research and gives legal opinions on regulatory issues, actions, and petitions submitted to CMS and ONC.

g. Reviews proposed legislation affecting CMS, ONC, Office of Medicare Hearing Appeals (OMHA) and DAB that originates in the Department or on which Congress requests the views of the Department.

h. Provides legal advice and assistance to the Office of the Secretary on matters within the expertise of the CMS Chief Legal Officer.

i. Provides legal advice and assistance to the Office of the Secretary on matters relating to the COVID–19 Provider Relief Fund (PRF) and similar provider relief programs, including advice regarding the administration of the PRF, civil litigation relating to the PRF, and fraud and abuse involving PRF payments.

8. *Civil Rights Division.* The Civil Rights Division provides legal services for the Office for Civil Rights (OCR) and provides legal advice with respect to the civil rights laws to all agencies and offices within the Department, and in coordination with the assigned Deputy General Counsel, evaluates complaints, advises whether there is legal basis to proceed, assists OCR in developing and implementing investigation plans, and clears the imposition of any civil money penalties. CRD likewise represents the Department in administrative proceedings and federal litigation, together with the Department of Justice. CRD provides these legal services with respect to:

a. Traditional civil rights laws such as, by way of example, title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.* and 47 U.S.C. 225, 661), section 1557 of the Affordable Care Act (42 U.S.C. 18116).

b. Conscience statutes, such as the Church Amendments, the Weldon Amendment, and the Coats-Snowe Amendment.

c. The Health Insurance and Portability and Accountability Act of 1996 (Social Security Act section 1171 *et seq.*), the Health Information Technology for Economic and Clinical Health (HITECH) Act, and the rules implementing them.

The authorities of CRD and the General Counsel described here do not supersede the terms of any statute, regulation, or delegation granting authority or responsibility to OCR.

9. *National Complex Litigation and Investigations Division.* The National Complex Litigation and Investigations Division provides legal services across the Department, as directed by the General Counsel or Principal Deputy General Counsel. In that regard, NCLID, performs the following:

a. Coordinates litigation spanning multiple OGC divisions, regional offices, or geographic areas.

b. Provides legal services in connection with complex litigation or anticipated complex litigation by or against the Department. Such litigation may include cases for which other OGC divisions or OGC regions request NCLID participation; cases spanning multiple OGC divisions or regional offices, or cases outside the scope of other OGC divisions or regional offices.

c. Conducts internal investigations at the request of the Secretary or Deputy Secretary, or on matters that could lead to litigation.

d. Administers the OGC-wide e-discovery program, and coordinates the use of e-discovery technology with other HHS staff and operating divisions.

e. Identifies and supports the implementation of best practices for litigation management, e-discovery, and virtual staffing across OGC.

C. Functions, Authorities and Responsibilities of the Regions

The Chief Counsel of each Region is HHS' legal representative in that Region. Regional offices within OGC provide a full range of legal services including, by way of example, legal counsel to their departmental clients and client agencies in the regions, as described below, subject to the professional supervision and direction of the General Counsel.

The Office of the General Counsel's ten regional offices provide legal advice, administrative and judicial litigation support and counseling services to the regional components of the Department. Regional attorneys provide general law support to regional clients and handle work in most areas within HHS' jurisdiction with particular emphasis on litigation for, among others, CMS, ACF, OCR, CDC, and IHS. Regional offices also provide leadership with respect to bankruptcy cases. In the area of civil rights, they work in close consultation with the Associate General Counsel for the Civil Rights Division to ensure that the regional positions align closely with those of the Division thereby fostering national uniformity. In other areas, the Divisions and Regions work collaboratively to provide consistent, uniform legal advice.

Dated: August 27, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2020–19325 Filed 8–28–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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: Neurological Sciences Training Initial Review Group; NST–1, Subcommittee NST–1.

Date: September 21–22, 2020.

Time: 9:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NSC, 6001 Executive Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: William C. Benzing, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS, NIH, NSC, 6001 Executive Blvd., Suite 3204, MSC 9529, Bethesda, MD 20892–9529, (301) 496–0660, *benzingw@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel, NST–1 Member Conflict Review Panel.

Date: September 22, 2020.

Time: 1:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NSC, 6001 Executive Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: William C. Benzing, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS, NIH NSC, 6001 Executive Blvd., Suite 3204, MSC 9529, Bethesda, MD 20892–9529, (301) 496–0660, *benzingw@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: August 27, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–19318 Filed 9–1–20; 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: Risk, Prevention and Health Behavior Integrated Review Group; Behavioral Medicine, Interventions and Outcomes Study Section.

Date: October 5–6, 2020.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Mark Allen Vosvick, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3110, Bethesda, MD 20892, 301–402–4128, *mark.vosvick@nih.gov*.

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Behavioral Genetics and Epidemiology Study Section.

Date: October 6–7, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Andrew Louden, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3137, Bethesda, MD 20817, 301–435–1985, *loudenan@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; S10 Programs for Shared Instrumentation Grant (SIG) and Shared Instrumentation for Animal Research (SIFAR) Grant.

Date: October 6, 2020.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jan Li, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, Bethesda, MD 20892, 301.402.9607, *Jan.Li@nih.gov*.

Name of Committee: Oncology 1-Basic Translational Integrated Review Group; Molecular Oncogenesis Study Section.

Date: October 7–8, 2020.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nywana Sizemore, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6204, MSC 7804, Bethesda, MD 20892, 301–435–1718, *sizemoren@csr.nih.gov*.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Mechanisms of Sensory, Perceptual, and Cognitive Processes Study Section.

Date: October 7–8, 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: Kirk Thompson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844, Bethesda, MD 20892, 301–435–1242, *kgt@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: August 27, 2020.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–19317 Filed 9–1–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2020–0490]

Commercial Fishing Safety Advisory Committee; Meeting

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Notice of Federal Advisory Committee virtual meeting.

SUMMARY: The Commercial Fishing Safety Advisory Committee (Committee) will meet via a virtual meeting to discuss voluntary guidelines for the prevention of falls overboard situations, as described in task statement #01–19(b). The virtual meeting will be open to the public.

DATES:

Meeting. The Committee is scheduled to meet virtually on Thursday, September 24, 2020, from 1 p.m. to 3 p.m. Eastern Daylight Time. Please note that this virtual meeting may adjourn early if the Committee has completed its business.

Comments and supporting documents: To ensure your comments are received by Committee members before the virtual meeting, submit your written comments no later than September 17, 2020.

ADDRESSES: To join the virtual meeting or to request special accommodations, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section no later than 1 p.m. on September 17, 2020.

Instructions: You are free to submit comments at any time, including orally at the virtual meeting as time permits, however, if you desire that the Committee members review your comments before the virtual meeting, please submit your comments no later than September 17, 2020. We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www/regulations.gov,* call or email the individual in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. You must include the docket number [USCG–2020–0490]. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). If you encounter technical difficulties with comment submission, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Docket Search: Documents mentioned in this notice as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign-up for email alerts, you will be notified when comments are posted.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Wendland, Alternate Designated Federal Officer (ADFO) of the Commercial Fishing Safety Advisory Committee, telephone (202) 372–1245, or email at *CGFishsafe@uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is in compliance with the *Federal Advisory Committee Act,* (5 U.S.C., Appendix).

The Commercial Fishing Safety Advisory Committee is authorized by Title 46 United States Code Section 4508. The Committee's purpose is to provide advice and recommendations to the United States Coast Guard and the Department of Homeland Security on matters relating to the safe operation of commercial fishing industry vessels.

Agenda

The agenda for the September 24, 2020, virtual meeting is as follows:

- Introduction.
- Roll call of Committee members and determination of a quorum.
- Comments by Designated Federal Officer (DFO).
- Comments by ADFO.
- Comments by the Committee Chairman.
- Comments by Federal Advisory Committee Representative.
- Old Business from the 40th Commercial Fishing Safety Advisory Committee meeting.
- Comments by U.S. Coast Guard Office of Standards Evaluation and Development.
- Comments by CG–NAV–3.
- New Business.
- Comments by Committee Chairman.
- Public comment period.
- Discussion: Task # 01–19(b)—Lifesaving/Man Overboard (MOB) Voluntary Best Practice Guide.
- Public comment period.
- Comments by DFO.
- Comments by Committee Chairman.
- Adjournment of meeting.

A copy of all pre-meeting documentation will be available at *https://www.dco.uscg.mil/fishsafe* no later than September 21, 2020. Alternatively, you may contact Mr. Jonathan Wendland as noted in the **FOR FURTHER INFORMATION CONTACT** section above.

During the September 24, 2020, virtual meeting, public comments will be limited to three minutes per person. Please note that the public comment period may end before the period allotted, following the last call for comments. Please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section above to register as a speaker prior to September 22, 2020.

Dated: August 28, 2020.

Wayne R. Arguin Jr.,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2020–19400 Filed 9–1–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[Docket No. USCBP–2020–0037]

Request for Applicants for Appointment to the Commercial Customs Operations Advisory Committee (COAC)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security (DHS).

ACTION: Committee Management; request for applicants for appointment to the COAC.

SUMMARY: U.S. Customs and Border Protection (CBP) is requesting that individuals who are interested in serving on the Commercial Customs Operations Advisory Committee (COAC) apply for membership. COAC provides advice and makes recommendations to the Secretaries of the Department of the Treasury (Treasury) and Department of Homeland Security (DHS) on all matters involving the commercial operations of CBP and related functions.

DATES: Applications for membership should be submitted to CBP at the address below on or before October 19, 2020.

ADDRESSES: If you wish to apply for membership, your application should be submitted by one of the following means:

- *Email: florence.v.constant-gibson@cbp.dhs.gov.*
- *Fax:* 202–325–4290.
- *Mail:* Ms. Florence Constant-Gibson, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Ms. Florence Constant-Gibson, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229. Email: *florence.v.constant-gibson@cbp.dhs.gov;* telephone 202–344–1440; facsimile 202–325–4290.

SUPPLEMENTARY INFORMATION: Section 109 of the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. 114–125, 130 Stat. 122, February 24, 2016) re-established the COAC. The COAC is an advisory committee established in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. Appendix. The COAC advises the Secretaries of the Treasury and DHS on the commercial operations of CBP and related Treasury and DHS functions. In accordance with Section 109 of the Trade Facilitation and Trade Enforcement Act, the COAC shall:

(1) Advise the Secretaries of the Treasury and DHS on all matters involving the commercial operations of CBP, including advising with respect to significant changes that are proposed with respect to regulations, policies, or practices of CBP;

(2) provide recommendations to the Secretaries of the Treasury and DHS on improvements to the commercial operations of CBP;

(3) collaborate in developing the agenda for COAC meetings; and

(4) perform such other functions relating to the commercial operations of CBP as prescribed by law or as the Secretaries of the Treasury and DHS jointly direct.

Balanced Membership Plans

The COAC consists of 20 members who are selected from representatives of the trade or transportation community served by CBP, or others who are directly affected by CBP commercial operations and related functions. The members shall represent the interests of individuals and firms affected by the commercial operations of CBP, and be appointed without regard to political affiliation. The members will be appointed by the Secretaries of the Treasury and DHS from candidates recommended by the Commissioner of CBP. In addition, members will represent major regions of the country.

COAC Meetings

The COAC meets at least once each quarter, although additional meetings may be scheduled. Generally, every other public meeting of the COAC may be held outside of Washington, DC, usually at a CBP port of entry. The members are not reimbursed for travel or per diem.

COAC Membership

Membership on the COAC is personal to the appointee and a member may not send an alternate to represent him or her at a COAC meeting. Appointees will serve a one- to three-year term of office, determined at the discretion of the appointing officials. Regular attendance is essential; a member who is absent for two consecutive meetings, or does not participate in the committee's work, may be recommended for replacement on the COAC.

Members who are currently serving on the COAC are eligible to re-apply for membership provided that they are not in their second consecutive term and that they have met the attendance requirements. A new application letter is required, and may incorporate copies of previously filed application materials noted herein. Members will not be considered Special Government Employees and will not be paid compensation by the Federal Government for their representative services with respect to the COAC.

Application for COAC Appointment

Any interested person wishing to serve on the COAC must provide the following:

- Statement of interest and reasons for application;
- Complete professional resume;
- Home address and telephone number;
- Work address, telephone number, and email address;
- Statement of the industry you represent; and
- Statement agreeing to submit to pre-appointment mandatory background and tax checks.

A national security clearance is not required for the position. DHS does not discriminate on the basis of race, color, religion, sex, national origin, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor. DHS strives to achieve a widely diverse candidate pool for all of its recruitment actions.

Signing Authority

The Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, Mark A. Morgan, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: August 28, 2020.

Robert F. Altneu,

Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

[FR Doc. 2020–19413 Filed 9–1–20; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–38]

30-Day Notice of Proposed Information Collection: Single Family Application for Insurance Benefits; OMB Control Number (2502–0429)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection

requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* October 2, 2020.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/Start Printed Page 15501PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on March 9, 2020 at 85 FR 13671.

A. Overview of Information Collection

Title of Information Collection: Single Family Application for Insurance Benefits.

OMB Approval Number: 2502–0429.

Type of Request: Revision.

Form Numbers: HUD–27011, HUD–9519–A, HUD–9539, HUD–50002, HUD–50012

Description of the need for the information and proposed use: The respondents for this collection of information are Mortgagees that service FHA-insured mortgage loans; Mortgagors who are the homeowners; and the Mortgage Compliance Manager (MCM) contractor who manages HUD's single family real estate owned (REO) activities. This collection of information is where FHA-insured mortgage loan servicing covers the claims, conveyance process, property inspection, and preservation. The data and information provided is essential for managing HUD's programs and FHA's Mutual Mortgage Insurance Fund.

Respondents: Individuals or households and business or other for-profits.

Estimated Number of Respondents: 440.

Estimated Number of Responses: 1,125,454.

Frequency of Response: 2557.85.

Average Hours per Response: 0.8293677961.

Total Estimated Burdens: 933,415.30.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology. HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 2 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

Dated: August 14, 2020.

Anna Guido,

Department Repots Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–19331 Filed 9–1–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–34]

30-Day Notice of Proposed Information Collection: Compliance Inspection Report and Mortgagee's Assurance of Completion; OMB Control Number (2502–0189)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* October 2, 2020.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/StartPrintedPage15501PRAMain*. 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: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410–5000, email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400 (this is not a toll free number). Persons with hearing or speech impairments may access the telephone number through TTY by calling the tollfree Federal Relay Service at 800–877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on February 25, 2020 at 85 FR 10712.

A. Overview of Information Collection

Title of Information Collection: Compliance Inspection Report and Mortgagee's Assurance of Completion.

OMB Control Number, if applicable: 2502–0189.

Type of Request: Extension of currently approved collection.

Form Numbers: HUD 92051, HUD–92300.

Description of the need for the information and proposed use: Accurate and thorough property information is critical to the accuracy of underwriting for the mortgage insurance process. This information collection is needed to ensure newly built homes financed with FHA mortgage insurance are constructed in accordance with acceptable building standards and that deficiencies found in newly constructed and existing dwellings are corrected.

Respondents: Mortgagees.

Estimated Number of Respondents: 2,966.

Estimated Number of Responses: 34,833.89.

Frequency of Response: 11.7444.

Average Hours per Response: 0.17500.

Total Estimated Burden Hours: 6,095.93.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: August 14, 2020.

Anna Guido,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–19332 Filed 9–1–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY–957000–20X–L14400000–BJ0000]

Filing of Plats of Survey, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The Bureau of Land Management (BLM) is scheduled to file plats of survey 30 calendar days from the date of this publication in the BLM Wyoming State Office, Cheyenne, Wyoming. The surveys, which were executed at the request of the BLM and the United States Forest Service are necessary for the management of these lands.

DATES: Protests must be received by the BLM prior to the scheduled date of official filing by October 2, 2020.

ADDRESSES: You may submit written protests to the Wyoming State Director at WY957, Bureau of Land Management, 5353 Yellowstone Road, Cheyenne, Wyoming 82009.

A person or party who wishes to protest one or more plats of survey identified below must file a written notice of protest within 30 calendar days from the date of this publication with the Wyoming State Director at the above address. Any notice of protest received after the scheduled date of official filing will be untimely and will not be considered. A written statement of reasons in support of a protest, if not filed with the notice of protest, must be filed with the State Director within 30 calendar days after the notice of protest is filed. If a notice of protest against a plat of survey is received prior to the scheduled date of official filing, the official filing of the plat of survey identified in the notice of protest will be stayed pending consideration of the protest. A plat of survey will not be officially filed until the next business day following dismissal or resolution of all protests of the plat. Before including your address, phone number, email address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: Sonja Sparks, BLM Wyoming Chief Cadastral Surveyor at 307–775–6225 or *s75spark@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact this office during normal business hours. The Service is available 24 hours a day, 7 days a week, to leave a message or question with this office. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management, Wyoming State Office, Cheyenne, Wyoming.

Sixth Principal Meridian, Wyoming

All plats of survey in this notice of official filing were accepted August 26, 2020.

T. 29 N., R. 109 W., Group No. 988, corrective dependent resurvey
T. 45 N., R. 101 W., Group No. 998, dependent resurvey and survey
T. 35 N., R. 109 W., Group No. 1001, corrective dependent resurvey
T. 50 N., R. 83 W., Group No. 1002, dependent resurvey and survey
T. 48 N., R. 65 W., Group No. 1003, dependent resurvey and survey
T. 30 N., R. 79 W., Group No. 1007, dependent resurvey and survey
T. 30 N., R. 80 W., Group No. 1007, dependent resurvey and survey
T. 15 N., R. 75 W., Group No. 1010, dependent resurvey
T. 49 N., R. 77 W., Group No. 1013, dependent resurvey
T. 31 N., R. 83 W., Group No. 1020, dependent resurvey and survey

Copies of the preceding described plats and field notes are available to the public at a cost of $4.20 per plat and $0.15 per page of field notes. Requests can be made to *blm_wy_survey_records@blm.gov* or by telephone at 307–775–6222.

Dated: August 28, 2020.

Sonja S. Sparks,

Chief Cadastral Surveyor, Division of Support Services.

[FR Doc. 2020–19412 Filed 9–1–20; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#-30808; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the

significance of properties nominated before August 22, 2020, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by September 17, 2020.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before August 22, 2020. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

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.

Nominations submitted by State or Tribal Historic Preservation Officers:

IDAHO

Fremont County

Albaugh, Eleanor, Cabin, 4141 Upper Teton Ave., Island Park, SG100005620

KANSAS

Barton County

High Rise Apartments, 1101 Kansas Ave., Great Bend, SG100005621

Douglas County

Holy Family Catholic Church, 911 East 9th St. (301 East 9th St., legal description), Eudora, SG100005623

Leavenworth County

William Small Memorial Home for Aged Women, 711 North Broadway St., Leavenworth, SG100005624

Saline County

Lowell School, (Public Schools of Kansas MPS), 1009 South Highland Ave., Salina, MP100005625

Sedgwick County

Century II Performing Arts and Convention Center, 225 West Douglas Ave., Wichita, SG100005627

McCormick-Armstrong Press Building, 1501 East Douglas Ave., Wichita, SG100005628

Wichita Public Library-Main Branch, 223 South Main St., Wichita, SG100005629

Shawnee County

Kouns, Charles and Dorothy, House, 1625 SW MacVicar Ave., Topeka, SG100005630

Fire Station No. 6, 1419 NE Seward Ave., Topeka, SG100005631

House at 116 Southwest The Drive, (Houses of the Garlinghouse Company in Topeka MPS), 116 SW The Drive, Topeka, MP100005633

Lippitt, James and Freda, House, (Houses of the Garlinghouse Company in Topeka MPS), 2532 SW Granthurst Ave., Topeka, MP100005634

Wabaunsee County

Grimm-Schultz Farmstead, (Agriculture-Related Resources of Kansas MPS), 35180 Old K–10 Hwy., Alma, MP100005635

MAINE

Cumberland County

Portland Waterfront Historic District (Boundary Increase III), 113–115 Middle St., Portland, BC100005648

Kennebec County

Vassalboro Mill, 934 and 960 Main St., Vassalboro, SG100005649

Knox County

BLACKJACK (friendship sloop), Rockland Harbor at 75 Mechanic St., Rockland, SG100005650

MARYLAND

Montgomery County

Washington Grove Historic District (Boundary Increase), Roughly bounded by Washington Grove Ln., Ridge Rd., and MARC tracks., Washington Grove, BC100005640

MISSISSIPPI

Harrison County

Gulfport-Harrison County Public Library, 1400 21st Ave., Gulfport, SG100005619

Rankin County

Brandon South College Street Historic District, Bounded by South College St., East Sunset Dr. to Bentonwood Dr., jct. of South College St., and MS 468, West Sunset and Prescott Drs., and West Jasper Sts., Brandon, SG100005646

SOUTH CAROLINA

Georgetown County

Sandy Island School, 32 Sandy Island Rd., Sandy Island, SG100005641

Richland County

Ruth's Beauty Parlor, (Segregation in Columbia, South Carolina MPS), 1221 Pine St., Columbia, MP100005638

VERMONT

Washington County

East Calais Historic District, VT14, Marshfield Rd., Batten Rd., Back St., and Moscow Woods Rd., Calais, SG100005618

Windsor County

Stockmayer, Walter and Sylvia, House, (Mid-Century Modern Residential Architecture in Norwich, Vermont MPS), 48 Overlook Dr., Norwich, MP100005643

A request for removal has been made for the following resources:

KANSAS

Wyandotte County

St. John the Divine Catholic Church, 2511 Metropolitan Ave., Kansas City, OT13000820

MAINE

Aroostook County

Lagassey Farm, 786 Main St., Saint Agatha, OT08001356

Additional documentation has been received for the following resources:

MAINE

Lincoln County

Kavanagh, Gov. Edward, House (Additional Documentation), ME 213 (Damariscotta Mills), Newcastle, AD74000178

MARYLAND

Montgomery County

Washington Grove Historic District (Additional Documentation), MD 124, Washington Grove, AD80001829

(Authority: Section 60.13 of 36 CFR part 60)

Dated: August 25, 2020.

Sherry A. Frear,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

[FR Doc. 2020–19355 Filed 9–1–20; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1171]

Certain Child Resistant Closures With Slider Devices Having a User Actuated Insertable Torpedo for Selectively Opening the Closures and Slider Devices Therefor Commission Final Determination of Violation of Section 337; Issuance of a General Exclusion Order; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Commission has determined to affirm, with modified reasoning, an initial determination (''ID'') of the presiding administrative law judge

(''ALJ'') granting summary determination on violation of section 337 by certain defaulting respondents. The Commission has also determined to issue a general exclusion order (''GEO'') barring entry of certain child resistant closures with slider devices having a user actuated insertable torpedo for selectively opening the closures and slider devices therefor that infringe the asserted claims of the three patents at issue in this investigation. This investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Richard P. Hadorn, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3179. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

SUPPLEMENTARY INFORMATION: On August 21, 2019, the Commission instituted this investigation based on a complaint filed by Reynolds Presto Products Inc. (''Presto''). 84 *FR* 43616–17 (Aug. 21, 2019). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337) (''section 337'') based on the importation into the United States, the sale for importation, or the sale within the United States after importation of certain child resistant closures with slider devices having a user actuated insertable torpedo for selectively opening the closures and slider devices therefor by reason of infringement of certain claims of U.S. Patent Nos. 9,505,531 (''the '531 patent''); 9,554,628; and 10,273,058 (''the '058 patent'') (collectively, the ''Asserted Patents''). *Id.* at 43616. The complaint further alleges that a domestic industry exists. *Id.* The Commission's notice of investigation names six respondents: Dalian Takebishi Packing Industry Co., Ltd. of Dalian, China (''Dalian Takebishi''); Dalian Altma Industry Co., Ltd. of Dalian, Liaoning, China (''Dalian Altma'') (collectively, the ''Dalian Respondents''); and Japan Takebishi Co., Ltd., of Tokyo, Japan; Takebishi Co., Ltd., of Shiga, Japan; Shanghai Takebishi Packing Material Co., Ltd., of Shanghai, China; and Qingdao Takebishi Packing Industry Co., Ltd., of Qingdao, China (collectively, the ''Unserved Respondents''). *Id.* at 43616–17. It also names the Office of Unfair Import Investigations (''OUII'') as a party. *Id.* at 43617.

On October 7, 2019, the ALJ issued an ID finding the two Dalian Respondents in default. Order No. 7 (Oct. 30, 2019), *unreviewed by* Comm'n Notice (Nov. 26, 2019). On November 19, 2019, the ALJ issued an ID terminating the investigation in part based on Presto's withdrawal of the complaint as to the Unserved Respondents, which were never served with the complaint. Order No. 10 (Nov. 19, 2019), *unreviewed by* Comm'n Notice (Dec. 18, 2019). That ID also terminated the investigation as to (i) claims 6 and 7 of the '531 patent and (ii) claims 6 and 7 of the '058 patent. *Id.*

On November 15, 2019, Presto filed a motion for summary determination that the domestic industry requirement was satisfied and that a violation had been established. Presto's motion requested immediate entry of a limited exclusion order (''LEO'') against the Dalian Respondents, a GEO, and a 100 percent bond. On November 26, 2019, OUII filed a response to the motion supporting the summary determination motion and the requested GEO and 100 percent bond during the period of Presidential review.

On April 21, 2020, the ALJ issued an ID granting summary determination of violation of section 337 by the Dalian Respondents. The ID also contains the ALJ's recommendation on remedy and bonding, in which the ALJ recommends issuance of a GEO or, in the alternative, a LEO directed to the Dalian Respondents, and that a 100 percent bond be set for importation during the period of Presidential review.

On May 1, 2020, OUII filed a petition seeking review of portions of the ID's analysis of the economic prong of the domestic industry requirement. No other party petitioned for review of the ID, and no party filed a response to OUII's petition.

On June 5, 2020, the Commission determined to review the ID in part with respect to the ID's analysis of the economic prong of the DI requirement. 85 FR 35662, 35663 (June 11, 2020). The Commission's notice also requested written submissions on remedy, the public interest, and bonding. *Id.* In particular, the notice requested a response to certain questions regarding whether Presto seeks cease and desist orders against the Dalian Respondents. *Id.* On June 11 and 12, 2020, Presto and OUII, respectively, filed written submissions in response to the Commission's notice. On June 19, 2020, OUII filed a reply submission. No other submissions were received.

Having examined the record in this investigation, including the ID granting summary determination, and the party's submissions, the Commission has determined to affirm, with modified reasoning, the ID's findings with respect to the economic prong of the domestic industry requirement and, thus, the ID's finding of a violation of section 337. The Commission has also determined that the appropriate remedy in this investigation is a GEO prohibiting the unlicensed entry of certain child resistant closures with slider devices having a user actuated insertable torpedo for selectively opening the closures and slider devices therefor that infringe certain claims of the three patents asserted in the investigation, pursuant to section 337(g)(2) (19 U.S.C. 1337(g)(2)). The Commission has further determined that the bond during the period of Presidential review pursuant to section 337(j) (19 U.S.C. 1337(j)) shall be in the amount of 100 percent of the entered value of the imported articles that are subject to the GEO. The Commission has also determined that the public interest factors enumerated in subsection 337(d)(1) (19 U.S.C. 1337(d)(1)) do not preclude the issuance of the GEO. The Commission's order was delivered to the President and to the United States Trade Representative on the day of its issuance. This investigation is hereby terminated in its entirety.

The Commission vote for these determinations took place on August 27, 2020.

The authority for the Commission's determinations is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

While temporary remote operating procedures are in place in response to COVID–19, the Office of the Secretary is not able to serve parties that have not retained counsel or otherwise provided a point of contact for electronic service. Accordingly, pursuant to Commission Rules 201.16(a) and 210.7(a)(1) (19 CFR 201.16(a), 210.7(a)(1)), the Commission orders that the Complainant(s) complete service for any party/parties without a method of electronic service noted on the attached Certificate of Service and shall file proof of service on the Electronic Document Information System (EDIS).

By order of the Commission.

Issued: August 27, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–19338 Filed 9–1–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–636 and 731–TA–1469–1470 (Final)]

Wood Mouldings and Millwork Products From Brazil and China; Scheduling of the Final Phase of Countervailing Duty and Antidumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping and countervailing duty investigation Nos. 701–TA–636 and 731–TA–1469–1470 (Final) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of wood mouldings and millwork products from Brazil and China, primarily provided for in subheadings 4409.10.40, 4409.10.45, 4409.10.50, 4409.22.40, 4409.22.50, 4409.29.41, and 4409.29.51 of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce (''Commerce'') to be subsidized and sold at less-than-fair-value.

DATES: August 12, 2020.

FOR FURTHER INFORMATION CONTACT: Keysha Martinez (202–205–2136), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Scope.—For purposes of these investigations, Commerce has defined the subject merchandise as ''wood mouldings and millwork products that are made of wood (regardless of wood species), bamboo, laminated veneer lumber (LVL), or of wood and composite materials (where the composite materials make up less than 50 percent of the total merchandise), and which are continuously shaped wood or finger-jointed or edge-glued moulding or millwork blanks (whether or not resawn). The merchandise subject to these investigations can be continuously shaped along any of its edges, ends, or faces.

The percentage of composite materials contained in a wood moulding or millwork product is measured by length, except when the composite material is a coating or cladding. Wood mouldings and millwork products that are coated or clad, even along their entire length, with a composite material, but that are otherwise comprised of wood, LVL, or wood and composite materials (where the non-coating composite materials make up 50 percent or less of the total merchandise) are covered by the scope.

The merchandise subject to these investigations consists of wood, LVL, bamboo, or a combination of wood and composite materials that is continuously shaped throughout its length (with the exception of any endwork/dados), profiled wood having a repetitive design in relief, similar milled wood architectural accessories, such as rosettes and plinth blocks, and fingerjointed or edge-glued moulding or millwork blanks (whether or not resawn). The scope includes continuously shaped wood in the forms of dowels, building components such as interior paneling and jamb parts, and door components such as rails, stiles, interior and exterior door frames or jambs (including split, flat, stop applied, single- or double-rabbeted), frame or jamb kits, and packaged door frame trim or casing sets, whether or not the door components are imported as part of a door kit or set.

The covered products may be solid wood, laminated, finger-jointed, edge-glued, face-glued, or otherwise joined in the production or remanufacturing process and are covered by the scope whether imported raw, coated (*e.g.,* gesso, polymer, or plastic), primed, painted, stained, wrapped (paper or vinyl overlay), any combination of the aforementioned surface coatings, treated, or which incorporate rot-resistant elements (whether wood or composite). The covered products are covered by the scope whether or not any surface coating(s) or covers obscures the grain, textures, or markings of the wood, whether or not they are ready for use or require final machining (*e.g.,* endwork/dado, hinge/strike machining, weatherstrip or application thereof, mitre) or packaging.

All wood mouldings and millwork products are included within the scope even if they are trimmed; cut-to-size; notched; punched; drilled; or have undergone other forms of minor processing.

Subject merchandise also includes wood mouldings and millwork products that have been further processed in a third country, including but not limited to trimming, cutting, notching, punching, drilling, coating, or any other processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the country of manufacture of the in-scope product.

Excluded from the scope of these investigations are countertop/butcherblocks, exterior fencing, exterior decking and exterior siding products (including solid wood siding, non-wood siding (*e.g.,* composite or cement), and shingles) that are not LVL or finger jointed; finished and unfinished doors; flooring; parts of stair steps (including newel posts, balusters, easing, gooseneck, risers, treads, rail fittings and stair stringers); picture frame components three feet and under in individual lengths; and lumber whether solid, finger-jointed, or edge-glued. To be excluded from the scope, finger-jointed or edge-glued lumber must have a nominal thickness greater than 1.5 inches and a certification stamp from an American Lumber Standard Committee-certified grading bureau. The exclusion for lumber whether solid, finger-jointed, or edge-glued does not apply to screen/''surfaced on 4 sides'' (S4S) and/or ''surface 1 side, 2 edges'' (S1S2E) stock (also called boards) that are finger-jointed, edge-glued mouldings, or millwork blanks (whether or not resawn).

Excluded from the scope of these investigations are all products covered by the scope of the antidumping duty order on *Hardwood Plywood from the People's Republic of China. See Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 83 FR 504 (January 4, 2018). Excluded from the scope of these investigations are all products covered by the scope of the antidumping duty order on *Multilayered Wood Flooring from the People's Republic of China. See Multilayered Wood Flooring from* *the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order,* 76 FR 76690 (December 8, 2011).

Excluded from the scope of these investigations are all products covered by the scope of the antidumping duty order on *Wooden Cabinets and Vanities from the People's Republic of China. See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Antidumping Duty Order,* 85 FR 22126 (April 21, 2020).

Excluded from the scope of these investigations are all products covered by the scope of the antidumping duty order on *Wooden Bedroom Furniture from the People's Republic of China. See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China,* 70 FR 329 (January 4, 2005).''

Background.—The final phase of these investigations is being scheduled pursuant to sections 705(b) and 731(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)), as a result of affirmative preliminary determinations by Commerce that certain benefits which constitute subsidies within the meaning of § 703 of the Act (19 U.S.C. 1671b) are being provided to manufacturers, producers, or exporters in China of wood mouldings and millwork products, and that such products are being sold in the United States at less than fair value within the meaning of § 733 of the Act (19 U.S.C. 1673b). The investigations were requested in petitions filed on January 8, 2020, by the Coalition of American Millwork Producers (Bright Wood Corporation, Madras, Oregon; Cascade Wood Products, Inc., White City, Oregon; Endura Products, Inc., Colfax, North Carolina; Sierra Pacific Industries, Red Bluff, California; Sunset Moulding, Live Oak, California; Woodgrain Millwork Inc., Fruitland, Idaho; and Yuba River Moulding, Yuba City, California).

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Although Commerce has preliminarily determined that imports of wood mouldings and millwork products from Brazil are not being and are not likely to be sold in the United States at less than fair value, for purposes of efficiency the Commission hereby waives rule 207.21(b) [1] so that the final phase of the investigations may proceed concurrently in the event that Commerce makes a final affirmative determination with respect to such imports.

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on December 8, 2020, and a public version will be issued thereafter, pursuant to § 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on Tuesday, December 22, 2020. Information about the place and form of the hearing, including about how to participate in and/or view the hearing, will be posted on the Commission's website at *https://www.usitc.gov/calendarpad/calendar.html.* Interested parties should check the Commission's website periodically for updates.

Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before December 16, 2020. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should participate in a prehearing conference to be held on December 18, 2020, at the U.S. International Trade Commission Building, if deemed necessary. Oral testimony and written materials to be submitted at the public hearing are governed by §§ 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.23 of the Commission's rules; the deadline for filing is December 15, 2020. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.25 of the Commission's rules. The deadline for filing posthearing briefs is December 31, 2020. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before December 31, 2020. On January 15, 2021, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before January 20, 2021, but such final comments must not contain new factual information and must otherwise comply with § 207.30 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing*

[1] § 207.21(b) of the Commission's rules provides that, where Commerce has issued a negative preliminary determination, the Commission will publish a Final Phase Notice of Scheduling upon receipt of an affirmative final determination from Commerce.

Procedures, available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to § 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.21 of the Commission's rules.

By order of the Commission.

Issued: August 28, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–19368 Filed 9–1–20; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; IRAP Program and Performance Reports for Standards Recognition Entities

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before October 2, 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.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie by telephone at 202–693–0456, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This information collection is authorized under the National Apprenticeship Act (29 U.S.C. 50). This data collection includes two reports for Standards Recognition Entities (SREs): (1) A program report which is required within 30 days of recognizing a new program or changing the status of a current program; and (2) a performance report which is required on an annual basis for each Industry-Recognized Apprenticeship Program (IRAP) they recognize. The information collected in these reports is aligned with the amendments to 29 CFR part 29, as set forth in subpart B. Pursuant to § 29.22(h), SREs are required to report data that will reflect the outcomes of the IRAPs it has recognized. Section 29.22(h) also requires SREs to make publicly available certain data about IRAPs and performance outcomes, which it must submit to the Department. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 26, 2020 (85 FR 31551).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–ETA.

Title of Collection: IRAP Program and Performance Reports for Standards Recognition Entities.

OMB Control Number: 1205–0NEW.

Affected Public: State, Local, and Tribal Governments; Private Sector—Businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 3,794.

Total Estimated Number of Responses: 12,447.

Total Estimated Annual Time Burden: 111,118 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Crystal Rennie,

Acting Departmental Clearance Officer.

[FR Doc. 2020–19339 Filed 9–1–20; 8:45 am]

BILLING CODE 4510–FR–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 11005620; NRC–2020–0105]

Energy Solutions Services, Inc.

AGENCY: Nuclear Regulatory Commission.

ACTION: Export license amendment application; opportunity to provide comment, request a hearing, and petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) received and is considering an application (XW010/04) from Energy*Solutions* Services, Inc. (ESSI) to amend and renew an existing license authorizing the export of radioactive waste to Canada. The NRC is providing notice of the opportunity to submit written comments, request a hearing, or a petition for leave to intervene on ESSI's application.

DATES: Submit comments by October 2, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received before this date. A request for a hearing or a petition for leave to intervene must be filed by October 2, 2020.

ADDRESSES: You may submit comments by any of the following methods:

• *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0105. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Email comments to: Hearing.Docket@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.

• *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

• *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

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: Stephen C. Baker, Office of International Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–287–9059, email: *Stephen.Baker@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to NRC–2020–0198 or Docket No. 11005620 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by the following methods:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0186.

• *NRC's Public Website:* Go to *https://www.nrc.gov* and search for XW010/04, Docket No. 11005620, or Docket ID NRC–2020–0105.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The export license amendment application from ESSI is available in ADAMS under Accession No. ML20211L826.

B. Submitting Comments

Please include Docket ID NRC–2020–0105 or Docket No. 11005620 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

In accordance with section 110.70(b) of title 10 of the *Code of Federal Regulations* (10 CFR), the NRC is providing notice of an application (XW010/04), submitted by ESSI on July 28, 2020, to amend and renew an existing export license authorizing the export of Canadian-origin radioactive waste from ESSI processing facilities in the State of Tennessee to Canada. The existing export license (XW010/03), which expires on December 31, 2020, authorizes the export of up to 10,000 tons of low-level radioactive waste, previously imported from Canada, resulting from the incineration of heath ash non-conforming materials. The application requests: (1) Renewing the cumulative radioactivity limits for XW010 of the total quantities of radioactive material/waste and increasing the weight of radioactive material/waste exported to Canada; (2) adding to the export license the authorization to export primary heat transfer pumps back to Canada if they are deemed unrepairable and categorized as waste for disposal in Canada if not processed for metal melt recycle; and (3) extending the license expiration date to December 31, 2026.

The NRC is providing notice of the receipt of the application; providing the opportunity to submit written comments concerning the application; and providing the opportunity to request a hearing or petition for leave to intervene for a period of 30 days after publication of this notice in the **Federal Register**. A hearing request or petition for leave to intervene must include the information specified in 10 CFR 110.82(b). Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner in accordance with 10 CFR 110.89(a), either by delivery, by mail, or filed with the NRC electronically in accordance with NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562, August 3, 2012). Information about filing electronically is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

To ensure timely electronic filing, at least 10 days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by calling 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

The information concerning this application for an export license amendment follows.

NRC EXPORT LICENSE AMENDMENT/RENEWAL APPLICATION

Application Information	
Name of Applicant	Energy*Solutions* Services, Inc.
Date of Application	July 14, 2020.
Date Received	July 28, 2020.
Application No.	XW010/04.
Docket No.	11005620.
ADAMS Accession No.	ML20211L826.

Description of Material	
Material Type	Mixed waste consisting of mixed hazardous and radioactive waste constituents, contaminated recyclable resource material/waste such as lead bricks or sheet as necessary.
Total Quantity [1]	Authorization to export a total maximum quantity of 380.064 TBq, based on the maximum activity authorized for possession at Energy Solutions Canada, Inc. ES Walker Operations as follows: H-3: 14.8 TBq, C-14: 7.4 Tbq, Ra-226: 0.74 TBq, Th-232: 0.74 TBq, Po-210: 0.37 TBq, Uranium (natural or depleted): 7.4 TBq, Uranium (not U-233, U-235 or U-238): 0.07 TBq, Atomic number 3 to 83: 29.6 TBq, Atomic number 84 to 91 (total): 0.09, Transuranics (TRU): 0.09 TBq, Am-241: 9.3 TBq, Fe-55: 37 TBq, and Special Nuclear Material (SNM), 235U equivalent: 350 grams.[2]
End Use	Return of non-conforming waste and/or waste resulting from processing materials for appropriate disposition. The amendment requests: (1) Renewing the radioactive limits for XW010 of the total quantities of radioactive material/waste and weights exported to Canada; (2) adding authorization to export primary heat transfer pumps back to Canada if they are deemed unrepairable and categorized as waste for disposal in Canada if not processed for metal melt recycle; and (3) extending the license expiration date to December 31, 2026.
Country of Destination	Canada.

[1] The permit activity limits are the cumulative total maximums over the term of the permit.
[2] Uranium 235 gram equivalent by weight of 350 grams (ESSI will not import enrichment level that exceed 20% by weight U-235)

Dated: August 27, 2020.

For the Nuclear Regulatory Commission.

David L. Skeen,

Deputy Director, Office of International Programs.

[FR Doc. 2020–19404 Filed 9–1–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Revised 678th Meeting of the Advisory Committee on Reactor Safeguards (ACRS)

In accordance with the purposes of Sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232b), the Advisory Committee on Reactor Safeguards (ACRS) will hold meetings on September 9–12, 2020. As part of the coordinated government response to combat the COVID–19 public health emergency, the Committee will conduct virtual meetings. The public will be able to participate in any open sessions via 1–866–822–3032, pass code 8272423#.

Wednesday, September 9, 2020

9:30 a.m.–9:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

9:35 a.m.–6:00 p.m.: Preparation of ACRS Reports (Open/Closed)—The Committee will have a discussion of the proposed ACRS report on observations and lessons-learned from ACRS licensing review for future applications including the NuScale design certification application review. **[NOTE: Pursuant to 5 U.S.C 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]**

[NOTE: Pursuant to 5 U.S.C. 552b(c)(2) and (6), a portion of this meeting may be closed to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.]

Thursday, September 10, 2020

9:35 a.m.–11:00 a.m.: Staff White Paper on 10 CFR part 53 Advanced Notice of Proposed Rulemaking (Open)—The Committee will have presentations and discussion with the NRC staff regarding the subject topic.

11:15 a.m.–1:30 p.m.: GEH Topical Report NEDC–3391P, ''BWRX–300 Reactor Vessel and Overpressure Protection'' (Open/Closed)—The Committee will have presentations and discussion with GEH and the NRC staff regarding the subject topic. **[NOTE: Pursuant to 5 U.S.C 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]**

2:30 p.m.–4:00 p.m.: Topical Report ANP–10337, Supplement 1, ''Deformer Spacer Grid Element'' (Open/Closed)—The Committee will have presentations and discussion with the NRC staff regarding the subject topic. **[NOTE: Pursuant to 5 U.S.C 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.].**

4:15 p.m.–6:15 p.m.: Preparation of ACRS Reports (Open/Closed)—The

Committee will continue its discussion of proposed ACRS reports. **[NOTE: Pursuant to 5 U.S.C 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]**

Friday, September 11, 2020

9:30 a.m.–10:30 a.m.: Future ACRS Activities/Report of the Planning and Procedures Subcommittee and Reconciliation of ACRS Comments and Recommendations/Preparation of Reports (Open/Closed)—The Committee will hear discussion of the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the Full Committee during future ACRS meetings, and/or proceed to preparation of reports as determined by the Chairman. **[NOTE: Pursuant to 5 U.S.C. 552b(c)(2) and (6), a portion of this meeting may be closed to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.]**

[NOTE: Pursuant to 5 U.S.C 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

10:30 a.m.–12:30 p.m.: Future Focused Research Projects (Open)—The Committee will have presentations and discussion with the NRC staff regarding the subject topic.

1:30 p.m.–6:00 p.m.: Preparation of ACRS Reports (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. **[NOTE: Pursuant to 5 U.S.C 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]**

Saturday, September 12, 2020

9:30 a.m.–2:00 p.m.: Preparation of ACRS Reports (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. **[NOTE: Pursuant to 5 U.S.C 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]**

[NOTE: Pursuant to 5 U.S.C. 552b(c)(2) and (6), portions of this meeting may be closed to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.]

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on June 13, 2019 (84 FR 27662). In accordance with those procedures, oral or written views may be presented by members of the public, including representatives of the nuclear industry. Persons desiring to make oral statements should notify Quynh Nguyen, Cognizant ACRS Staff and the Designated Federal Official (DFO) (Telephone: 301–415–5844, Email: *Quynh.Nguyen@nrc.gov*), 5 days before the meeting, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the Cognizant ACRS staff if such rescheduling would result in major inconvenience.

An electronic copy of each presentation should be emailed to the Cognizant ACRS Staff at least one day before meeting.

In accordance with Subsection 10(d) of Public Law 92–463 and 5 U.S.C. 552b(c), certain portions of this meeting may be closed, as specifically noted above. Use of still, motion picture, and television cameras during the meeting may be limited to selected portions of the meeting as determined by the Chairman. Electronic recordings will be permitted only during the open portions of the meeting.

ACRS meeting agendas, meeting transcripts, and letter reports are available through the NRC Public Document Room at *pdr.resource@nrc.gov,* or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System (PARS) component of NRC's document system (ADAMS) which is accessible from the NRC website at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/#ACRS/*.

Video teleconferencing service is available for observing open sessions of ACRS meetings. Those wishing to use this service should contact Thomas Dashiell, ACRS Audio Visual Technician (301–415–7907), between 7:30 a.m. and 3:45 p.m. (ET), at least 10 days before the meeting to ensure the availability of this service. Individuals or organizations requesting this service will be responsible for telephone line charges and for providing the equipment and facilities that they use to establish the video teleconferencing link. The availability of video teleconferencing services is not guaranteed.

Note: *The revision of this FRN is due to the addition of the sessions on Wednesday, September 9, 2020.*

Dated: August 28, 2020.

Russell E. Chazell,

Federal Advisory Committee Management Officer, Office of the Secretary.

[FR Doc. 2020–19408 Filed 9–1–20; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33998, File No. 812–15123]

Spinnaker ETF Series, et al.

August 28, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

Applicants: Spinnaker ETF Series (the ''Trust''), OBP Capital LLC (the ''Adviser'') and Capital Investment Group, Inc. (the ''Distributor'').

Summary of Application: Applicants request an order (''Order'') that permits: (a) The Funds (defined below) to issue shares (''Shares'') redeemable in large aggregations only (''creation units''); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value; (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of creation units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the Funds to acquire Shares of the Funds. The Order would incorporate by reference terms and conditions of a previous order granting the same relief sought by applicants, as that order may be amended from time to time ("Reference Order").[1]

Filing Date: The application was filed on April 16, 2020 and amended on July 22, 2020.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on September 22, 2020, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: c/o Tracie Coop, Secretary, Spinnaker ETF Series, *traciecoop@ncfunds.com.*

FOR FURTHER INFORMATION CONTACT: Laura J. Riegel, Senior Counsel, at (202) 551–3038 or Trace W. Rakestraw, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants

1. The Trust is a statutory trust organized under the laws of Delaware and will consist of one or more series operating as a Fund. The Trust is registered as an open-end management investment company under the Act. Applicants seek relief with respect to Funds (as defined below), including an initial Fund (the "Initial Fund"). The Funds will offer exchange-traded shares utilizing active management investment strategies as contemplated by the Reference Order.[2]

2. The Adviser, a North Carolina limited liability company, will be the investment adviser to the Initial Fund. Subject to approval by the Fund's board of trustees, the Adviser (as defined below) will serve as investment adviser to each Fund. The Adviser is, and any other Adviser will be, registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"). The Adviser may enter into sub-advisory agreements with other investment advisers to act as sub-advisers with respect to the Funds (each a "Sub-Adviser"). Any Sub-Adviser to a Fund will be registered under the Advisers Act.

3. The Distributor is a North Carolina corporation and a broker-dealer registered under the Securities Exchange Act of 1934, as amended, and will act as the principal underwriter of Shares of the Funds. Applicants request that the requested relief apply to any distributor of Shares, whether affiliated or unaffiliated with the Adviser and/or Sub-Adviser (included in the term "Distributor"). Any Distributor will comply with the terms and conditions of the Order.

Applicants' Requested Exemptive Relief

4. Applicants seek the requested Order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested Order would permit applicants to offer Funds that utilize the NYSE Proxy Portfolio Methodology. Because the relief requested is the same as the relief granted by the Commission under the Reference Order and because the Adviser has entered into a licensing agreement with NYSE Group, Inc. in order to offer Funds that utilize the NYSE Proxy Portfolio Methodology,[3] the Order would incorporate by reference the terms and conditions of the Reference Order.

5. Applicants request that the Order apply to the Initial Fund and to any other existing or future registered open-end management investment company or series thereof that: (a) Is advised by the Adviser or any entity controlling, controlled by, or under common control with the Adviser (any such entity included in the term "Adviser"); (b) offers exchange-traded shares utilizing active management investment strategies as contemplated by the Reference Order; and (c) complies with the terms and conditions of the Order and of the Reference Order, which is incorporated by reference into the Order (each such company or series and the Initial Fund, a "Fund").[4]

6. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provisions of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the transaction is consistent with the policies of the registered investment company and the general purposes of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Applicants submit that for the reasons stated in the Reference Order the requested relief meets the exemptive standards under sections 6(c), 17(b) and 12(d)(1)(J) of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19427 Filed 9–1–20; 8:45 am]

BILLING CODE 8011–01–P

[1] Natixis ETF Trust II, *et al.,* Investment Company Act Rel. Nos. 33684 (November 14, 2019) (notice) and 33711 (December 10, 2019) (order).

[2] To facilitate arbitrage, among other things, each day a Fund will publish a basket of securities and cash that, while different from the Fund's portfolio, is designed to closely track its daily performance.

[3] The NYSE Proxy Portfolio Methodology (as defined in the Reference Order) is the intellectual property of the NYSE Group, Inc.

[4] All entities that currently intend to rely on the Order are named as applicants. Any other entity that relies on the Order in the future will comply with the terms and conditions of the Order and of the Reference Order, which is incorporated by reference into the Order.

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33958A; File No. 812–15057]

Morgan Stanley Direct Lending Fund, et al.

August 28, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

Summary of Application: Applicants request an order to permit certain business development companies (''BDCs'') and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated funds.

Applicants: Morgan Stanley Direct Lending Fund (''MS BDC''), MS Capital Partners Adviser Inc. (''MS Adviser''), NH Credit Partners III Holdings L.P., NH Expansion Credit Fund Holdings LP, North Haven Credit Partners II L.P., North Haven Credit Partners III L.P., North Haven Senior Loan Fund (ALMA) Designated Activity Company, North Haven Senior Loan Fund L.P., North Haven Senior Loan Fund Offshore L.P., North Haven Senior Loan Fund Unleveraged Offshore L.P., North Haven Tactical Value Fund (AIV) LP, North Haven Tactical Value Fund LP, North Haven Unleveraged Senior Loan Fund (Yen) L.P., NH Senior Loan Fund Offshore Holdings L.P., NH Senior Loan Fund Onshore Holdings LLC, and DLF CA SPV LLC (''MS BDC Sub'').

Filing Dates: The application was filed on August 9, 2019, and amended on December 20, 2019, April 3, 2020, May 21, 2020, and August 27, 2020.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on September 17, 2020, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Mr. Mustufa Salehbhai, Executive Director, *Mustufa.Salehbhai@morganstanley.com.*

FOR FURTHER INFORMATION CONTACT: Jean E. Minarick, Senior Counsel, at (202) 551–6811 or Kaitlin C. Bottock, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Introduction

1. The applicants request an order of the Commission under sections 17(d) and 57(i) of the Act and rule 17d–1 thereunder (the ''Order'') to permit, subject to the terms and conditions set forth in the application (the ''Conditions''), a Regulated Fund [1] and one or more other Regulated Funds and/or one or more Affiliated Funds [2] to enter into Co-Investment Transactions with each other. ''Co-Investment Transaction'' means any transaction in which a Regulated Fund (or its Wholly-Owned Investment Sub (as defined below)) participated together with one or more Affiliated Funds and/or one or more other Regulated Funds (or its Wholly-Owned Investment Sub) in reliance on the Order. ''Potential Co-Investment Transaction'' means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more Affiliated Funds and/or one or more other Regulated Funds (or its Wholly-Owned Investment Sub) without obtaining and relying on the Order.[3]

Applicants

2. MS BDC is a non-diversified, closed-end management investment company incorporated in Delaware that will elect to be regulated as a BDC under the Act.[4] The Board [5] of MS BDC currently consist of six directors, four of whom are Independent Directors.[6]

3. MS Adviser, a corporation under the laws of the state of Delaware, is registered with the Commission as an investment adviser under the Advisers Act. MS Adviser is a wholly-owned subsidiary of Morgan Stanley, a global financial services firm that through its subsidiaries and affiliates, advises, originates, trades, manages and distributes capital for governments, institutions and individuals. Morgan Stanley is a bank holding company structured as a Delaware corporation that controls the MS Adviser.

4. MS BDC Sub is a wholly-owned subsidiary of MS BDC formed specifically for the purpose of procuring financing or otherwise holding investments.

5. Applicants state that a Regulated Fund may, from time to time, form one or more Wholly-Owned Investment Subs.[7] Such a subsidiary may be

[1] ''Regulated Funds'' means MS BDC and the Future Regulated Funds. ''Future Regulated Fund'' means a closed-end management investment company (a) that is registered under the Act or has elected to be regulated as a BDC, (b) whose investment adviser (and sub-adviser, if any) is an Adviser, and (c) that intends to participate in the Co-investment Program.

''Adviser'' means the MS Adviser, together with any future investment adviser that (a) is controlled by the MS Adviser, (b) (i) is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') or (ii) is a relying adviser of an investment adviser that is registered under the Advisers Act, and that is controlled by the MS Adviser, and (c) is not a Regulated Fund or a subsidiary of a Regulated Fund.

[2] ''Affiliated Fund'' means any entity (a) whose investment adviser (and sub-adviser(s), if any) is an Adviser, (b) that either (i) would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act or (ii) relies on rule 3a–7 under the Act, and (c) that intends to participate in the Co-Investment Program.

[3] All existing entities that currently intend to rely on the Order have been named as applicants and any existing or future entities that may rely on the Order in the future will comply with its terms and Conditions set forth in the application.

[4] Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in section 55(a)(1) through 55(a)(3) and makes available significant managerial assistance with respect to the issuers of such securities.

[5] ''Board'' means the board of directors (or the equivalent) of a Regulated Fund.

[6] ''Independent Director'' means a member of the Board of any relevant entity who is not an ''interested person'' as defined in section 2(a)(19) of the Act. No Independent Director of a Regulated Fund (including any non-interested member of an Independent Party) will have a financial interest in any Co-Investment Transaction, other than indirectly through share ownership in one of the Regulated Funds.

[7] ''Wholly-Owned Investment Sub'' means the MS BDC Sub or an entity (i) that is wholly-owned by a Regulated Fund (with such Regulated Fund at all times holding, beneficially and of record, 100% or more of the voting and economic interests); (ii) whose sole business purpose is to hold one or more investments on behalf of such Regulated Fund (and in the case of an SBIC Subsidiary, maintain a license under the Small Business Investment Act of

prohibited from investing in a Co-Investment Transaction with a Regulated Fund (other than its parent) or any Affiliated Fund because it would be a company controlled by its parent Regulated Fund for purposes of section 57(a)(4) and rule 17d–1. Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of the Regulated Fund that owns it and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for purposes of the Order, as though the parent Regulated Fund were participating directly.

Applicants' Representations

A. Allocation Process

6. Applicants represent that the Adviser will establish processes for allocating initial investment opportunities, opportunities for subsequent investments in an issuer and dispositions of securities holdings reasonably designed to treat all clients fairly and equitably. Further, applicants represent that these processes will be extended and modified in a manner reasonably designed to ensure that the additional transactions permitted under the Order will both (i) be fair and equitable to the Regulated Funds and the Affiliated Funds and (ii) comply with the Conditions.

7. Opportunities for Potential Co-Investment Transactions may arise when investment advisory personnel of an Adviser becomes aware of investment opportunities that may be appropriate for one or more Regulated Funds and/or one or more Affiliated Funds. If the requested Order is granted, the Adviser will establish, maintain and implement policies and procedures reasonably designed to ensure that, when such opportunities arise, the Advisers to the relevant Regulated Funds are promptly notified and receive the same information about the opportunity as any other Advisers considering the opportunity for their clients. In particular, consistent with Condition 1, if a Potential Co-Investment Transaction falls within the then-current Objectives and Strategies [8] and any Board-Established Criteria [9] of a Regulated Fund, the policies and procedures will require that the relevant portfolio managers, as well as the teams and committees of portfolio managers, analysts and senior management (''Investment Teams'' and ''Investment Committees'') responsible for that Regulated Fund receive sufficient information to allow the Regulated Fund's Adviser to make its independent determination and recommendations under the Conditions. The Adviser to each applicable Regulated Fund, working through the applicable portfolio manager, or in conjunction with any applicable Investment Team or Investment Committee, will then make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances. If the Adviser to a Regulated Fund deems the Regulated Fund's participation in such Potential Co-Investment Transaction to be appropriate, then it will, working through the applicable portfolio manager, or in conjunction with any applicable Investment Team or Investment Committee, formulate a recommendation regarding the proposed order amount for the Regulated Fund.

8. Applicants state that, for each Regulated Fund and Affiliated Fund whose Adviser recommends participating in a Potential Co-Investment Transaction, the Adviser, working through the applicable portfolio manager, or in conjunction with any applicable Investment Team or Investment Committee, will approve an investment amount. Prior to the External Submission (as defined below), each proposed order amount may be reviewed and adjusted, in accordance with the applicable Advisers' written allocation policies and procedures, by the Morgan Stanley Private Credit Allocation Committee, on which senior management and the Adviser's chief compliance officer participate.[10] The order of a Regulated Fund or Affiliated Fund resulting from this process is referred to as its ''Internal Order.'' The Internal Order will be submitted for approval by the Required Majority of any participating Regulated Funds in accordance with the Conditions.[11]

9. If the aggregate Internal Orders for a Potential Co-Investment Transaction do not exceed the size of the investment opportunity immediately prior to the submission of the orders to the underwriter, broker, dealer or issuer, as applicable (the ''External Submission''), then each Internal Order will be fulfilled as placed. If, on the other hand, the aggregate Internal Orders for a Potential Co-Investment Transaction exceed the size of the investment opportunity immediately prior to the External Submission, then the allocation of the opportunity will be made pro rata on the basis of the size of the Internal Orders.[12] If, subsequent to such External Submission, the size of the opportunity is increased or decreased, or if the terms of such opportunity, or the facts and circumstances applicable to the Regulated Funds' or the Affiliated Funds' consideration of the opportunity, change, the participants will be

1958 (''SBA Act'') and issue debentures guaranteed by the Small Business Administration (''SBA'')); (iii) with respect to which such Regulated Fund's Board has the sole authority to make all determinations with respect to the entity's participation under the Conditions; and (iv) that (a) would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act, or (b) that relies on Rule 3a–7 under the Act. ''SBIC Subsidiary'' means a Wholly-Owned Investment Sub that is licensed by the SBA to operate under the SBA Act as a small business investment company.

[8] ''Objectives and Strategies'' means (i) with respect to any Regulated Fund, its investment objectives and strategies, as described in its most current filings with the Commission under the Securities Act of 1933 (''Securities Act'') or under the Securities Exchange Act of 1934, and the Act, and its most current report to stockholders.

[9] ''Board-Established Criteria'' means criteria that the Board of a Regulated Fund may establish from time to time to describe the characteristics of Potential Co-Investment Transactions regarding which the Adviser to the Regulated Fund should be notified under Condition 1. The Board-Established Criteria will be consistent with the Regulated Fund's Objectives and Strategies. If no Board-Established Criteria are in effect, then the Regulated Fund's Adviser will be notified of all Potential Co-Investment Transactions that fall within the Regulated Fund's then-current Objectives and Strategies. Board-Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve a discretionary assessment. The Adviser to the Regulated Fund may from time to time recommend criteria for the Board's consideration, but Board-Established Criteria will only become effective if approved by a majority of the Independent Directors. The Independent Directors of a Regulated Fund may at any time rescind, suspend or qualify their approval of any Board-Established Criteria, though applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[10] The reason for any such adjustment to a proposed order amount will be documented in writing and preserved in the records of each Adviser.

[11] ''Required Majority'' means a required majority, as defined in section 57(o) of the Act. In the case of a Regulated Fund that is a registered closed-end fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a BDC subject to section 57(o).

[12] The Advisers will maintain records of all proposed order amounts, Internal Orders and External Submissions in conjunction with Potential Co-Investment Transactions. Each applicable Adviser will provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with the Conditions.

''Eligible Directors'' means, with respect to a Regulated Fund and a Potential Co-Investment Transaction, the members of the Regulated Fund's Board eligible to vote on that Potential Co-Investment Transaction under section 57(o) of the Act (treating any registered investment company or series thereof as a BDC for this purpose).

permitted to submit revised Internal Orders in accordance with written allocation policies and procedures that the Advisers will establish, implement and maintain.[13]

B. Follow-On Investments

10. Applicants state that from time to time the Regulated Funds and Affiliated Funds may have opportunities to make Follow-On Investments [14] in an issuer in which a Regulated Fund and one or more other Regulated Funds and/or Affiliated Funds previously have invested.

11. Applicants propose that Follow-On Investments would be divided into two categories depending on whether the prior investment was a Co-Investment Transaction or a Pre-Boarding Investment.[15] If the Regulated Funds and Affiliated Funds had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Follow-On Investment would be subject to the Standard Review Follow-Ons described in Condition 8. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Follow-On Investment would be subject to the Enhanced-Review Follow-Ons described in Condition 9. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Funds and Affiliated Funds would need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer would be governed by the requirements of Standard Review Follow-Ons.

12. A Regulated Fund would be permitted to invest in Standard Review Follow-Ons either with the approval of the Required Majority under Condition 8(c) or without Board approval under Condition 8(b) if it is (i) a Pro Rata Follow-On Investment [16] or (ii) a Non-Negotiated Follow-On Investment.[17] Applicants believe that these Pro Rata and Non-Negotiated Follow-On Investments do not present a significant opportunity for overreaching on the part of any Adviser and thus do not warrant the time or the attention of the Board. Pro Rata Follow-On Investments and Non-Negotiated Follow-On Investments remain subject to the Board's periodic review in accordance with Condition 10.

C. Dispositions

13. Applicants propose that Dispositions [18] would be divided into two categories. If the Regulated Funds and Affiliated Funds holding investments in the issuer had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Disposition would be subject to the Standard Review Dispositions described in Condition 6. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Disposition would be subject to the Enhanced Review Dispositions described in Condition 7. Subsequent Dispositions with respect to the same issuer would be governed by Condition 6 under the Standard Review Dispositions.[19]

14. A Regulated Fund may participate in a Standard Review Disposition either with the approval of the Required Majority under Condition 6(d) or without Board approval under Condition 6(c) if (i) the Disposition is a Pro Rata Disposition [20] or (ii) the securities are Tradable Securities [21] and the Disposition meets the other requirements of Condition 6(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the Board's periodic review in accordance with Condition 10.

D. Delayed Settlement

15. Applicants represent that under the terms and Conditions of the application, all Regulated Funds and Affiliated Funds participating in a Co-Investment Transaction will invest at the same time, for the same price and with the same terms, conditions, class, registration rights and any other rights, so that none of them receives terms

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[13] The Board of the Regulated Fund will then either approve or disapprove of the investment opportunity in accordance with Condition 2, 6, 7, 8 or 9, as applicable.

[14] ''Follow-On Investment'' means an additional investment in the same issuer, including, but not limited to, through the exercise of warrants, conversion privileges or other rights to purchase securities of the issuer.

[15] ''Pre-Boarding Investments'' are investments in an issuer held by a Regulated Fund as well as one or more Affiliated Funds and/or one or more other Regulated Funds that: (a) Were acquired prior to participating in any Co-Investment Transaction; (b) were acquired in transactions in which the only term negotiated by or on behalf of such funds was price; and (c) were acquired either (i) in reliance on one of the JT No-Action Letters (defined below); or (ii) in transactions occurring at least 90 days apart and without coordination between the Regulated Fund and any Affiliated Fund or other Regulated Fund.

[16] A ''Pro Rata Follow-On Investment'' is a Follow-On Investment (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investments in the issuer or security, as appropriate, immediately preceding the Follow-On Investment, and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in the pro rata Follow-On Investments as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Follow-On Investments, in which case all subsequent Follow-On Investments will be submitted to the Regulated Fund's Eligible Directors in accordance with Condition 8(c).

[17] A ''Non-Negotiated Follow-On Investment'' is a Follow-On Investment in which a Regulated Fund participates together with one or more Affiliated Funds and/or one or more other Regulated Funds (i) in which the only term negotiated by or on behalf of the funds is price and (ii) with respect to which, if the transaction were considered on its own, the funds would be entitled to rely on one of the JT No-Action Letters.

''JT No-Action Letters'' means SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life Insurance Company, SEC No-Action Letter (pub. avail. June 7, 2000).

[18] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[19] However, with respect to an issuer, if a Regulated Fund's first Co-Investment Transaction is an Enhanced Review Disposition, and the Regulated Fund does not dispose of its entire position in the Enhanced Review Disposition, then before such Regulated Fund may complete its first Standard Review Follow-On in such issuer, the Eligible Directors must review the proposed Follow-On Investment not only on a stand-alone basis but also in relation to the total economic exposure in such issuer (*i.e.,* in combination with the portion of the Pre-Boarding Investment not disposed of in the Enhanced Review Disposition), and the other terms of the investments. This additional review would be required because such findings would not have been required in connection with the prior Enhanced Review Disposition, but they would have been required had the first Co-Investment Transaction been an Enhanced Review Follow-On.

[20] A ''Pro Rata Disposition'' is a Disposition (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investment in the security subject to Disposition immediately preceding the Disposition; and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in pro rata Dispositions as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Dispositions, in which case all subsequent Dispositions will be submitted to the Regulated Fund's Eligible Directors.

[21] ''Tradable Security'' means a security that meets the following criteria at the time of Disposition: (i) It trades on a national securities exchange or designated offshore securities market as defined in rule 902(b) under the Securities Act; (ii) it is not subject to restrictive agreements with the issuer or other security holders; and (iii) it trades with sufficient volume and liquidity (findings as to which are documented by the Advisers to any Regulated Funds holding investments in the issuer and retained for the life of the Regulated Fund) to allow each Regulated Fund to dispose of its entire position remaining after the proposed Disposition within a short period of time not exceeding 30 days at approximately the value (as defined by section 2(a)(41) of the Act) at which the Regulated Fund has valued the investment.

more favorable than any other. However, the settlement date for an Affiliated Fund in a Co-Investment Transaction may occur up to ten business days after the settlement date for the Regulated Fund, and vice versa. Nevertheless, in all cases, (i) the date on which the commitments of the Affiliated Funds and Regulated Funds are made will be the same even where the settlement date is not and (ii) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other.

E. Holders

16. Under Condition 15, if an Adviser, its principals, or any person controlling, controlled by, or under common control with the Adviser or its principals, and the Affiliated Funds (collectively, the ''Holders'') own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (the ''Shares''), then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on matters specified in the Condition.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit participation by a registered investment company and an affiliated person in any ''joint enterprise or other joint arrangement or profit-sharing plan,'' as defined in the rule, without prior approval by the Commission by order upon application. Section 17(d) of the Act and rule 17d–1 under the Act are applicable to Regulated Funds that are registered closed-end investment companies.

2. Similarly, with regard to BDCs, section 57(a)(4) of the Act generally prohibits certain persons specified in section 57(b) from participating in joint transactions with the BDC or a company controlled by the BDC in contravention of rules as prescribed by the Commission. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to transactions subject to section 57(a)(4). Because the Commission has not adopted any rules under section 57(a)(4), rule 17d–1 also applies to joint transactions with Regulated Funds that are BDCs.

3. Co-Investment Transactions are prohibited by either or both of rule 17d–1 and section 57(a)(4) without a prior exemptive order of the Commission to the extent that the Affiliated Funds and the Regulated Funds participating in such transactions fall within the category of persons described by rule 17d–1 and/or section 57(b), as modified by rule 57b–1 thereunder, as applicable, vis-à-vis each participating Regulated Fund. Because an Adviser will be the investment adviser (and sub-adviser, if any) to each Affiliated Fund and Regulated Fund, the Advisers, a Regulated Fund and the Affiliated Funds may be deemed to be a person related to each other Regulated Fund in a manner described by section 57(b) (or section 17(d) in the case of Regulated Funds that are registered under the Act). Thus, each Regulated Fund and each Affiliated Fund could be deemed to be a person related to a Regulated Fund, in a manner described by section 57(b) and related to the other Regulated Funds in a manner described by rule 17d–1; and therefore the prohibitions of rule 17d–1 and section 57(a)(4) (or Section 17(d) in the case of Regulated Funds that are registered under the Act) would apply respectively to prohibit the Affiliated Funds from participating in Co-Investment Transactions with the Regulated Funds. Further, because the Wholly-Owned Investment Subs are controlled by the Regulated Funds, the Wholly-Owned Investment Subs are subject to section 57(a)(4) (or section 17(d) in the case of Wholly-Owned Investment Subs controlled by Regulated Funds that are registered under the Act) and thus also subject to the provisions of rule 17d–1.

4. In passing upon applications under rule 17d–1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

5. Applicants state that in the absence of the requested relief, in many circumstances the Regulated Funds would be limited in their ability to participate in attractive and appropriate investment opportunities. Applicants state that, as required by rule 17d–1(b), the Conditions ensure that the terms on which Co-Investment Transactions may be made will be consistent with the participation of the Regulated Funds being on a basis that it is neither different from nor less advantageous than other participants, thus protecting the equity holders of any participant from being disadvantaged. Applicants further state that the Conditions ensure that all Co-Investment Transactions are reasonable and fair to the Regulated Funds and their shareholders and do not involve overreaching by any person concerned, including the Advisers. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions in accordance with the Conditions will be consistent with the provisions, policies, and purposes of the Act and would be done in a manner that is not different from, or less advantageous than, that of other participants.

Applicants' Conditions

Applicants agree that the Order will be subject to the following Conditions:

1. *Identification and Referral of Potential Co-Investment Transactions.*

(a) The Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that each Adviser is promptly notified of all Potential Co-Investment Transactions that fall within the then-current Objectives and Strategies and Board-Established Criteria of any Regulated Fund the Adviser manages.

(b) When an Adviser to a Regulated Fund is notified of a Potential Co-Investment Transaction under Condition 1(a), the Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. *Board Approvals of Co-Investment Transactions.*

(a) If the Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by the Advisers to be invested in the Potential Co-Investment Transaction by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application. Each Adviser to a participating Regulated Fund will promptly notify and provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with these Conditions.

(c) After making the determinations required in Condition 1(b) above, each Adviser to a participating Regulated Fund will distribute written information concerning the Potential Co-Investment

Transaction (including the amount proposed to be invested by each participating Regulated Fund and each participating Affiliated Fund) to the Eligible Directors of its participating Regulated Fund(s) for their consideration. A Regulated Fund will enter into a Co-Investment Transaction with one or more other Regulated Funds or Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its equity holders and do not involve overreaching in respect of the Regulated Fund or its equity holders on the part of any person concerned;

(ii) the transaction is consistent with:

(A) The interests of the Regulated Fund's equity holders; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Fund(s) or Affiliated Fund(s) would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from, or less advantageous than, that of any other Regulated Fund(s) or Affiliated Fund(s) participating in the transaction; provided that the Required Majority shall not be prohibited from reaching the conclusions required by this Condition 2(c)(iii) if:

(A) The settlement date for another Regulated Fund or an Affiliated Fund in a Co-Investment Transaction is later than the settlement date for the Regulated Fund by no more than ten business days or earlier than the settlement date for the Regulated Fund by no more than ten business days, in either case, so long as: (x) The date on which the commitments of the Affiliated Funds and Regulated Funds are made is the same; and (y) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other; or

(B) any other Regulated Fund or Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors, the right to have a board observer or any similar right to participate in the governance or management of the portfolio company so long as: (x) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any; (y) the Adviser agrees to, and does, provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and (z) any fees or other compensation that any other Regulated Fund or Affiliated Fund or any affiliated person of any other Regulated Fund or Affiliated Fund receives in connection with the right of one or more Regulated Funds or Affiliated Funds to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among any participating Affiliated Funds (who may, in turn, share their portion with their affiliated persons) and any participating Regulated Fund(s) in accordance with the amount of each such party's investment; and

(iv) the proposed investment by the Regulated Fund will not involve compensation, remuneration or a direct or indirect [22] financial benefit to the Advisers, any other Regulated Funds, the Affiliated Funds or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by Condition 14, (B) to the extent permitted by section 17(e) or 57(k), as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in Condition 2(c)(iii)(B)(z).

3. *Right to Decline.* Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. *General Limitation.* Except for Follow-On Investments made in accordance with Conditions 8 and 9 below,[23] a Regulated Fund will not invest in reliance on the Order in any issuer in which a Related Party has an investment.[24]

5. *Same Terms and Conditions.* A Regulated Fund will not participate in any Potential Co-Investment Transaction unless (i) the terms, conditions, price, class of securities to be purchased, date on which the commitment is entered into and registration rights (if any) will be the same for each participating Regulated Fund and Affiliated Fund and (ii) the earliest settlement date and the latest settlement date of any participating Regulated Fund or Affiliated Fund will occur as close in time as practicable and in no event more than ten business days apart. The grant to one or more Regulated Funds or Affiliated Funds, but not the respective Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this Condition 5, if Condition 2(c)(iii)(B) is met.

6. *Standard Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of an interest in a security and one or more Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer, then:

(i) The Adviser to such Regulated Fund or Affiliated Fund, as applicable, will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition.

(b) *Same Terms and Conditions.* Each Regulated Fund will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated Funds.

(c) *No Board Approval Required.* A Regulated Fund may participate in such a Disposition without obtaining prior approval of the Required Majority if:

(i)(A) The participation of each Regulated Fund and Affiliated Fund in

[22] For example, procuring the Regulated Fund's investment in a Potential Co-Investment Transaction to permit an affiliate to complete or obtain better terms in a separate transaction would constitute an indirect financial benefit.

[23] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

[24] ''Related Party'' means (i) any Close Affiliate and (ii) in respect of matters as to which any Adviser has knowledge, any Remote Affiliate.

''Close Affiliate'' means the Advisers, the Regulated Funds, the Affiliated Funds and any other person described in section 57(b) (after giving effect to rule 57b–1) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) except for limited partners included solely by reason of the reference in section 57(b) to section 2(a)(3)(D).

''Remote Affiliate'' means any person described in section 57(e) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) and any limited partner holding 5% or more of the relevant limited partner interests that would be a Close Affiliate but for the exclusion in that definition.

such Disposition is proportionate to its then-current holding of the security (or securities) of the issuer that is (or are) the subject of the Disposition; [25] (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such Dispositions on a pro rata basis (as described in greater detail in the application); and (C) the Board of the Regulated Fund is provided on a quarterly basis with a list of all Dispositions made in accordance with this Condition; or

(ii) each security is a Tradable Security and (A) the Disposition is not to the issuer or any affiliated person of the issuer; and (B) the security is sold for cash in a transaction in which the only term negotiated by or on behalf of the participating Regulated Funds and Affiliated Funds is price.

(d) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

7. *Enhanced Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of a Pre-Boarding Investment in a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to such Regulated Fund or Affiliated Fund, as applicable, will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that:

(i) The Disposition complies with Condition 2(c)(i), (ii), (iii)(A), and (iv); and

(ii) the making and holding of the Pre-Boarding Investments were not prohibited by section 57 or rule 17d–1, as applicable, and records the basis for the finding in the Board minutes.

(c) *Additional Requirements:* The Disposition may only be completed in reliance on the Order if:

(i) *Same Terms and Conditions.* Each Regulated Fund has the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and Conditions as those applicable to the Affiliated Funds and any other Regulated Funds;

(ii) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(iii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable;

(iv) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial [26] in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(v) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

8. *Standard Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer and the Regulated Funds and Affiliated Funds holding investments in the issuer previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund, as applicable, will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund.

(b) *No Board Approval Required.* A Regulated Fund may participate in the Follow-On Investment without obtaining prior approval of the Required Majority if:

(i)(A) The proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer or the security at issue, as appropriate,[27] immediately preceding the Follow-On Investment; and (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as

[25] In the case of any Disposition, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Disposition.

[26] In determining whether a holding is "immaterial" for purposes of the Order, the Required Majority will consider whether the nature and extent of the interest in the transaction or arrangement is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement.

[27] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of a security held by the participating Regulated Funds and Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Funds or Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

described in greater detail in the application); or

(ii) it is a Non-Negotiated Follow-On Investment.

(c) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority makes the determinations set forth in Condition 2(c). If the only previous Co-Investment Transaction with respect to the issuer was an Enhanced Review Disposition, the Eligible Directors must complete this review of the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms of the investment.

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

9. *Enhanced Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer that is a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds holding investments in the issuer have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund, as applicable, will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority reviews the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms and makes the determinations set forth in Condition 2(c). In addition, the Follow-On Investment may only be completed in reliance on the Order if the Required Majority of each participating Regulated Fund determines that the making and holding of the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable. The basis for the Board's findings will be recorded in its minutes.

(c) *Additional Requirements.* The Follow-On Investment may only be completed in reliance on the Order if:

(i) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(ii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable;

(iii) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(iv) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

10. *Board Reporting, Compliance and Annual Re-Approval.*

(a) Each Adviser to a Regulated Fund will present to the Board of each Regulated Fund, on a quarterly basis, and at such other times as the Board may request, (i) a record of all investments in Potential Co-Investment Transactions made by any of the other Regulated Funds or any of the Affiliated Funds during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria that were not made available to the Regulated Fund, and an explanation of why such investment opportunities were not made available to the Regulated Fund; (ii) a record of all Follow-On Investments in and Dispositions of investments in any issuer in which the Regulated Fund holds any investments by any Affiliated Fund or other Regulated Fund during the prior quarter; and (iii) all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Funds or Affiliated Funds that the Regulated Fund considered but declined to participate in, so that the Independent Directors, may determine whether all Potential Co-Investment Transactions and Co-Investment Transactions during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the Conditions.

(b) All information presented to the Regulated Fund's Board pursuant to this Condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

(c) Each Regulated Fund's chief compliance officer, as defined in rule 38a-1(a)(4), will prepare an annual report for its Board each year that evaluates (and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and Conditions of the application and the procedures established to achieve such compliance.

(d) The Independent Directors (including the non-interested members of each Independent Party) will consider at least annually whether continued participation in new and existing Co-Investment Transactions is in the Regulated Fund's best interests.

11. *Record Keeping.* Each Regulated Fund will maintain the records required by section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these Conditions were approved by the Required Majority under section 57(f).

12. *Director Independence.* No Independent Director (including the non-interested members of any Independent Party) of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise be an ''affiliated person'' (as defined in the Act) of any Affiliated Fund.

13. *Expenses.* The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the Advisers under their respective advisory agreements with the Regulated Funds and the Affiliated Funds, be shared by the Regulated Funds and the participating Affiliated Funds in proportion to the relative amounts of the securities held or being acquired or disposed of, as the case may be.

14. *Transaction Fees.*[28] Any transaction fee (including break-up, structuring, monitoring or commitment fees but excluding brokerage or underwriting compensation permitted by section 17(e) or 57(k)) received in connection with any Co-Investment Transaction will be distributed to the participants on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by the Adviser at a bank or banks having the qualifications prescribed in section 26(a)(1), and the account will earn a competitive rate of interest that will also be divided pro rata among the participants. None of the Advisers, the Affiliated Funds, the other Regulated Funds or any affiliated person of the Affiliated Funds or the Regulated Funds will receive any additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction other than (i) in the case of the Regulated Funds and the Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in Condition 2(c)(iii)(B)(z), (ii) brokerage or underwriting compensation permitted by section 17(e) or 57(k) or (iii) in the case of the Advisers, investment advisory compensation paid in accordance with investment advisory agreements between the applicable Regulated Fund(s) or Affiliated Fund(s) and its Adviser.

15. *Independence.* If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the Act or applicable State law affecting the Board's composition, size or manner of election.

[28] Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

For the Commission, by the Division of Investment Management, under delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19406 Filed 9–1–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33999]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

August 28, 2020.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of August 2020. A copy of each application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the relevant applicant with a copy of the request by email, if an email address is listed for the relevant applicant below, or personally or by mail, if a physical address is listed for the relevant applicant below. Hearing requests should be received by the SEC by 5:30 p.m. on September 22, 2020, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to Rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary at *Secretarys-Office@sec.gov*.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov*.

FOR FURTHER INFORMATION CONTACT: Shawn Davis, Assistant Director, at (202) 551–6413 or Chief Counsel's Office at (202) 551–6821; SEC, Division of Investment Management, Chief Counsel's Office, 100 F Street NE, Washington, DC 20549–8010.

Nuveen All Cap Energy MLP Opportunities Fund [File No. 811–22877]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On May 8, 2020, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of $5,713.02 incurred in connection with the liquidation were paid by the applicant.

Filing Date: The application was filed on June 23, 2020.

Applicant's Address: dglatz@stradley.com.

Nuveen Energy MLP Total Return Fund [File No. 811–22482]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On May 8, 2020, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of $39,806.45 incurred in connection with the liquidation were paid by the applicant.

Filing Date: The application was filed on June 23, 2020.

Applicant's Address: dglatz@stradley.com

Nuveen High Income December 2019 Target Term Fund [File No. 811–23141]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On November 29, 2019, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of $3,454 incurred in connection with the liquidation were paid by the applicant.

Filing Dates: The application was filed on March 11, 2020, and amended on July 22, 2020.

Applicant's Address: dglatz@stradley.com.

Nuveen Impact Bond 2025 Term Fund [File No. 811–23337]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Date: The application was filed on June 12, 2020.

Applicant's Address: dglatz@stradley.com.

Nuveen Mortgage and Income Fund [File No. 811–23433]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Dates: The application was filed on October 23, 2019, and amended on June 23, 2020.

Applicant's Address: dglatz@stradley.com.

SSGA Master Trust [File No. 811–22705]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On September 6, 2019, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of $7,000 incurred in connection with the liquidation were paid by the applicant's investment adviser.

Filing Date: The application was filed on July 9, 2020.

Applicant's Address: beau.yanoshik@morganlewis.com.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jill. M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19426 Filed 9–1–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89694; File No. SR–NYSEArca–2020–76]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the NYSE Arca Options Fee Schedule

August 27, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on August 26, 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–44.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Arca Options Fee Schedule (''Fee Schedule'') to extend the waiver of certain Floor-based fixed fees through September 2020. The Exchange proposes to implement the fee change effective August 26, 2020. 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 purpose of this filing is to modify the Fee Schedule to extend the waiver of certain Floor-based fixed fees through September 2020 for market participants that have been unable to resume their Floor operations to a certain capacity level, as discussed below. The Exchange proposes to implement the fee change effective August 26, 2020.

On March 18, 2020, the Exchange announced that it would temporarily close the Trading Floor, effective Monday, March 23, 2020, as a precautionary measure to prevent the potential spread of COVID–19. Following the temporary closure of the Trading Floor, the Exchange waived certain Floor-based fixed fees for April and May 2020 (the ''fee waiver'').[4] Although the Trading Floor partially reopened on May 4, 2020 and Floor-based open outcry activity is supported, certain participants have been unable to resume pre-Floor closure levels of operations. As a result, the Exchange extended the fee waiver through June,

[4] *See* Securities Exchange Act Release Nos. 88596 (April 8, 2020), 85 FR 20796 (April 14, 2020) (SR–NYSEArca–2020–29); 88812 (May 5, 2020), 85 FR 27787 (May 11, 2020) (SR–NYSEArca–2020–38).

July and August 2020, but only for Floor Broker firms that were unable to operate at more than 50% of their March 2020 on-Floor staffing levels and for Market Maker firms that have vacant or ''unmanned'' Podia for the entire month due to COVID–19 related considerations (the ''Qualifying Firms'').[5] Because the Trading Floor will continue to operate with reduced capacity, the Exchange proposes to extend the prior fee waiver for Qualifying Firms through September 2020.

Specifically, the proposed fee waiver covers the following fixed fees for Qualifying Firms, which relate directly to Floor operations, are charged only to Floor participants and do not apply to participants that conduct business off-Floor:

- Floor Booths;
- Market Maker Podia;
- Options Floor Access;
- Wire Services; and
- ISP Connection.[6]

Like the previous fee waiver for Qualifying Firms, the proposed fee change is designed to reduce monthly costs for Qualifying Firms whose operations continue to be disrupted despite the fact that the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening. Absent this change, such participants may experience an unexpected increase in the cost of doing business on the Exchange.[7] The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[9] 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.

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [10]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[11] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in June 2020, the Exchange had slightly over 10% market share of executed volume of multiply-listed equity & ETF options trades.[12]

This proposed fee change is reasonable, equitable, and not unfairly discriminatory because it would reduce monthly costs for Qualifying Firms whose operations have been disrupted despite the fact that the Trading Floor has partially reopened because of the social distancing requirements and/or other health concerns related to resuming operation on the Floor. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening of the Floor. Absent this change, such participants may experience an unexpected increase in the cost of doing business on the Exchange. The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits as it merely continues the previous fee waiver for Qualifying Firms, which affects fees charged only to Floor participants and does not apply to participants that conduct business off-Floor. The Exchange believes it is an equitable allocation of fees and credits to extend the fee waiver for Qualifying Firms because such firms have either less than half of their Floor staff (March 2020) levels or have vacant podia—and this reduction in physical capacity on the Floor impacts the speed, volume and efficiency with which these firms can operate, which is to their detriment.

The Exchange believes that the proposal is not unfairly discriminatory because the proposed continuation of the fee waiver would affect all similarly-situated market participants on an equal and non-discriminatory basis.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes would encourage the continued participation of Qualifying Firms, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [13]

Intramarket Competition. The proposed change, which continues the fee waiver for Qualifying Firms, is designed to reduce monthly costs for those Floor participants whose

[5] *See* Securities Exchange Act Release Nos. 89038 (June 10, 2020), 85 FR 36447 (June 16, 2020) (SR–NYSEArca–2020–52); 89242 (June 7, 2020), 85 FR 42037 (July 13, 2020) (SR–NYSEArca–2020–60); 89480 (August 5, 2020), 85 FR 48591 (August 11, 2020) (SR–NYSEArca–2020–69). *See also* Fee Schedule, NYSE Arca OPTIONS: FLOOR and EQUIPMENT and CO–LOCATION FEES.

[6] *See* proposed Fee Schedule, NYSE Arca OPTIONS: FLOOR and EQUIPMENT and CO–LOCATION FEES (providing that certain fees are waived for Qualifying Firms ''for June through September 2020'').

[7] The Exchange will refund participants of the Floor Broker Prepayment Program for any prepaid September 2020 fees that are waived. *See* proposed Fee Schedule, FLOOR BROKER FIXED COST PREPAYMENT INCENTIVE PROGRAM (the ''FB Prepay Program'') (providing that ''the Exchange will refund certain of the prepaid Eligible Fixed costs that were waived for June through September 2020 for Qualifying Firms as defined, and set forth in, NYSE Arca OPTIONS: FLOOR and EQUIPMENT and CO–LOCATION FEES'').

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[11] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, *available here: https://www.theocc.com/market-data/volume/default.jsp.*

[12] Based on OCC data, *see id.,* in 2019, the Exchange's market share in equity-based options increased from 9.51% for the month of June 2019 to 10.65% for the month of June 2020.

[13] *See* Reg NMS Adopting Release, *supra* note 10, at 37499.

operations continue to be impacted despite the fact that the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms to reallocate funds to assist with the cost of shifting and maintaining their previously on-Floor operations to off-Floor. Absent this change, such Qualifying Firms may experience an unintended increase in the cost of doing business on the Exchange, given that the Floor has only reopened in a limited capacity. The Exchange believes that the proposed waiver of fees for Qualifying Firms would not impose a disparate burden on competition among market participants on the Exchange because off-Floor market participants are not subject to these Floor-based fixed fees and Floor-based firms that are not subject to the extent of staffing shortfalls as the Qualifying Firms—*i.e.,* have at least 50% of their March 2020 staffing levels on the Floor and/or have no vacant Podia during September 2020, do not face the same operational disruption and potential financial impact during the partial reopening of the Floor.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange currently has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[14] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in June 2020, the Exchange had slightly over 10% market share of executed volume of multiply-listed equity & ETF options trades.[15]

The Exchange believes that the proposed rule change reflects this competitive environment because it waives fees for Qualifying Firms and is designed to reduce monthly costs for Floor participants whose operations continue to be disrupted despite the fact that the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow affected participants to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor. Absent this change, Qualifying Firms may experience an unintended increase in the cost of doing business on the Exchange, which would make the Exchange a less competitive venue on which to trade as compared to other options exchanges.

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)[16] of the Act and subparagraph (f)(2) of Rule 19b–4[17] 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)[18] 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–2020–76 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–2020–76. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–76, and should be submitted on or before September 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19327 Filed 9–1–20; 8:45 am]

BILLING CODE 8011–01–P

[14] *See supra* note 11.

[15] Based on OCC data, *supra* note 12, the Exchange's market share in equity-based options was 9.51% for the month of June 2019 and 10.65% for the month of June 2020.

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 15 U.S.C. 78s(b)(2)(B).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89692; File No. SR–NYSEAMER–2020–65]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Modify the NYSE American Options Fee Schedule

August 27, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on August 26, 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 modify the NYSE American Options Fee Schedule (''Fee Schedule'') to waive certain Floor-based fixed fees for September 2020. The Exchange proposes to implement the fee change effective August 26, 2020. The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to modify the Fee Schedule to waive certain Floor-based fixed fees for September 2020 for market participants that have been unable to resume their Floor operations to a certain capacity level, as discussed below. The Exchange proposes to implement the fee change effective August 26, 2020.

On March 18, 2020, the Exchange announced that it would temporarily close the Trading Floor, effective Monday, March 23, 2020, as a precautionary measure to prevent the potential spread of COVID–19. Following the temporary closure of the Trading Floor, the Exchange temporarily modified certain fees for April, May and June 2020 (the ''fee waiver'').[4] Although the Trading Floor partially reopened on May 26, 2020 and Floor-based open outcry activity is supported, certain participants have been unable to resume pre-Floor closure levels of operations. As a result, the Exchange extended the fee waiver through July, and later August, 2020, but only for Floor Broker firms that were unable to operate at more than 50% of their March 2020 on-Floor staffing levels and for Market Maker firms that have vacant or ''unmanned'' Podia for the entire month due to COVID–19 related considerations (the ''Qualifying Firms'').[5] Because the Trading Floor will continue to operate with reduced capacity, the Exchange proposes to extend the August fee waiver for Qualifying Firms through September 2020.

Specifically, the proposed fee waiver covers the following fixed fees for Qualifying Firms, which relate directly to Floor operations, are charged only to Floor participants and do not apply to participants that conduct business off-Floor:

- Floor Access Fee;
- Floor Broker Handheld
- Transport Charges
- Floor Market Maker Podia;
- Booth Premises; and
- Wire Services.[6]

Like the August fee waiver, the proposed fee change is designed to reduce monthly costs for Qualifying Firms whose operations continue to be disrupted, despite the fact that the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening of the Floor. Absent this change, such participants may experience an unexpected increase in the cost of doing business on the Exchange.[7] The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[9] 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.

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release Nos. 88595 (April 8, 2020), 85 FR 20737 (April 14, 2020) (SR–NYSEAMER–2020–25) (waiving Floor-based fixed fees); 88840 (May 8, 2020), 85 FR 28992 (May 14, 2020) (SR–NYSEAMER–2020–37) (extending April 2020 fee changes through May 2020); and 89049 (June 11, 2020), 85 FR 36649 (June 17, 2020) (SR–NYSEAMER–2020–44) (extending April and May fee changes through June 2020). *See also* Fee Schedule, Section III. Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, and IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees.

[5] *See* Securities Exchange Act Release Nos. 89241 (July 7, 2020), 85 FR 42034 (July 13, 2020) (SR–NYSEAMER–2020–47); 89482 (August 5, 2020), 85 FR 48577 (August 11, 2020) (SR–NYSEAMER–2020–55) (the ''August fee waiver''). *See also* Fee Schedule, Section III., Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, and IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees.

[6] *See* proposed Fee Schedule, Section III., Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, and IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees.

[7] The Exchange will refund participants of the Floor Broker Prepayment Program for any prepaid September 2020 fees that are waived. *See* proposed Fee Schedule, Section III.E.1 (providing that ''the Exchange will refund certain of the prepaid Eligible Fixed costs that were waived for July through September 2020 for Qualifying Firms, as defined, and set forth in, Sections III.B and IV'').

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

broader forms that are most important to investors and listed companies.'' [10]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[11] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in June 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.[12]

This proposed fee change is reasonable, equitable, and not unfairly discriminatory because it would reduce monthly costs for Qualifying Firms whose operations have been disrupted despite the fact that the Trading Floor has partially reopened because of the social distancing requirements and/or other health concerns related to resuming operation on the Floor. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening. Absent this change, such participants may experience an unexpected increase in the cost of doing business on the Exchange.

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits as it merely continues the August fee waiver, which affects fees charged only to Floor participants and does not apply to participants that conduct business off-Floor. The Exchange believes it is an equitable allocation of fees and credits to extend this fee waiver to Qualifying Firms because such firms have either less than half of their Floor staff (March 2020) levels or have vacant podia—and this reduction in physical capacity on the Floor impacts the speed, volume and efficiency with which these firms can operate, which is to their detriment.

The Exchange believes that the proposal is not unfairly discriminatory because the proposed continuation of the fee waiver would affect all similarly-situated market participants on an equal and non-discriminatory basis.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes would encourage the continued participation of Qualifying Firms, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [13]

Intramarket Competition. The proposed change, which continues the fee waiver in place when the Floor was temporarily closed but only for Qualifying Firms, is designed to reduce monthly costs for Floor participants whose operations continue to be impacted, despite the fact that the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms to reallocate funds to assist with the cost of shifting and maintaining their previously on-Floor operations to off-Floor. Absent this change, such Qualifying Firms may experience an unintended increase in the cost of doing business on the Exchange, given that the Floor has only reopened in a limited capacity. The Exchange believes that the proposed waiver of fees for Qualifying Firms would not impose a disparate burden on competition among market participants on the Exchange because off-Floor market participants are not subject to these Floor-based fixed fees, and Floor-based firms that are not subject to the extent of staffing shortfalls as the Qualifying Firms—*i.e.,* have at least 50% of their March 2020 staffing levels on the Floor and/or have no vacant Podia during September 2020, do not face the same operational disruption and potential financial impact during the partial reopening of the Floor.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange currently has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[14] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in June 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.[15]

The Exchange believes that the proposed rule change reflects this competitive environment because it waives fees for Qualifying Firms and is designed to reduce monthly costs for Floor participants whose operations continue to be disrupted despite the fact that the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow affected participants to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor. Absent this change, Qualifying Firms may experience an unintended increase in the cost of doing business on the Exchange, which would make the Exchange a less competitive venue on which to trade as compared to other options exchanges.

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) [16] of the Act and

[10] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[11] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, *available here: https://www.theocc.com/market-data/volume/default.jsp.*

[12] Based on OCC data, *see id.,* the Exchange's market share in equity-based options increased slightly from 8.20% for the month of June 2019 to 8.32% for the month of June 2020.

[13] *See* Reg NMS Adopting Release, *supra* note 10, at 37499.

[14] *See supra* note 11.

[15] Based on OCC data, *supra* note 12, the Exchange's market share in equity-based options was 8.20% for the month of June 2019 and 8.32% for the month of June 2020.

[16] 15 U.S.C. 78s(b)(3)(A).

subparagraph (f)(2) of Rule 19b–4 [17] 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) [18] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMER–2020–65 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–2020–65. 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–2020–65, and should be submitted on or before September 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19326 Filed 9–1–20; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 240.19b–4(f)(2).

[18] 15 U.S.C. 78s(b)(2)(B).

[19] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Claritas Capital Specialty Debt Fund, L.P.; License No. 04/04–0310; Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration under the Small Business Investment Act of 1958, as amended, under Section 309 of the Act and Section 107.1900 of the Small Business Administration Rules and Regulations (13 CFR 107.1900) to function as a small business investment company under the Small Business Investment Company License No. 04/04–0310 issued to Claritas Capital Specialty Debt Fund, L.P. said license is hereby declared null and void.

U.S. Small Business Administration.

Christopher L. Weaver,

Acting Associate Administrator, Office of Investment and Innovation.

[FR Doc. 2020–18849 Filed 9–1–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF STATE

[Public Notice 11196]

60-Day Notice of Proposed Information Collection: Request To Change End-User, End-Use and/or Destination of Hardware

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to *November 2, 2020.*

ADDRESSES: You may submit comments by any of the following methods:

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2020–0038'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: DDTCPublicComments@state.gov,* ATTN: Advisory Opinion Form.
- *Regular Mail:* Send written comments to: Directorate of Defense Trade Controls, Department of State; 2401 E St. NW, Suite H1205, Washington, DC 20522.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

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 Andrea Battista, Directorate of Defense Trade Controls, Department of State, who may be reached at *BattistaAl@state.gov or 202–663–3136* (please include subject line ''ATTN: Advisory Opinion Form'').

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Request to Change End-User, End-Use and/or Destination of Hardware.
- *OMB Control Number:* 1405–0173.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* T/PM/DDTC.

• *Form Number:* DS–6004.
• *Respondents:* Individuals, Business, or Nonprofit Organizations engaged in the business of exporting or temporarily importing defense articles or defense services.
• *Estimated Number of Respondents:* 1,563.
• *Estimated Number of Responses:* 1,563.
• *Average Time Per Response:* 1 hour.
• *Total Estimated Burden Time:* 1,563 hours.
• *Frequency:* On occasion.
• *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

• 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 Request to Change End-User, End-Use and/or Destination of Hardware information collection is used to request DDTC approval prior to any sale, transfer, transshipment, or disposal, whether permanent or temporary, of classified or unclassified defense articles to any end-user, end-use or destination other than as stated on a license or other approval.

Methodology

Applicants are referred to ITAR 123.9 for guidance on information to submit regarding the request to change end-user, end-use and/or destination of hardware. A DS–6004 may be submitted electronically through DDTC's case management system, The Defense Export Control and Compliance System (DECCS).

Neal Kringel,

Director of Management, Directorate of Defense Trade Controls, Department of State.

[FR Doc. 2020–19396 Filed 9–1–20; 8:45 am]

BILLING CODE 4710–25–P

SURFACE TRANSPORTATION BOARD

60–Day Notice of Intent To Seek Extension of Approval for Information Collection: Rail Service Data

AGENCY: Surface Transportation Board.

ACTION: Notice and request for comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the information collection of Rail Service Data, as described below.

DATES: Comments on this information collection should be submitted by November 2, 2020.

ADDRESSES: Direct all comments to Chris Oehrle, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, and to *PRA@stb.gov.* When submitting comments, please refer to ''Paperwork Reduction Act Comments, Rail Service Data.'' For further information regarding this collection, contact Michael Higgins, Deputy Director, Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), at (202) 245–0284 and at *Michael.Higgins@stb.gov.* Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Comments are requested concerning: (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collection

Title: Rail Service Data Collection.
OMB Control Number: 2140–0033.
STB Form Number: None.
Type of Review: Extension without change.
Respondents: Class I railroads (on behalf of themselves and the Chicago Transportation Coordination Office (''CTCO'')).
Number of Respondents: Seven.
Estimated Time per Response: The collection seeks three related responses, as indicated in the table below.

TABLE—ESTIMATED TIME PER RESPONSE

Type of responses	Estimated time per response (hours)
Weekly	1.5
Quarterly	1.5
On occasion	1.5

Frequency: The frequencies of the collection are set forth in the table below.

TABLE—FREQUENCY OF RESPONSES

Type of responses	Frequency of responses (year)
Weekly	52
Quarterly	4
On occasion	2

Total Burden Hours (annually including all respondents): The total annual burden hours are estimated to be no more than 591 hours per year, as indicated in the table below.

TABLE—TOTAL BURDEN HOURS (PER YEAR)

Type of responses	Number of respondents	Estimated time per response (hours)	Frequency of responses (year)	Total yearly burden hours
Weekly	7	1.5	52	546
Quarterly	7	1.5	4	42
On occasion	1	1.5	2	3
Total				591

Total "Non-hour Burden" Cost: There are no other costs identified because filings are submitted electronically to the Board.

Needs and Uses: Under 49 CFR part 1250, the Board requires the nation's seven Class I (large) railroads and the Chicago Transportation Coordination Office (CTCO), through its Class I members, to report certain railroad service performance metrics on a weekly basis and certain other information on a quarterly and occasional basis. This collection of rail service data aids the Board in identifying rail service issues, allowing the Board to better understand current service issues and to identify and address potential future regional and national service disruptions more quickly. The transparency resulting from this collection also benefits rail shippers and other stakeholders by helping them to better plan operations and make informed decisions based on publicly available, near real-time data and their own analysis of performance trends over time.

Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Under 44 U.S.C. 3506(c)(2)(A), federal agencies are required to provide, prior to an agency's submitting a collection to OMB for approval, a 60-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: August 28, 2020.

Aretha Laws-Byrum,

Clearance Clerk.

[FR Doc. 2020–19409 Filed 9–1–20; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

60-Day Notice of Intent To Seek Approval for Information Collections: Joint Notice of Intent To Arbitrate and Notice of Availability for Arbitrator Roster

AGENCY: Surface Transportation Board.

ACTION: Notice and request for comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for the existing collections without OMB control numbers of the Joint Notice of Intent to Arbitrate and Notice of Availability for Arbitrator Roster, as described separately below.

DATES: Comments on these information collections should be submitted by November 2, 2020.

ADDRESSES: Direct all comments to Chris Oehrle, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, and to *PRA@stb.gov.* When submitting comments, please refer to "Paperwork Reduction Act Comments, Arbitration Procedures under 49 CFR 1108." For further information regarding this collection, contact Michael Higgins, Deputy Director, Office of Public Assistance, Governmental Affairs, and Compliance, at (202) 245–0284 or at *Michael.Higgins@stb.gov.* Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Comments are requested concerning: (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collections

Information Collection 1

Title: Joint Notice of Intent to Arbitrate.

OMB Control Number: 2140–XXXX.

STB Form Number: None.

Type of Review: Existing collection without an OMB control number.

Respondents: Parties seeking to submit to arbitration certain matters before the Board.

Number of Respondents: One.

Estimated Time per Response: One hour.

Frequency: On occasion.

Total Burden Hours (annually including all respondents): One.

Total "Non-hour Burden" Cost: None identified. Filings are submitted electronically to the Board.

Needs and Uses: Under 49 CFR 1108.5, arbitration commences with a written complaint that contains a statement that the relevant parties are participants in the Board's arbitration program, or that the complainant is willing to arbitrate the dispute pursuant to the Board's arbitration procedures. The respondent's answer to the written complaint must then indicate the respondent's participation in the Board's arbitration program or its willingness to arbitrate the dispute at hand pursuant to the Board's arbitration procedures.

As an alternative to filing a written complaint, parties may submit a joint notice to the Board, indicating the consent of both parties to submit an issue in dispute to the Board's arbitration program. In the joint notice, parties state the issue(s) that they are willing to submit to arbitration. The notice must contain a statement that would indicate that all relevant parties are participants in the Board's arbitration program pursuant to § 1108.3(a), or that the relevant parties are willing to arbitrate voluntarily a matter pursuant to the Board's arbitration procedures, and the relief requested. The notice must also indicate whether parties have agreed to a three-member arbitration panel or a single arbitrator and must indicate whether the parties have mutually agreed to a lower amount of potential liability in lieu of the monetary award cap that would otherwise be applicable. The joint notice encourages greater use of arbitration to resolve disputes at the Board.

Information Collection 2

Title: Notice of Availability for Arbitrator Roster.

OMB Control Number: 2140–XXXX.

STB Form Number: None.

Type of Review: Existing collection without an OMB control number.

Respondents: Potential arbitrators.

Number of Respondents: 14.

Estimated Time per Response: One hour.

Frequency: Annually.

Total Burden Hours (annually including all respondents): 14.

Total "Non-hour Burden" Cost: None identified. Filings are submitted electronically to the Board.

Needs and Uses: Under 49 CFR 1108.6(b), an arbitration roster is compiled by the Chairman, and potential interested, qualified persons who wish to be placed on the Board's arbitration roster must submit notice of their availability to be added to the roster. The Chairman may augment the roster at any time to include eligible arbitrators and remove from the roster any arbitrators who are no longer available or eligible. Potential arbitrators must also update their availability and information annually, if they wish to remain available for the arbitration roster. The arbitration rosters are available to the public on the Board's website at *https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1581607804924/50102.pdf.*

Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Under 44 U.S.C. 3506(c)(2)(A), federal agencies are required to provide, prior to an agency's submitting a collection to OMB for approval, a 60-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: August 28, 2020.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2020–19411 Filed 9–1–20; 8:45 am]

BILLING CODE 4915–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Product Exclusion Extensions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of product exclusion extensions.

SUMMARY: On August 20, 2019, at the direction of the President, the U.S. Trade Representative determined to modify the action being taken in the Section 301 investigation of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation by imposing additional duties of 10 percent *ad valorem* on goods of China with an annual trade value of approximately $300 billion. The additional duties on products in List 1, which is set out in Annex A of that action, became effective on September 1, 2019. The U.S. Trade Representative initiated a product exclusion process in October 2019, and has issued eight product exclusion notices under this action. These exclusions will expire on September 1, 2020. On June 26, July 17, and August 11, 2020, the U.S. Trade Representative established processes for the public to comment on whether to extend particular exclusions granted under the $300 billion action for up to 12 months. This notice announces the U.S. Trade Representative's determination to extend certain exclusions through December 31, 2020.

DATES: The product exclusion extensions announced in this notice will apply as of September 1, 2020, and extend through December 31, 2020. U.S. Customs and Border Protection will issue instructions on entry guidance and implementation.

FOR FURTHER INFORMATION CONTACT: For general questions about this notice, contact Associate General Counsel Philip Butler or Assistant General Counsel Benjamin Allen, or Director of Industrial Goods Justin Hoffmann at (202) 395–5725. For specific questions on customs classification or implementation of the product exclusions identified in the Annex to this notice, contact *traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

For background on the proceedings in this investigation, please see prior notices including 82 FR 40213 (August 24, 2017), 83 FR 14906 (April 6, 2018), 84 FR 22564 (May 17, 2019), 84 FR 43304 (August 20, 2019), 84 FR 45821 (August 30, 2019), 84 FR 57144 (October 24, 2019), 84 FR 69447 (December 18, 2019), 85 FR 3741 (January 22, 2020), 85 FR 13970 (March 10, 2020), 85 FR 15244 (March 17, 2020), 85 FR 17936 (March 31, 2020), 85 FR 28693 (May 13, 2020), 85 FR 32099 (May 28, 2020), 85 FR 35975 (June 12, 2020), 85 FR 38482 (June 26, 2020), 85 FR 41658 (July 10, 2020), 85 FR 43639 (July 17, 2020), 85 FR 44563 (July 23, 2020), 85 FR 48595 (August 11, 2020), and 85 FR 48627 (August 11, 2020).

In a notice published on August 20, 2019, the U.S. Trade Representative, at the direction of the President, announced a determination to modify the action being taken in the Section 301 investigation by imposing an additional 10 percent *ad valorem* duty on products of China with an annual aggregate trade value of approximately $300 billion. 84 FR 43304 (August 20 notice). The August 20 notice contains two separate lists of tariff subheadings, with two different effective dates. List 1, which is set out in Annex A of the August 20 notice, was effective on September 1, 2019. List 2, which is set out in Annex C of the August 20 notice, was scheduled to take effect on December 15, 2019. Subsequently, the U.S. Trade Representative announced determinations suspending until further notice the additional duties on products set out in Annex C (List 2) and reducing the additional duties for the products covered in Annex A of (List 1) to 7.5 percent. *See* 84 FR 57144, 85 FR 3741. On October 24, 2019, the U.S. Trade Representative established a process by which U.S. stakeholders could request exclusion of particular products classified within an eight-digit Harmonized Tariff Schedule of the United States (HTSUS) subheading covered by List 1 of the $300 billion action from the additional duties. *See* 84 FR 57144 (October 24 notice). The October 24 notice required submission of requests for exclusion from the $300 billion action no later than January 31, 2020, and noted that the U.S. Trade Representative periodically would announce decisions. The U.S. Trade Representative has issued eight notices of product exclusions under this action. These exclusions are scheduled to expire on September 1, 2020.

On June 26, July 17, and August 11, 2020, the U.S. Trade Representative invited the public to comment on whether to extend by up to 12 months, particular exclusions granted under the $300 billion action. *See* 85 FR 38482 (June 26, 2020); 85 FR 43639 (July 17, 2020); 85 FR 48595 (August 11, 2020) (the $300 billion extension notices).

Under the $300 billion extension notices, commenters were asked to address:

- Whether the particular product and/or a comparable product is available from sources in the United States and/or in third countries.
- Any changes in the global supply chain since September 2019 with respect to the particular product, or any other relevant industry developments.
- Efforts, if any, importers or U.S. purchasers have undertaken since September 2019 to source the product from the United States or third countries.

In addition, commenters who were importers and/or purchasers of the products covered by an exclusion were asked to provide information regarding:

- Their efforts since September 2019 to source the product from the United States or third countries.
- The value and quantity of the Chinese-origin product covered by the specific exclusion request purchased in

2018 and 2019, and whether these purchases are from a related company.

• Whether Chinese suppliers have lowered their prices for products covered by the exclusion following the imposition of duties.

• The value and quantity of the product covered by the exclusion purchased from domestic and third country sources in 2018 and 2019.

• The commenter's gross revenue for 2018 and 2019.

• Whether the Chinese-origin product of concern is sold as a final product or as an input.

• Whether the imposition of duties on the products covered by the exclusion will result in severe economic harm to the commenter or other U.S. interests.

• Any additional information in support or in opposition of the extending the exclusion. The June 26, 2020 notice required the submission of comments no later than July 30, 2020. The July 17, 2020 notice required the submission of comments no later than August 14, 2020. The August 11, 2020 notice required the submission of comments no later than August 20, 2020.

B. Determination To Extend Certain Exclusions

Based on evaluation of the factors set out in the October 24 notice and the $300 billion extension notices, which are summarized above, pursuant to sections 301(b), 301(c), and 307(a) of the Trade Act of 1974, as amended, and in accordance with the advice of the interagency Section 301 Committee, the U.S. Trade Representative has determined to extend certain product exclusions granted under the $300 billion action, as set out in the Annexes to this notice.

The $300 billion extension notices provided that the U.S. Trade Representative would consider extensions of up to 12 months. In light of the cumulative effect of current and possible future exclusions or extensions of exclusions on the effectiveness of the action taken in this investigation, the U.S. Trade Representative has determined to extend the exclusions in the Annexes to this notice for less than 12 months—through December 31, 2020. To date, the U.S. Trade Representative has granted more than 6,800 exclusion requests, has extended some of these exclusions, and may consider further extensions of exclusions. The U.S. Trade Representative will take account of the cumulative effect of exclusions in considering the possible further extension of the exclusions covered by this notice, as well as possible extensions of exclusions of other products covered by the action in this investigation. The U.S. Trade Representative's determination also takes into account advice from advisory committees and any public comments concerning extension of the pertinent exclusions.

In accordance with the October 24 notice, the exclusions are available for any product that meets the description in the Annexes, regardless of whether the importer filed an exclusion request. Further, the scope of each exclusion is governed by the scope of the ten-digit HTSUS headings and product descriptions in the Annexes to this notice, and not by the product descriptions set out in any particular request for exclusion.

Joseph Barloon,

General Counsel, Office of the United States Trade Representative.

Annexes for Extensions of Certain Product Exclusions From Tranche 4

Annex A

A. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on September 1, 2020 and before 11:59 p.m. eastern daylight time on December 31, 2020, subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) is modified:

1. By inserting the following new heading 9903.88.57 in numerical sequence, with the material in the new heading inserted in the columns of the HTSUS labeled ''Heading/Subheading'', ''Article Description'', and ''Rates of Duty 1-General'', respectively:

Heading/Subheading	Article description	Rates of duty		
		1		2
		General	Special	
''9903.88.57	Effective with respect to entries on or after September 1, 2020, and through December 31, 2020, articles the product of China, as provided for in U.S. note 20(jjj) to this subchapter, each covered by an exclusion granted by the U.S. Trade Representative.	The duty provided in the applicable subheading''		

2. by inserting the following new U.S. note 20(jjj) to subchapter III of chapter 99 in numerical sequence:

''(jjj) The U.S. Trade Representative determined to establish a process by which particular products classified in heading 9903.88.15 and provided for in U.S. notes 20(r) and 20(s) to this subchapter could be excluded from the additional duties imposed by heading 9903.88.15. See 84 FR 43304 (August 20, 2019), 84 FR 45821 (August 30, 2019), 84 FR 57144 (October 24, 2019), and 85 FR 3741 (January 22, 2020). Pursuant to the product exclusion process, the U.S. Trade Representative has determined that, as provided in heading 9903.88.57, the additional duties provided for in heading 9903.88.15 shall not apply to the following particular products, which are provided for in the enumerated statistical reporting numbers:

(1) 0505.10.0050
(2) 0505.10.0055
(3) 3401.19.0000
(4) 3926.90.9910
(5) 4015.19.0510
(6) 4015.19.0550
(7) 4818.90.0000 prior to July 1, 2020; 4818.90.0020 or 4818.90.0080 effective July 1, 2020
(8) 5210.11.4040
(9) 5210.11.6020
(10) 5504.10.0000
(11) 6210.10.5000
(12) 6307.90.6090
(13) 6307.90.6800
(14) 6506.10.6030
(15) Cynomolgus macaques (Macaca fascicularis) (also known as crab-eating macaques or long-tailed macaques) and rhesus macaques (Macaca mulatta), captive bred for research (described in statistical reporting number 0106.11.0000)
(16) Feathers of a kind used for stuffing, of ducks or geese, not further worked than cleaned, disinfected or treated for preservation, the foregoing other than feathers meeting both test standards 4 and 10.1 of Federal Standard 148a

promulgated by the General Services Administration (described in statistical reporting number 0505.10.0060)
(17) Sodium alginate resins (CAS No. 9005–38–3) (described in statistical reporting number 3913.10.0000)
(18) Shower heads of plastics, designed to be fixed, hand-held, height-adjustable or combinations thereof, and parts of such shower heads (described in statistical reporting number 3924.90.5650)
(19) Sets of three polyvinyl chloride-coated foam pads, of plastics, of a kind used to assemble flotation work vests by passing adjustable straps with buckles through slots in the pads, each set comprising two irregularly shaped front/side pads and one rectangular back pad (described in statistical reporting number 3926.90.9990 prior to July 1, 2020; described in statistical reporting number 3926.90.9985 effective July 1, 2020)
(20) Bowls of molded plastics, with clips for retaining guide wires during surgical procedures (described in statistical reporting number 3926.90.9990 prior to July 1, 2020; described in statistical reporting number 3926.90.9985 effective July 1, 2020)
(21) Coverings, of plastics, designed to fit over wound sites or casts thereby forming a protective seal for keeping the covered area dry and debris free while showering or bathing (described in statistical reporting number 3926.90.9990 prior to July 1, 2020; described in statistical reporting number 3926.90.9985 effective July 1, 2020)
(22) Disposable graduated medicine dispensing cups of plastics (described in statistical reporting number 3926.90.9990 prior to July 1, 2020; described in statistical reporting number 3926.90.9985 effective July 1, 2020)
(23) Single-use sterile drapes and covers of plastics, of a kind used to protect the sterile field in surgical operating rooms (described in statistical reporting number 3926.90.9990 prior to July 1, 2020; described in statistical reporting number 3926.90.9985 effective July 1, 2020)
(24) Sterile decanters of polystyrene plastics, each of a kind used to transfer aseptic fluids or medication to and from sterile bags, vials or glass containers (described in statistical reporting number 3926.90.9990 prior to July 1, 2020; described in statistical reporting number 3926.90.9985 effective July 1, 2020)
(25) Wallpaper, other than described in subheading 4814.20.00, with floral, landscape, figure or abstract designs or solid backgrounds painted by hand, whether or not with applications of metal leaf (described in statistical reporting number 4814.90.0200)
(26) Printed art and pictorial books, each valued at least $5 but not more than $17, each measuring at least 22 cm but not more than 39 cm in height and at least 14 cm but not more than 32 cm in width, weighing not more than 3 kg, with die-cut or tipped-in extra pages and bound with foil stamping or with silkscreen on the cover stock (described in statistical reporting number 4901.99.0065)
(27) Women's knit robes in chief weight of cotton, with hook and loop tab closure (described in statistical reporting number 6108.91.0030)
(28) Babies' gowns of cotton knitted interlock fabric, each with sleeves, neck opening and elasticized bottom opening (described in statistical reporting number 6111.20.6070)
(29) Babies' sleep sacks of cotton interlock knitted fabric, sleeveless, each with neck opening and two-way zipper (described in statistical reporting number 6111.20.6070)
(30) Babies' sleep sacks, knitted, of cotton, each with neck opening and two-way zipper (described in statistical reporting number 6111.20.6070)
(31) Babies' swaddle sacks of cotton knitted interlock fabric, each with sleeves and mitten cuffs (described in statistical reporting number 6111.20.6070)
(32) Babies' blanket sleepers of polyester knitted fleece, sleeveless, each with two-way zipper (described in statistical reporting number 6111.30.5015)
(33) Gloves, containing less than 50 percent by weight of textile fibers, coated with rubber or plastics designed for enhanced grip (described in statistical reporting number 6116.10.6500)
(34) Men's and boys' cotton terry bathrobes with muslin trim, each beltless but featuring a hook-and-loop tab (described in statistical reporting number 6207.91.1000)
(35) Women's cotton terry bathrobes with muslin trim, each beltless but featuring a hook-and-loop tab (described in statistical reporting number 6208.91.1010)
(36) Girls' cotton terry bathrobes with muslin trim, each beltless but featuring a hook-and-loop tab (described in statistical reporting number 6208.91.1020)
(37) Girls' fleece bathrobes, each beltless but featuring a hook-and-loop tab (described in statistical reporting number 6208.92.0020)
(38) Blankets (other than electric blankets) of cotton, woven, each measuring at least 116 cm but not more than 118 cm on an edge (described in statistical reporting number 6301.30.0010)
(39) Blankets (other than electric blankets) of cotton, other than woven, each measuring at least 116 cm but not more than 118 cm on an edge (described in statistical reporting number 6301.30.0020)
(40) Dust covers of knitted polyester fabric, designed for bed mattresses and pillows (described in statistical reporting number 6302.10.0020)
(41) Crib sheets of muslin cotton, fitted with elastic (described in statistical reporting number 6302.31.9020)
(42) Protective covers of cotton for pillows, not knitted or crocheted, of cotton, not napped or printed, each with full encasement construction and zipper opening (described in statistical reporting number 6302.31.9040)
(43) Cold packs consisting of a single-use, instant, endothermic chemical reaction cold pack combined with a textile exterior lining (described in statistical reporting number 6307.90.9889 prior to July 1, 2020; described in statistical reporting number 6307.90.9891 effective July 1, 2020)
(44) Disposable shoe and boot covers of man-made fiber fabrics (described in statistical reporting number 6307.90.9889 prior to July 1, 2020; described in statistical reporting number 6307.90.9891 effective July 1, 2020)
(45) Face masks and particulate facepiece respirators, of textile fabrics (described in statistical reporting number 6307.90.9889 prior to July 1, 2020; described in statistical reporting number 6307.90.9845, 6307.90.9850, 6307.90.9870, or 6307.90.9875 effective July 1, 2020)
(46) Hot packs of textile material, single-use (exothermic chemical reaction) (described in statistical reporting number 6307.90.9889 prior to July 1, 2020; described in statistical reporting number 6307.90.9891 effective July 1, 2020)
(47) Laparotomy sponges of cotton (described in statistical reporting number 6307.90.9889 prior to July 1, 2020; described in statistical

reporting number 6307.90.9891 effective July 1, 2020)

(48) Single-use blood pressure cuff sleeves of textile materials (described in statistical reporting number 6307.90.9889 prior to July 1, 2020; described in statistical reporting number 6307.90.9891 effective July 1, 2020)

(49) Single-use medical masks of textile material (described in statistical reporting number 6307.90.9889 prior to July 1, 2020; described in statistical reporting number 6307.90.9845, 6307.90.9850, or 6307.90.9870 effective July 1, 2020)

(50) Single-use stethoscope covers (described in statistical reporting number 6307.90.9889 prior to July 1, 2020; described in statistical reporting number 6307.90.9891 effective July 1, 2020)

(51) Woven gauze sponges of cotton in square or rectangular sizes (described in statistical reporting number 6307.90.9889 prior to July 1, 2020; described in statistical reporting number 6307.90.9891 effective July 1, 2020)

(52) Athletic, recreational and sporting headgear comprising shells of polyvinyl chloride, polycarbonate plastic or acrylonitrile butadiene styrene, each with an inner liner of expanded polypropylene or expanded polystyrene, designed for use with bicycles (described in statistical reporting number 6506.10.6045)

(53) Bright C1060 galvanized round wire, containing by weight 0.6 percent or more of carbon, measuring at least 0.034 mm but not more than 0.044 mm in diameter (described in statistical reporting number 7217.20.4530)

(54) Sewing machines of the household type, each weighing not more than 22.5 kg, having a touch screen control, a sewing light, a presser foot lifter and an automatic needle threader (described in statistical reporting number 8452.10.0090)

(55) Gasoline-powered earth-drilling power augers, each weighing not more than 16 kg, having a gasoline engine of a cylinder displacement not more than 55 cc and an output shaft connectable to an auger bit, whether or not presented with one or more auger bits (described in statistical reporting number 8467.89.5060)

(56) Gasoline powered or propane-powered engines of a cylinder displacement not more than 80 cc, each machine including a fitted auger bit specially designed for cutting through ice covers of bodies of water (described in statistical reporting number 8467.89.5090)

(57) Parts of hand-operated faucets, of copper, each weighing not more than 5 kg (described in statistical reporting number 8481.90.1000)

(58) Apparatus suitable for wearing on the wrist, having time-display functions, each article having an accelerometer and being capable of displaying and transmitting data sent to it by a network (*e.g.,* portable ADP unit, LAN or cellular network) (described in statistical reporting number 8517.62.0090)

(59) Tracking devices, each device measuring not more than 86 mm on a side (if rectangular) or 28 mm in diameter (if circular) and not more than 7.5 mm in thickness, not weighing more than 15 g, designed to be attached to another article and to establish a Bluetooth connection with another device for the purposes of providing relative location information (described in statistical reporting number 8517.62.0090)

(60) Wireless communication apparatus that can receive audio data to be distributed to wireless speakers (described in statistical reporting number 8518.22.0000)

(61) Television liquid crystal display (''LCD'') main board assemblies, each consisting of a printed circuit board containing a television tuner and audio and video components (described in statistical reporting number 8529.90.1300)

(62) Protective Articles (described in statistical reporting number 9004.90.0000)

(63) Prism binoculars, other than for use with infrared light, comprising a plastic, aluminum or magnesium alloy body with a rubber jacket, with magnification ranging from at least 4X but not more than 22X and aperture ranging from at least 21 mm but not more than 56 mm (described in statistical reporting number 9005.10.0040)

(64) Liquid crystal display (''LCD'') modules, not capable of receiving or processing a broadcast television signal, each with a video display diagonal measuring not more than 191 cm (described in statistical reporting number 9013.80.9000)

(65) Watch cases of stainless steel and titanium, not gold- or silver-plated, unassembled, each measuring at least 20 mm but not more than 48 mm in diameter and weighing at least 50 g but not more than 250 g (described in statistical reporting number 9111.20.4000)

(66) Watch dials of brass, each measuring at least 18 mm but not exceeding 50 mm in width and weighing at least 10 g but not more than 20 g (described in statistical reporting number 9114.30.4000)

(67) Acoustic upright pianos, other than used, containing a case measuring less than 111.76 cm in height (described in statistical reporting number 9201.10.0011)

(68) Acoustic upright pianos (other than used), each containing a case measuring 111.76 cm or more, but less than 121.92 cm in height (described in statistical reporting number 9201.10.0021)

(69) Acoustic upright pianos (other than used), each containing a case measuring 121.92 cm or more but less than 129.54 in height (described in statistical reporting number 9201.10.0031)

(70) Acoustic upright pianos (other than used), each containing a case measuring 129.54 cm or more in height (described in statistical reporting number 9201.10.0041)

(71) Acoustic grand pianos (other than used), each containing a case measuring 152.4 cm or more but less than 167.64 cm in length (described in statistical reporting number 9201.20.0021)

(72) Acoustic grand pianos (other than used), each containing a case measuring 167.64 cm or more but less than 180.34 cm in length (described in statistical reporting number 9201.20.0031)

(73) Acoustic grand pianos (other than used), each containing a case measuring 180.34 cm or more but less than 195.58 cm in length (described in statistical reporting number 9201.20.0041)

(74) Acoustic grand pianos (other than used), each containing a case measuring 195.58 cm or more in length (described in statistical reporting number 9201.20.0051)

(75) Harp sharping levers of steel (described in statistical reporting number 9209.92.8000)

(76) Parts of child safety seats (described in statistical reporting number 9401.90.1085)

(77) Parts of child safety seats incorporating springs (described in statistical reporting number 9401.90.1085)

(78) Pillow shells of cotton, each filled with goose or duck down (described in statistical reporting number 9404.90.1000)

(79) Quilted pillow shells of cotton (described in statistical reporting number 9404.90.1000)

(80) Quilted pillow shells of man-made fibers (described in statistical reporting number 9404.90.2000)
(81) Balance trainers of plastics, each measuring not more than 120 cm in length by 45 cm in width by 27 cm in height, containing an air bladder (described in statistical reporting number 9506.91.0030)
(82) Arrowheads of metal (described in statistical reporting number 9506.99.0520)
(83) Brushes of natural goat hair bristles, which are in lengths of at least 30 mm but not more than 33 mm, enclosed in a plastic protective holder, for cleaning optical lenses (described in statistical reporting number 9603.90.8050)
(84) Tufts of swine hair bristles, oriented with the soft feather tipped ends of the hairs facing up and the hard, root ends of the hairs facing down, with the root ends of the hairs glued together to form a round bottom not more than 7 mm in diameter, for incorporation into brushes (described in statistical reporting number 9603.90.8050)
(85) Paintings, drawings or pastels, each executed entirely by hand (the foregoing other than drawings of heading 4906 and other than hand-painted or hand-decorated manufactured articles), each measuring not more than 300 cm by not more than 2,000 cm (described in statistical reporting number 9701.10.0000)
(86) Postage stamps (described in statistical reporting number 9704.00.0000)
(87) Collectors' pieces of mineralogical interest (described in statistical reporting number 9705.00.0085)''

3. by amending the last sentence of the first paragraph of U.S. note 20(r) to subchapter III of chapter 99 by:

a. By deleting ''or (8)'' and by inserting ''(8)'' in lieu thereof; and

b. by inserting ''; or (9) heading 9903.88.57 and U.S. note 20(jjj) to subchapter III of chapter 99'' after ''U.S. note 20(hhh) to subchapter III of chapter 99''.

4. by amending the Article Description of heading 9903.88.15:

a. by deleting ''9903.88.53 or'' and by inserting ''9903.88.53,'' in lieu thereof; and

b. by inserting ''or 9903.88.57,'' after ''9903.88.55''.

Annex B

The following table is provided for informational purposes only. The table contains a list of the original product exclusions that are being extended by this notice. The original product exclusions were provided for in various subdivisions in note 20 to subchapter III of chapter 99 and an associated 9903.88 heading. In addition, the table contains the corresponding subdivisions in new note 20(jjj) to subchapter III of Chapter 99 and new heading 9903.88.57 for the product exclusions that are being extended by this notice. The original product exclusions expire on September 1, 2020. The exclusions that are being extended are effective from September 1, 2020 until December 31, 2020.

Original product exclusions		Corresponding extension of product exclusions	
Note 20 subdivision	Chapter 99 heading	Note 20 subdivision	Chapter 99 heading
20(ww)(1)	9903.88.44	20(jjj)(1)	9903.88.57
20(fff)(1)	9903.88.53	20(jjj)(2)	9903.88.57
20(rr)(1)	9903.88.39	20(jjj)(3)	9903.88.57
20(rr)(2)	9903.88.39	20(jjj)(4)	9903.88.57
20(rr)(3)	9903.88.39	20(jjj)(5)	9903.88.57
20(rr)(4)	9903.88.39	20(jjj)(6)	9903.88.57
20(rr)(5)	9903.88.39	20(jjj)(7)	9903.88.57
20(bbb)(1)	9903.88.49	20(jjj)(8)	9903.88.57
20(bbb)(2)	9903.88.49	20(jjj)(9)	9903.88.57
20(fff)(2)	9903.88.53	20(jjj)(10)	9903.88.57
20(rr)(6)	9903.88.39	20(jjj)(11)	9903.88.57
20(rr)(7)	9903.88.39	20(jjj)(12)	9903.88.57
20(rr)(8)	9903.88.39	20(jjj)(13)	9903.88.57
20(zz)(2)	9903.88.47	20(jjj)(14)	9903.88.57
20(ddd)(1)	9903.88.51	20(jjj)(15)	9903.88.57
20(ddd)(2)	9903.88.51	20(jjj)(16)	9903.88.57
20(fff)(12)	9903.88.53	20(jjj)(17)	9903.88.57
20(ddd)(5)	9903.88.51	20(jjj)(18)	9903.88.57
20(fff)(17)	9903.88.53	20(jjj)(19)	9903.88.57
20(uu)(1)	9903.88.42	20(jjj)(20)	9903.88.57
20(ww)(6)	9903.88.44	20(jjj)(21)	9903.88.57
20(uu)(2)	9903.88.42	20(jjj)(22)	9903.88.57
20(uu)(4)	9903.88.42	20(jjj)(23)	9903.88.57
20(uu)(5)	9903.88.42	20(jjj)(24)	9903.88.57
20(ddd)(10)	9903.88.51	20(jjj)(25)	9903.88.57
20(ddd)(12)	9903.88.51	20(jjj)(26)	9903.88.57
20(fff)(18)	9903.88.53	20(jjj)(27)	9903.88.57
20(fff)(19)	9903.88.53	20(jjj)(28)	9903.88.57
20(fff)(21)	9903.88.53	20(jjj)(29)	9903.88.57
20(fff)(20)	9903.88.53	20(jjj)(30)	9903.88.57
20(fff)(22)	9903.88.53	20(jjj)(31)	9903.88.57
20(fff)(23)	9903.88.53	20(jjj)(32)	9903.88.57
20(bbb)(10)	9903.88.49	20(jjj)(33)	9903.88.57
20(fff)(24)	9903.88.53	20(jjj)(34)	9903.88.57
20(fff)(25)	9903.88.53	20(jjj)(35)	9903.88.57
20(fff)(26)	9903.88.53	20(jjj)(36)	9903.88.57
20(fff)(27)	9903.88.53	20(jjj)(37)	9903.88.57
20(fff)(28)	9903.88.53	20(jjj)(38)	9903.88.57
20(fff)(29)	9903.88.53	20(jjj)(39)	9903.88.57
20(ddd)(13)	9903.88.51	20(jjj)(40)	9903.88.57
20(fff)(30)	9903.88.53	20(jjj)(41)	9903.88.57

Original product exclusions		Corresponding extension of product exclusions	
Note 20 subdivision	Chapter 99 heading	Note 20 subdivision	Chapter 99 heading
20(fff)(31)	9903.88.53	20(jjj)(42)	9903.88.57
20(uu)(6)	9903.88.42	20(jjj)(43)	9903.88.57
20(uu)(7)	9903.88.42	20(jjj)(44)	9903.88.57
20(uu)(9)	9903.88.42	20(jjj)(45)	9903.88.57
20(uu)(11)	9903.88.42	20(jjj)(46)	9903.88.57
20(uu)(12)	9903.88.42	20(jjj)(47)	9903.88.57
20(uu)(14)	9903.88.42	20(jjj)(48)	9903.88.57
20(uu)(15)	9903.88.42	20(jjj)(49)	9903.88.57
20(uu)(16)	9903.88.42	20(jjj)(50)	9903.88.57
20(uu)(17)	9903.88.42	20(jjj)(51)	9903.88.57
20(ddd)(20)	9903.88.51	20(jjj)(52)	9903.88.57
20(ddd)(21)	9903.88.51	20(jjj)(53)	9903.88.57
20(ddd)(25)	9903.88.51	20(jjj)(54)	9903.88.57
20(ddd)(26)	9903.88.51	20(jjj)(55)	9903.88.57
20(ddd)(27)	9903.88.51	20(jjj)(56)	9903.88.57
20(ddd)(28)	9903.88.51	20(jjj)(57)	9903.88.57
20(ww)(12)	9903.88.44	20(jjj)(58)	9903.88.57
20(zz)(7)	9903.88.47	20(jjj)(59)	9903.88.57
20(fff)(48)	9903.88.53	20(jjj)(60)	9903.88.57
20(bbb)(19)	9903.88.49	20(jjj)(61)	9903.88.57
20(uu)(19)	9903.88.42	20(jjj)(62)	9903.88.57
20(ddd)(33)	9903.88.51	20(jjj)(63)	9903.88.57
20(bbb)(23)	9903.88.49	20(jjj)(64)	9903.88.57
20(bbb)(24)	9903.88.49	20(jjj)(65)	9903.88.57
20(bbb)(26)	9903.88.49	20(jjj)(66)	9903.88.57
20(ddd)(35)	9903.88.51	20(jjj)(67)	9903.88.57
20(ddd)(36)	9903.88.51	20(jjj)(68)	9903.88.57
20(ddd)(37)	9903.88.51	20(jjj)(69)	9903.88.57
20(ddd)(38)	9903.88.51	20(jjj)(70)	9903.88.57
20(ddd)(39)	9903.88.51	20(jjj)(71)	9903.88.57
20(ddd)(40)	9903.88.51	20(jjj)(72)	9903.88.57
20(ddd)(41)	9903.88.51	20(jjj)(73)	9903.88.57
20(ddd)(42)	9903.88.51	20(jjj)(74)	9903.88.57
20(ddd)(44)	9903.88.51	20(jjj)(75)	9903.88.57
20(bbb)(29)	9903.88.49	20(jjj)(76)	9903.88.57
20(ddd)(46)	9903.88.51	20(jjj)(77)	9903.88.57
20(ddd)(47)	9903.88.51	20(jjj)(78)	9903.88.57
20(ddd)(48)	9903.88.51	20(jjj)(79)	9903.88.57
20(ddd)(49)	9903.88.51	20(jjj)(80)	9903.88.57
20(fff)(56)	9903.88.53	20(jjj)(81)	9903.88.57
20(ddd)(51)	9903.88.51	20(jjj)(82)	9903.88.57
20(fff)(59)	9903.88.53	20(jjj)(83)	9903.88.57
20(bbb)(33)	9903.88.49	20(jjj)(84)	9903.88.57
20(ddd)(53)	9903.88.51	20(jjj)(85)	9903.88.57
20(ddd)(57)	9903.88.51	20(jjj)(86)	9903.88.57
20(ddd)(59)	9903.88.51	20(jjj)(87)	9903.88.57

[FR Doc. 2020–19419 Filed 9–1–20; 8:45 am]
BILLING CODE 3290–F0–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0011]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Transportation (DOT).

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from five individuals for an exemption from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. If granted, the exemptions will enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Comments must be received on or before October 2, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2020–0011 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/docket?D=FMCSA-2020-0011.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical

Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2020–0011), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0011.* Click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0011* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Docket Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The five individuals listed in this notice have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding vision found in § 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

On July 16, 1992, the Agency first published the criteria for the Vision Waiver Program, which listed the conditions and reporting standards that CMV drivers approved for participation would need to meet (57 FR 31458). The current Vision Exemption Program was established in 1998, following the enactment of amendments to the statutes governing exemptions made by § 4007 of the Transportation Equity Act for the 21st Century, Public Law 105–178, 112 Stat. 107, 401 (June 9, 1998). Vision exemptions are considered under the procedures established in 49 CFR part 381 subpart C, on a case-by-case basis upon application by CMV drivers who do not meet the vision standards of § 391.41(b)(10).

To qualify for an exemption from the vision requirement, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely in intrastate commerce with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at *https://www.regulations.gov/docket?D=FMCSA-1998-3637.*

FMCSA believes it can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrated the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively.[1] The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly (See Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (See Weber, Donald C., ''Accident Rate Potential: An

[1] A thorough discussion of this issue may be found in a FHWA final rule published in the **Federal Register** on March 26, 1996 and available on the internet at *https://www.govinfo.gov/content/pkg/FR-1996-03-26/pdf/96-7226.pdf.*

Application of Multiple Regression Analysis of a Poisson Process,'' Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

III. Qualifications of Applicants

Tanner L. Batey

Mr. Batey, 21, has had glaucoma in his right eye since birth. The visual acuity in his right eye is counting fingers, and in his left eye, 20/20. Following an examination in 2019, his ophthalmologist stated, ''I certify that this patient has sufficient vision to perform all required driving tasks required to operate a commercial vehicle.'' Mr. Batey reported that he has driven straight trucks for 6 years, accumulating 60,000 miles and tractor-trailer combinations for 5 years, accumulating 185,000 miles. He holds a Class A CDL from Montana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Martin G. Burley, Jr.

Mr. Burley, 57, has had chorioretinal scarring in his right eye due to myopia for five years. The visual acuity in his right eye is 20/70, and in his left eye, 20/25. Following an examination in 2019, his optometrist stated, ''He has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Burley reported that he has driven straight trucks for 11 years, accumulating 221,000 miles and tractor-trailer combinations for 1 year, accumulating 210,000 miles. He holds a Class A CDL from Idaho. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Fernando Casillas Lucio

Mr. Casillas Lucio, 36, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/150. Following an examination in 2020, his optometrist stated, ''In my professional opinion, vision wise, patient is stable and able to operate a commercial vehicle.'' Mr. Lucio reported that he has driven straight trucks for 3 years, accumulating 56,016 miles. He holds a Class B CDL from California. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Franz E. Fehr

Mr. Fehr, 29, has had amblyopia in his right eye since 2006. The visual acuity in his right eye is 20/400, and in his left eye, 20/20. Following an examination in 2019, his optometrist stated, ''Based on my findings Franz Fehr has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Fehr reported that he has driven tractor-trailer combinations for 4 years, accumulating 580,000 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jonathan D. Steen

Mr. Steen, 39, has macular scarring in his right eye due to an infection in childhood. The visual acuity in his right eye is 20/125, and in his left eye, 20/20. Following an examination in 2020, his optometrist stated, ''In my medical opinion, Mr. Jonathan Steen has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Steen reported that he has driven tractor-trailer combinations for 20 years, accumulating 3 million miles. He holds a Class A CDL from Minnesota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments and material received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–19359 Filed 9–1–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0009]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt six individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. They are unable to meet the vision requirement in one eye for various reasons. The exemptions enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: The exemptions were applicable on August 14, 2020. The exemptions expire on August 14, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0009* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Docket Operations.

B. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

On July 14, 2020, FMCSA published a notice announcing receipt of applications from six individuals requesting an exemption from vision requirement in 49 CFR 391.41(b)(10) and requested comments from the public (85 FR 42484). The public comment period ended on August 13, 2020, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in § 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The Agency's decision regarding these exemption applications is based on medical reports about the applicants' vision, as well as their driving records and experience driving with the vision deficiency. The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the July 14, 2020, **Federal Register** notice (85 FR 42484) and will not be repeated here.

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their limitation and demonstrated their ability to drive safely. The six exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including amblyopia, complete loss of vision, corneal scar, macular scar, and prosthesis. In most cases, their eye conditions did not develop recently. Three of the applicants were either born with their vision impairments or have had them since childhood. The three individuals that developed their vision conditions as adults have had them for a range of 9 to 20 years. Although each applicant has one eye that does not meet the vision requirement in § 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and, in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV.

Doctors' opinions are supported by the applicants' possession of a valid license to operate a CMV. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV with their limited vision in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions.

The applicants in this notice have driven CMVs with their limited vision in careers ranging for 7 to 54 years. In the past 3 years, no drivers were involved in crashes, and no drivers were convicted of moving violations in CMVs. All the applicants achieved a record of safety while driving with their vision impairment that demonstrates the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

Consequently, FMCSA finds that in each case exempting these applicants from the vision requirement in § 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in § 391.41(b)(10) and (b) by a certified medical examiner (ME) who attests that the individual is otherwise physically qualified under § 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the ME at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the six exemption applications, FMCSA exempts the following drivers from the vision requirement, § 391.41(b)(10), subject to the requirements cited above:

Heath G. Brown (NC)
Frederick V. Hanks (AL)
David T. Lembke (WI)
David W. McVicar (IL)
Anthony M. Millard (NE)
Paul B. Overman (WA)

In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–19360 Filed 9–1–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2014–0106; FMCSA–2016–0002; FMCSA–2017–0061]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Transportation (DOT).

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for eight individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The exemptions are applicable on September 6, 2020. The exemptions expire on September 6, 2022. Comments must be received on or before October 2, 2020

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2014–0106, Docket No. FMCSA–2016–0002, or Docket No. FMCSA–2017–0061 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/docket?D=FMCSA-2014-0106, http://www.regulations.gov/docket?D=FMCSA-2016-0002,* or *http://www.regulations.gov/docket?D=FMCSA-2017-0061.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2014–0106, Docket No. FMCSA–2016–0002, or Docket No. FMCSA–2017–0061), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov/docket?D=FMCSA-2014-0106, http://www.regulations.gov/docket?D=FMCSA-2016-0002,* or *http://www.regulations.gov/docket?D=FMCSA-2017-0061.* Click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2014-0106, http://www.regulations.gov/docket?D=FMCSA-2016-0002,* or *http://www.regulations.gov/docket?D=FMCSA-2017-0061* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Docket Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding hearing found in 49 CFR 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

The eight individuals listed in this notice have requested renewal of their exemptions from the hearing standard in § 391.41(b)(11), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the eight applicants has satisfied the renewal conditions for obtaining an exemption from the hearing requirement. The eight drivers in this notice remain in good standing with the Agency. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of these drivers for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of September and are discussed below. As of September 6, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following eight individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Weston Arthurs (CA)
Mathias Conway (MI)
Charles DePriest (TX)
Agustin Hernandez (TX)
Robert Hilber (TX)
Richard Hoots (AR)
D'Nielle Smith (OH)
Michael Sweet (GA)

The drivers were included in docket numbers FMCSA–2014–0106, FMCSA–2016–0002, or FMCSA–2017–0061. Their exemptions are applicable as of September 6, 2020, and will expire on September 6, 2022.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must report any crashes or accidents as defined in § 390.5; and (2) report all citations and convictions for disqualifying offenses under 49 CFR 383 and 49 CFR 391 to FMCSA; and (3) each driver prohibited from operating a motorcoach or bus with passengers in interstate commerce. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. In addition, the exemption does not exempt the individual from meeting the applicable CDL testing requirements. Each exemption will be valid for 2 years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the eight exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the hearing requirement in § 391.41 (b)(11). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for two years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–19358 Filed 9–1–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0123; FMCSA–2015–0326; FMCSA–2015–0328; FMCSA–2015–0329; FMCSA–2017–0057; FMCSA–2017–0059; FMCSA–2017–0060; FMCSA–2017–0061]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Transportation (DOT).

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 18 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on August 22, 2020. The exemptions expire on August 22, 2022. Comments must be received on or before October 2, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0123, Docket No. FMCSA–2015–0326, Docket No. FMCSA–2015–0328, Docket No. FMCSA–2015–0329, Docket No. FMCSA–2017–0057, Docket No. FMCSA–2017–0059, Docket No. FMCSA–2017–0060, or Docket No. FMCSA–2017–0061 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical

Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2012–0123, FMCSA–2015–0326, FMCSA–2015–0328, FMCSA–2015–0329, FMCSA–2017–0057, FMCSA–2017–0059, FMCSA–2017–0060, and FMCSA–2017–0061), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2012–0123, FMCSA–2015–0326, FMCSA–2015–0328, FMCSA–2015–0329, FMCSA–2017–0057, FMCSA–2017–0059, FMCSA–2017–0060, or FMCSA–2017–0061, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov.* Insert the docket number, FMCSA–2012–0123, FMCSA–2015–0326, FMCSA–2015–0328, FMCSA–2015–0329, FMCSA–2017–0057, FMCSA–2017–0059, FMCSA–2017–0060, or FMCSA–2017–0061, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Docket Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding hearing found in 49 CFR 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

The 18 individuals listed in this notice have requested renewal of their exemptions from the hearing standard in § 391.41(b)(11), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 18 applicants has satisfied the renewal conditions for obtaining an exemption from the hearing requirement. The 18 drivers in this notice remain in good standing with the Agency. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of these drivers for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

As of August 22, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 18 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Mataio Brown (MS)
Barry Carpenter (SD)
Lyle Eash (VA)
Clay Fitzpatrick (ID)
Berenice Martinez (TX)
Michael McCarthy (MN)
Steven Moorehead (KY)
Gary Nagel (MN)

Christopher Poole (OH)
Ricardo Porras-Payan (TX)
James Quinn (TN)
Willine Smith (GA)
Brandon Soto (MO)
Dennis Stotts (OH)
Michael Tayman (ME)
Carlos Torres (FL)
Paul Wentworth (WA)
Joseph Woodle (KY)

The drivers were included in docket number FMCSA–2012–0123, FMCSA–2015–0326, FMCSA–2015–0328, FMCSA–2015–0329, FMCSA–2017–0057, FMCSA–2017–0059, FMCSA–2017–0060, or FMCSA–2017–0061. Their exemptions were applicable as of August 22, 2020, and will expire on August 22, 2022.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must report any crashes or accidents as defined in § 390.5; and (2) report all citations and convictions for disqualifying offenses under 49 CFR 383 and 49 CFR 391 to FMCSA; and (3) each driver prohibited from operating a motorcoach or bus with passengers in interstate commerce. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. In addition, the exemption does not exempt the individual from meeting the applicable CDL testing requirements. Each exemption will be valid for 2 years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 18 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the hearing requirement in § 391.41(b)(11). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for two years unless revoked earlier by FMCSA.

Larry W. Minor,
Associate Administrator for Policy.

[FR Doc. 2020–19357 Filed 9–1–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7006; FMCSA–2002–11714; FMCSA–2002–12294; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2005–21711; FMCSA–2005–22727; FMCSA–2006–24783; FMCSA–2008–0021; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0266; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2011–0380; FMCSA–2012–0104; FMCSA–2012–0159; FMCSA–2012–0215; FMCSA–2013–0167; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0004; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2015–0070; FMCSA–2015–0345; FMCSA–2015–0347; FMCSA–2015–0350; FMCSA–2016–0024; FMCSA–2016–0028; FMCSA–2016–0029; FMCSA–2016–0206; FMCSA–2018–0008; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0017]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 55 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirements in one eye.

DATES: Each group of renewed exemptions are applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before October 2, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2000–7006, Docket No. FMCSA–2002–11714, Docket No. FMCSA–2002–12294, Docket No. FMCSA–2004–17984, Docket No. FMCSA–2004–18885, Docket No. FMCSA–2005–21711, Docket No. FMCSA–2005–22727, Docket No. FMCSA–2006–24783, Docket No. FMCSA–2008–0021, Docket No. FMCSA–2008–0106, Docket No. FMCSA–2008–0231, Docket No. FMCSA–2008–0266, Docket No. FMCSA–2010–0082, Docket No. FMCSA–2010–0114, Docket No. FMCSA–2010–0161, Docket No. FMCSA–2010–0187, Docket No. FMCSA–2011–0380, Docket No. FMCSA–2012–0104, Docket No. FMCSA–2012–0159, Docket No. FMCSA–2012–0215, Docket No. FMCSA–2013–0167, Docket No. FMCSA–2013–0174, Docket No. FMCSA–2014–0002, Docket No. FMCSA–2014–0004, Docket No. FMCSA–2014–0006, Docket No. FMCSA–2014–0007, Docket No. FMCSA–2014–0010, Docket No. FMCSA–2014–0011, Docket No. FMCSA–2014–0296, Docket No. FMCSA–2015–0070, Docket No. FMCSA–2015–0345, Docket No. FMCSA–2015–0347, Docket No. FMCSA–2015–0350, Docket No. FMCSA–2016–0024, Docket No. FMCSA–2016–0028, Docket No. FMCSA–2016–0029, Docket No. FMCSA–2016–0206, Docket No. FMCSA–2018–0008, Docket No. FMCSA–2018–0011, Docket No. FMCSA–2018–0012, or Docket No. FMCSA–2018–0017 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the SUPPLEMENTARY INFORMATION section for instructions on submitting comments

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2000–7006; FMCSA–2002–11714; FMCSA–2002–12294; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2005–21711; FMCSA–2005–22727; FMCSA–2006–24783; FMCSA–2008–0021; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0266; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2011–0380; FMCSA–2012–0104; FMCSA–2012–0159; FMCSA–2012–0215; FMCSA–2013–0167; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0004; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2015–0070; FMCSA–2015–0345; FMCSA–2015–0347; FMCSA–2015–0350; FMCSA–2016–0024; FMCSA–2016–0028; FMCSA–2016–0029; FMCSA–2016–0206; FMCSA–2018–0008; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0017), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2000–7006; FMCSA–2002–11714; FMCSA–2002–12294; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2005–21711; FMCSA–2005–22727; FMCSA–2006–24783; FMCSA–2008–0021; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0266; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2011–0380; FMCSA–2012–0104; FMCSA–2012–0159; FMCSA–2012–0215; FMCSA–2013–0167; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0004; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2015–0070; FMCSA–2015–0345; FMCSA–2015–0347; FMCSA–2015–0350; FMCSA–2016–0024; FMCSA–2016–0028; FMCSA–2016–0029; FMCSA–2016–0206; FMCSA–2018–0008; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0017, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

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C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

The 55 individuals listed in this notice have requested renewal of their exemptions from the vision standard in § 391.41(b)(10), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 55 applicants has satisfied the renewal conditions for obtaining an exemption from the vision standard (see 65 FR 20245; 65 FR 57230; 67 FR 15662; 67 FR 37907; 67 FR 46016; 67 FR 57266; 67 FR 57267; 69 FR 26206; 69 FR 33997; 69 FR 51346; 69 FR 52741; 69 FR 53493; 69 FR 61292; 69 FR 62742; 70 FR 48797; 70 FR 61493; 70 FR 71884; 71 FR 4632; 71 FR 26602; 71 FR 32183; 71 FR 41310; 71 FR 53489; 71 FR 55820; 71 FR 62148; 73 FR 5259; 73 FR 15567; 73 FR 27015; 73 FR 27018; 73 FR 35195; 73 FR 35199; 73 FR 36955; 73 FR 46973; 73 FR 48275; 73 FR 51336; 73 FR 51689; 73 FR 54888; 73 FR 61925; 73 FR 63047; 73 FR 65009; 75 FR 1451; 75 FR 19674; 75 FR 25918; 75 FR 34212; 75 FR 36778; 75 FR 36779; 75 FR 39725; 75 FR 39729; 75 FR 44051; 75 FR 47883; 75 FR 47888; 75 FR 52062; 75 FR 52063; 75 FR 57105; 75 FR 59327; 75 FR 61833; 75 FR 61883; 75 FR 63257; 75 FR 64396; 77 FR 545; 77 FR 17109; 77 FR 23797; 77 FR 27845; 77 FR 27847; 77 FR 36336; 77 FR 36338; 77 FR 38384; 77 FR 38386; 77 FR 40945; 77 FR 46153; 77 FR 46795; 77 FR 52381; 77 FR 52388; 77 FR 52389; 77 FR 56262; 77 FR 60010; 77 FR 64582; 77 FR 64583; 77 FR 64841; 78 FR 64271; 78 FR 78475; 79 FR 1908; 79 FR 2748; 79 FR 10606; 79 FR 14333; 79 FR 18392; 79 FR 22003; 79 FR 23797; 79 FR 29498; 79 FR 35212; 79 FR 35218; 79 FR 35220; 79 FR 38659; 79 FR 38661; 79 FR 45868; 79 FR 46153; 79 FR 46300; 79 FR 47175; 79 FR 51642; 79 FR 51643; 79 FR 53514; 79 FR 56097; 79 FR 56099; 79 FR 56104; 79 FR 56117; 79 FR 58856; 79 FR 64001; 79 FR 70928; 79 FR 72754; 80 FR 67476; 80 FR 79414; 80 FR 80443; 81 FR 1474; 81 FR 14190; 81 FR 15404; 81 FR 20433; 81 FR 21655; 81 FR 28138; 81 FR 39100; 81 FR 39320; 81 FR 42054; 81 FR 44680; 81 FR 48493; 81 FR 60115; 81 FR 66718; 81 FR 66720; 81 FR 66722; 81 FR 71173; 81 FR 72642; 81 FR 81230; 81 FR 90050; 81 FR 91239; 81 FR 96196; 83 FR 6922; 83 FR 15195; 83 FR 15216; 83 FR 24146; 83 FR 24585; 83 FR 28320; 83 FR 28323; 83 FR 28325; 83 FR 28332; 83 FR 34661; 83 FR 34677; 83 FR 45749; 83 FR 45750; 83 FR 56137; 83 FR 56902). They have submitted evidence showing that the vision in the better eye continues to meet the requirement specified at § 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past 2 years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of October and are discussed below. As of October 1, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 37 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (65 FR 20245; 65 FR 57230; 67 FR 46016; 67 FR 57266; 67 FR 57267; 69 FR 51346; 69 FR 52741; 70 FR 71884; 71 FR 4632; 71 FR 53489; 73 FR 5259; 73 FR 15567; 73 FR 27015; 73 FR 35195; 73 FR 35199; 73 FR 48275; 73 FR 51336; 75 FR 1451; 75 FR 19674; 75 FR 25918; 75 FR 34212; 75 FR 39729; 75 FR 44051; 75 FR 47888; 75 FR 52062; 77 FR 545; 77 FR 23797; 77 FR 27847; 77 FR 36336; 77 FR 36338; 77 FR 38386; 77 FR 40945; 77 FR 46153; 77 FR 46795; 77 FR 52389; 78 FR 64271; 78 FR 78475; 79 FR 1908; 79 FR 2748; 79 FR 10606; 79 FR 14333; 79 FR 18392; 79 FR 22003; 79 FR 23797; 79 FR 29498; 79 FR 35212; 79 FR 35220; 79 FR 38659; 79 FR 38661; 79 FR 45868; 79 FR 46153; 79 FR 46300; 79 FR 47175; 79 FR 51643; 79 FR 53514; 79 FR 64001; 80 FR 67476; 80 FR 79414; 80 FR 80443; 81 FR 1474; 81 FR 14190; 81 FR 15404; 81 FR 2043381 FR 21655; 81 FR 28138; 81 FR 39100; 81 FR 39320; 81 FR 42054; 81 FR 44680; 81 FR 48493; 81 FR 60115; 81 FR 66718; 81 FR 66720; 81 FR 66722; 81 FR 72642; 81 FR 81230; 81 FR 90050; 81 FR 91239; 81 FR 96196; 83 FR 6922; 83 FR 15195; 83 FR 15216; 83 FR 24146; 83 FR 24585; 83 FR 28320; 83 FR 28323; 83 FR 28325; 83 FR 28332; 83 FR 34661; 83 FR 34677; 83 FR 45749; 83 FR 56902):

Dominic A. Berube (MA)
Mark F. Besco (IA)
Lester E. Burnes (NM)
Antonio A. Calixto (MN)
Walter O. Connelly (WA)
Tommy J. Cross, Jr. (TN)
Donald R. Date, Jr. (MD)
Jacob Dehoyos (NM)
David Diamond (IL)
Timothy C. Dotson (MO)
Michael Giagnacova (PA)
Joshua D. Giles (NC)
Esteban G. Gonzalez (TX)
Jimmy G. Hall (NC)
Ricky P. Hastings (TX)
Kevin L. Jones (SC)
Keith A. Kelley (ME)
William J. Krysinski (MN)
Melvin L. Lester (MS)
William L. Martin (OR)
Michael P. Mazza (WA)
Duane A. McCord (IL)
Richard L. Miller (IN)
Philip L. Neff (PA)
Michael Pace (TX)
Aaron L. Paustian (IA)
Markus Perkins (LA)
Kent A. Perry (WY)
Mario A. Quezada (TX)
Carroll G. Quisenberry (KY)
Ruel W. Reed (IA)
Guadalupe Reyes (FL)
Ivan Romero (IL)
Jess C. Sanchez (TX)
Robert Schick (PA)
Michael D. Singleton (IN)
Ricky W. Witt (IA)

The drivers were included in docket numbers FMCSA–2000–7006; FMCSA–2002–12294; FMCSA–2005–22727; FMCSA–2008–0021; FMCSA–2008–0106; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2012–0104; FMCSA–2012–0159; FMCSA–2013–0167; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0004; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2015–0070; FMCSA–2015–0345; FMCSA–2015–0347; FMCSA–2015–0350; FMCSA–2016–0024; FMCSA–2016–0028; FMCSA–2016–0029; FMCSA–2016–0206; FMCSA–2018–0008; FMCSA–2018–0011; FMCSA–2018–0012. Their exemptions are applicable as of October 1, 2020, and will expire on October 1, 2022.

As of October 6, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following six individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (67 FR 15662; 67 FR 37907; 69 FR 26206; 70 FR 48797; 70 FR 61493; 71 FR 26602; 71 FR 32183; 71 FR 41310; 73 FR 27018; 73 FR 36955; 75 FR 36778; 75 FR 36779; 75 FR 39725; 75 FR 61833; 77 FR 17109; 77 FR 27845; 77 FR 38384; 77 FR 56262; 79 FR 23797; 79 FR 35218; 79 FR 51642; 81 FR 71173; 83 FR 56902):

John E. Breslin (NV)
Ronald M. Green (OH)
David W. Grooms (IN)
Ralph E. Holmes (MD)
Daniel W. Johnson (NY)
Charles E. Stokes (FL)

The drivers were included in docket number FMCSA–2002–11714; FMCSA–2005–21711; FMCSA–2006–24783; FMCSA–2010–0161; FMCSA–2011–0380. Their exemptions are applicable as of October 6, 2020, and will expire on October 6, 2022.

As of October 11, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (83 FR 45750; 83 FR 56137):

Thomas J. Knapp (WA)

The driver was included in docket number FMCSA–2018–0017. The exemption is applicable as of October 11, 2020, and will expire on October 11, 2022.

As of October 15, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following two individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (69 FR 33997; 69 FR 61292; 71 FR 55820; 73 FR 46973; 73 FR 54888; 73 FR 65009; 75 FR 52063; 75 FR 57105; 77 FR 52388; 77 FR 60010; 81 FR 71173; 83 FR 56902):

William C. Ball (NC) and Kevin C. Palmer (OR)

The drivers were included in docket numbers FMCSA–2004–17984; FMCSA–2008–0231. Their exemptions are applicable as of October 15, 2020, and will expire on October 15, 2022.

As of October 21, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (79 FR 56099; 79 FR 70928; 81 FR 71173; 83 FR 56902):

Raymond Holt (CA)

The driver was included in docket number FMCSA–2014–0011. The exemption is applicable as of October 21, 2020, and will expire on October 21, 2022.

As of October 22, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following four individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (73 FR 51689; 73 FR 63047; 75 FR 39725; 75 FR 47883; 75 FR 61883; 75 FR 63257; 75 FR 64396; 77 FR 64582; 79 FR 56104; 81 FR 71173; 83 FR 56902):

Randall J. Benson (MN)
James D. Drabek, Jr. (IL)
Delone W. Dudley (MD)
Jeromy W. Leatherman (PA)

The drivers were included in docket number FMCSA–2008–0266; FMCSA–2010–0161; FMCSA–2010–0187. Their exemptions are applicable as of October 22, 2020, and will expire on October 22, 2022.

As of October 23, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (77 FR 52381; 77 FR 64841; 79 FR 56097; 81 FR 71173; 83 FR 56902):

James T. Stalker (OH)

The driver was included in docket number FMCSA–2012–0215. The exemption is applicable as of October 23, 2020, and will expire on October 23, 2022.

As of October 27, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following two individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (69 FR 53493; 69 FR 62742; 71 FR 62148; 73 FR 61925; 75 FR 59327; 77 FR 64583; 79 FR 56117; 81 FR 71173; 83 FR 56902):

David W. Brown (TN) and Zbigniew P. Pietranik (WI)

The drivers were included in docket number FMCSA–2004–18885. Their exemptions are applicable as of October 27, 2020, and will expire on October 27, 2022.

As of October 31, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (79 FR 58856; 79 FR 72754; 81 FR 71173; 83 FR 56902):

Henry L. Chrestensen (IA)

The driver was included in docket number FMCSA–2014–0296. The exemption is applicable as of October 31, 2020, and will expire on October 31, 2022.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must undergo an annual physical examination (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a certified medical examiner (ME), as defined by § 390.5, who attests that the driver is otherwise physically qualified under § 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the ME at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file or keep a copy of his/her driver's qualification if he/her is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VI. Conclusion

Based upon its evaluation of the 55 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the vision requirement in § 391.41(b)(10), subject to the requirements cited above. In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–19356 Filed 9–1–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2011–0085]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on August 24, 2020, BNSF Railway Company (BNSF) petitioned the Federal Railroad Administration (FRA) to amend a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 213, Track Safety Standards. FRA assigned the petition Docket Number FRA–2011–0085.

Specifically, BNSF requests to modify its existing waiver from 49 CFR 213.109(d)(6) which allows for the use of concrete crossties with one shoulder broken off where, if turned end for end, every other crosstie is fastened 100 percent on both rails (''3/4 Concrete Ties''). BNSF seeks to: (1) Amend the waiver locations to reflect BNSF's historical practice under the waiver; and (2) clarify that multiple Gage Restraint Measurement System (GRMS) test platforms may be employed to test gage widening. BNSF's proposal would effectively ''grandfather'' BNSF's continued use of these types of crossties across six divisions throughout the BNSF operating system.

BNSF claims: (1) The performance of 3/4 Concrete Ties have not resulted in any derailments due to gage or defective crossties defects since the issuance of the waiver in 2011; (2) FRA has taken no exception to wide gage throughout BNSF's use of 3/4 Concrete Ties in the past; and (3) foot-by-foot analysis by automated inspection show the 3/4 Concrete Ties remained stable and are not degrading.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation (DOT), 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by October 2, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov*.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2020–19398 Filed 9–1–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2020–0068]

Petition for Waiver of Compliance

Under part 211 of title 49 of the Code of Federal Regulations (CFR), this document provides the public notice that on August 14, 2020, the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA) (Petitioners), on behalf of themselves and their member railroads, petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 236, Rules, Standards, and Instructions Governing the Installation, Inspection, Maintenance, and Repair of Signal and Train Control Systems, Devices, and Appliances. FRA assigned the petition Docket Number FRA–2020–0068.

Specifically, Petitioners request relief from 49 CFR 236.1021, which governs the Request for Amendment (RFA) process when material modifications are made to a mixed-certification Interoperable Train Control Positive Train Control (PTC) system or its accompanying Safety Plan (PTCSP). Petitioners state that the RFA process when modifications are made to a PTCSP is a time consuming and significant undertaking for both FRA and railroad staff, involving submission of a voluminous amount of information and likely a lengthy review and approval process. Petitioners further state that frequently occurring modifications to account for regular PTC technology updates of the FRA-certified PTC system are necessary to allow for the continued successful and safe operation of the PTC system.

Petitioners assert that approval of this waiver request would eliminate undue paperwork, administrative burdens, and delays to modifications that are intended to improve the functioning of existing PTC systems. Petitioners also contend that approval would result in significant resource and cost savings to both FRA and the railroads.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *http://www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- Website: *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation (DOT), 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by October 19, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *http://www.regulations.gov/#!privacyNotice* for the privacy notice of *regulations.gov*.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2020–19397 Filed 9–1–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2020–0027–N–18]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA), this notice announces that FRA is forwarding the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and comment. The ICR describes the information collection and its expected burden. On May 29, 2020, FRA published a notice providing a 60-day period for public comment on the ICR.

DATES: Interested persons are invited to submit comments on or before October 2, 2020.

ADDRESSES: Written comments and recommendations for the proposed ICR should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular ICR by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ms. Kim Toone, Information Collection Clearance Officer, Office of Administration, Office of Information Technology, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone: (202) 493–6132).

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On May 29, 2020, FRA published a 60-day notice in the **Federal Register** soliciting comment on the ICR for which it is now seeking OMB approval. *See* 85 FR 32440. FRA received one comment from Rio Metro Regional Transit Authority suggesting that the current grant application be improved to eliminate redundancies. It recommended that FRA capture from applicants additional information in the project narrative so that the Statement of Work (SOW) can be eliminated. After careful consideration, FRA determined that this recommendation could not be implemented as the documents serve distinct functions. The primary purpose of the project narrative is to address statutory grant evaluation and selection criteria and the primary purpose of the SOW is to determine project readiness for obligations. Therefore, FRA plans on continuing both the project narrative and SOW.

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.10(b); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summaries below describe the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Grants Management Requirements for Federal Railroad Administration. Grant Awards and Cooperative Agreements.

OMB Control Number: 2130–0615.

Abstract: FRA solicits grant applications for projects including, but not limited to, preconstruction planning activities, safety improvements, congestion relief, improvements of grade crossings, and rail line relocation, as well as projects that encourage development, expansion, and upgrades to passenger and freight rail infrastructure and services. FRA funds projects that meet FRA and government-wide evaluation standards and align with the DOT Strategic Plan.

FRA administers award agreements for both construction and non-construction projects that will result in benefits or other tangible improvements in rail corridors, service, safety, and technology. These projects include completion of preliminary engineering environmental, research and development, final design, and construction.

FRA requires systematic and uniform collection and submission of information, as approved by OMB, to ensure accountability of Federal assistance provided by FRA. Through this information collection, FRA will measure Federal award recipients' performance and results, including expenditures in support of agreed-upon activities and allowable costs outlined in FRA Notice of Grant Award. This information collection includes OMB-required reports and documentation, as well a additional forms and submission to compile evidence relevant to addressing FRA's important policy challenges, promoting cost-effectiveness in FRA programs, and providing effective oversight of programmatic and financial performance. FRA issues and manages awards in compliance with 2 CFR part 200; Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

Form(s): All FRA forms are located at FRA's public website; all SF forms are located at *Grants.gov*. FRA forms 30 (FRA Assurance and Certifications Regarding Lobbying; Debarment, Suspension and Other Responsibility Matters and Drug-Free Workplace Requirements), 31 (Grant Adjustment Require Form), 32 (Service Outcome Agreement Annual Reporting), 33 (Final Performance Report), 34 (Quarterly Progress Report), 35 (Application Form), 217 (Categorical Exclusion Worksheet), 229 (NIST Manufacturing Extension Partnership Supplier Scouting—FRA Item Opportunity Synopsis), 251 (Applicant Financial Capability Questionnaire), and 252 (Payment Summary Spreadsheet). SF forms 270 (Request for Advance or Reimbursement), 424 (Application for Federal Assistance), 424 A (Budget Information for Non-Construction Programs), 424B (Assurance for Non-Construction Programs), 424C (Budget Information for Construction Programs), 424D (Assurances for Construction

Programs), 425 (Federal Financial Report), and LLL (Disclosure of Lobbying Activities).

Type of Request: Revision of a currently approved collection.

Affected Public: Generally includes States, d local governments and railroads.

Frequency of Submission: Varied.

Total Estimated Annual Responses: 6,551 responses.

Total Estimated Annual Burden: 88,293.50 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $3,619,150.57.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Brett A. Jortland,

Deputy Chief Counsel.

[FR Doc. 2020–19330 Filed 9–1–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Application To Participate in the IRS Acceptance Program

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service (IRS), in accordance with the Paperwork Reduction Act of 1995 (PRA 95), provides the general public and Federal agencies with an opportunity to comment on continuing collections of information. This helps the IRS assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the IRS's information collection requirements and provide the requested data in the desired format. The IRS is soliciting comments concerning Application to Participate in the IRS Acceptance Agent Program. Form 13551 is used to gather information to determine applicant's eligibility in the Acceptance Agent Program.

DATES: Written comments should be received on or before November 2, 2020 to be assured of consideration.

ADDRESSES: Direct all written comments to Paul Adams, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Sara Covington, at (737)800–6149 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington DC 20224, or through the internet at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Application to Participate in the IRS Acceptance Agent Program.

OMB Number: 1545–1896.

Form Number: 13551.

Abstract: Form 13551 is used by all parsons who wish to participate in the TIN (Taxpayer Identification Number) Acceptance Agent Program must apply by completing this application. Acceptance Agents are individuals or entities (colleges, financial institutions, accounting firms, etc.) that have entered into formal agreements with IRS that permit them to assist alien individuals and other foreign persons with obtaining TINs.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations, not-for-profit institutions, and Federal, state, local or tribal government.

Estimated Number of Respondents: 4,422.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 2,211.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 27, 2020.

Sara L. Covington,

Tax Analyst.

[FR Doc. 2020–19362 Filed 9–1–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request Concerning Procedures for Requesting Competent Authority Assistance Under Tax Treaties

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning procedures for requesting competent authority assistance under tax treaties.

DATES: Written comments should be received on or before November 2, 2020 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis, at (202) 317–5751 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington DC 20224, or through the internet, at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Procedures for Requesting Competent Authority Assistance Under Tax Treaties.

OMB Number: 1545–2044.

Revenue Procedure Number: 2015–40.

Abstract: Taxpayers who believe that the actions of the United States, a treaty country, or both, result or will result in taxation that is contrary to the provisions of an applicable tax treaty are required to submit the requested information in order to receive assistance from the IRS official acting as the U.S. competent authority. The information is used to assist the taxpayer in reaching a mutual agreement with the IRS and the appropriate foreign competent authority.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations.

Estimated Number of Respondents: 300.

Estimated Time Per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 900.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: August 28, 2020.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2020–19361 Filed 9–1–20; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

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Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Parts 292 and 375

Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978; Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 292 and 375

[Docket Nos. RM19–15–000 and AD16–16–000; Order No. 872]

Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: In this Order, the Federal Energy Regulatory Commission issues its final rule approving certain revisions to its regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). These changes will enable the Commission to continue to fulfill its statutory obligations under sections 201 and 210 of PURPA.

DATES: This rule is effective December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Lawrence R. Greenfield (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6415, *lawrence.greenfield@ferc.gov*.

Helen Shepherd (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6176, *helen.shepherd@ferc.gov*.

Thomas Dautel (Technical Information), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6196, *thomas.dautel@ferc.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

1. In this Order, the Federal Energy Regulatory Commission (Commission) issues its final rule approving certain revisions to its regulations (PURPA Regulations) [1] implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).[2]

2. On September 19, 2019, the Commission issued a notice of proposed rulemaking (NOPR) proposing to modify its PURPA Regulations.[3] Those regulations were promulgated in 1980 and have been modified in only specific respects since then. Approximately 130 separate comments were submitted in response to the NOPR,[4] several of which were submitted on behalf of multiple parties. In total, over 1,600 pages of comments were submitted, and in addition thousands of pages of exhibits

[1] 18 CFR part 292 (2019). In connection with the revisions to the PURPA Regulations, the Commission also is revising its delegation of authority to Commission staff in 18 CFR pt. 375.

[2] 16 U.S.C. 796(17)–(18), 824a–3.

[3] *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* 168 FERC ¶ 61184 (2019) (NOPR).

[4] See Appendix for list of commenters.

were attached to the comments. The entities that filed comments are listed in Appendix A. This final rule addresses comments received in response to the NOPR.

3. We largely adopt the NOPR proposals. However, this final rule makes certain modifications to the NOPR proposals, as further discussed below.

4. Given the Commission's expressed intent in the NOPR to propose revisions to the PURPA Regulations that more closely adhere to the goals and terms of PURPA,[5] we considered comments regarding whether these proposals are consistent with the requirements of PURPA. Based on that review and further consideration, we adopt the following changes to the proposals in the NOPR, among certain others described below:

- We establish a rebuttable presumption, rather than a per se rule, that locational marginal prices (LMPs) may reflect a purchasing electric utility's avoided energy costs;
- We provide that any competitive solicitations used to establish avoided capacity costs must adhere to the Commission's *Allegheny*[6] standard for evaluating competitive solicitations;
- We do not adopt the proposed rule permitting states with retail competition to allow relief from the purchase obligation but instead clarify that the Commission's existing PURPA Regulations already require that states, to the extent practicable, must account for reduced loads in setting QF capacity rates;
- We clarify terminology we used in the NOPR relating to the determination of whether small power production facilities are separate facilities to focus not on whether they are *separate facilities,* but rather to mirror the statutory language and thus focus on whether they are at ''*the same site*'';
- We clarify in the regulations that protests may be made to initial self-certifications and applications for Commission certification, but only to self-recertifications and applications for Commission recertification making substantive changes to the existing certification;
- We identify additional factors that can be considered for small power production qualifying facilities (QFs) located more than one but less than 10 miles apart, such as evidence of shared control systems, common permitting and land leasing, and shared step-up transformers;
- We revise the regulations to lower the rebuttable presumption of small power production QFs' nondiscriminatory access to 5 MW, rather than 1 MW as proposed in the NOPR, and include factors that a small power production QF sized greater than 5 MW could rely on to rebut the presumption that it has nondiscriminatory access to markets defined in PURPA sections 210(m)(1); and
- We revise the proposed requirements to establish a legally enforceable obligation (LEO) to provide that with regard to the issue of obtaining permits, QFs need only have applied for all required permits, instead of being required to have already obtained those permits.

II. Overview

5. Before discussing each of the individual changes to the PURPA Regulations adopted herein, this final rule first addresses certain overall themes raised in the comments on the NOPR, both those supporting the NOPR and those opposing.

A. The Commission's PURPA Regulations, as Revised by This Final Rule, Continue To Encourage the Development of QFs Within the Requirements of PURPA's Statutory Limitations

6. PURPA section 210(a) requires that the Commission prescribe rules that it determines necessary to encourage the development of qualifying small power production facilities and cogeneration facilities.

7. The bulk of the criticism of the Commission's proposed rule changes is based on a widespread misunderstanding, as reflected in the comments on the NOPR, that PURPA and the PURPA Regulations were intended to encourage QF development without any limit, and that the rule changes proposed in the NOPR improperly reduce or even eliminate encouragement in contravention of the statute. Those commenters opposing the NOPR proposals argue that the Commission has determined, in contravention of the statute, that there no longer is a need to encourage QFs, or eliminated any provision that provides such encouragement.[7] Many of the commenters supporting the changes proposed in the NOPR applaud the Commission for eliminating what they argue amounts to an improper subsidy of QFs.[8]

8. Neither side is correct about either what PURPA and the current PURPA Regulations require, or the basis for the changes to the PURPA Regulations proposed in the NOPR.

9. As an initial matter, PURPA was not a directive to the Commission to encourage QF development without limitation. Indeed, as explained below, Congress included several limitations in PURPA. By reading the statute as a whole, and the PURPA Regulations as a whole as revised by this final rule, it is clear that the PURPA Regulations continue to encourage the development of QFs consistent with PURPA.[9]

10. We also emphasize that we do not by this final rule change other elements to the Commission's existing PURPA Regulations that continue to encourage QF development. These elements include, but are not limited to, rules that: (1) Require electric utilities to provide backup electric energy to QFs on a non-discriminatory basis and at just and reasonable rates; (2) require electric utilities to interconnect with QFs; and (3) provide exemptions to QFs from many provisions of the Federal Power Act (FPA) and state laws governing utility rates and financial organization.[10] These provisions encourage the development of QFs by relieving them of certain regulatory burdens otherwise imposed on sellers of power and ensure they can operate their facilities. Moreover, we stress that, besides the changes to the PURPA Regulations regarding applications to terminate a purchasing electric utility's mandatory purchase obligation under PURPA section 210(m) (see *infra* section IV.G), nothing in this final rule eliminates QFs' rights to sell electric energy or capacity as provided under PURPA.

11. As discussed in greater detail below, while PURPA provided for the encouragement of cogeneration and small power production, PURPA also provided that the Commission could not prescribe a rule that provided for ''a rate which exceeds the incremental cost to the electric utility of alternative electric energy.''[11] Furthermore, PURPA requires the Commission to ''insure'' that the resulting rates ''shall be just and reasonable to the electric consumers of

[5] NOPR, 168 FERC ¶ 61,184 at P 31.

[6] *Allegheny Energy Supply Co., LLC,* 108 FERC ¶ 61,082, at P 18 (2004) (*Allegheny*).

[7] *See, e.g.,* Biological Diversity Comments at 14; ConEd Development Comments at 2; Harvard Electricity Law Comments at 4; New England Small Hydro Comments at 4; NIPPC, CREIA, REC, and OSEIA Comments at 3, 21, 28; Public Interest Organizations Comments at 9, 39; Solar Energy Industries Comments at 4; Southeast Public Interest Organizations Comments at 17.

[8] *See* Competitive Enterprise Institute Comments at 3; Progressive Policy Institute Comments at 1–2; SBE Council Comments at 2; Mr. Moore Comments at 1–2.

[9] 16 U.S.C. 824a–3(a).

[10] *See* 18 CFR 292.303(c), 292.305, 292.601–02.

[11] *Compare id. with* 16 U.S.C. 824a–3(b).

the electric utility and in the public interest[.]'' [12] Likewise, while PURPA provided for the encouragement of small power production, PURPA also limited the facilities which could be encouraged to those facilities with no more than 80 MW power production capacity at the same site.[13]

12. Nothing in the text of PURPA requires the establishment of a subsidy for QFs. This point was confirmed in the Conference Report accompanying PURPA's passage: ''The provisions of this section are not intended to require the rate payers of a utility to subsidize cogenerators or small power producers.'' [14] Congress thus structured PURPA both specifically to give effect to its intent that QFs not be subsidized and also to impose other mandatory limits on the Commission's ability to encourage QFs that are relevant to this final rule, as briefly summarized below.

1. Avoided Cost Cap on QF Rates

13. PURPA section 210(b) sets out the standards governing the rates purchasing utilities must pay to QFs.[15] Sections 210(b)(1) and (b)(2) provide that QF rates ''shall be just and reasonable to the electric consumers of the electric utility and in the public interest'' and ''shall not discriminate against qualifying cogenerators or qualifying small power producers.'' [16] After establishing these standards, Congress then placed, in the final sentence of section 210(b), a cap on the level of the rates utilities could be required to pay QFs: ''No such rule prescribed under subsection (a) *shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy*.'' [17] As the Conference Report for PURPA explains:

> [T]he utility would not be required to purchase electric energy from a qualifying cogeneration or small power production facility *at a rate which exceeds the lower of* the rate described above, namely a rate which is just and reasonable to consumers of the utility, in the public interest, and nondiscriminatory, or the incremental cost of alternate electric energy. This limitation on the rates which may be required in purchasing from a cogenerator or small power producer *is meant to act as an upper limit on the price* at which utilities can be required under this section to purchase electric energy.[18]

14. This upper limit on QF rates established in section 210(b), equal to a purchasing utility's incremental costs, commonly called ''avoided costs,'' implements Congress's intent that QFs not be subsidized. It ensures that the purchasing utility cannot be required to pay more for power purchased from a QF than it would otherwise pay to generate the power itself or to purchase power from a third party.

15. Consistent with the statutory standard, when the Commission issued its PURPA Regulations in 1980, it set the rates for QFs at, but not above, the statutorily defined incremental or avoided cost of alternative electric energy.[19] The PURPA Regulations applied this limitation generally to QF rates, without distinguishing between as-available energy [20] and the fixed energy and capacity rate option applicable to long-term contracts or other legally enforceable obligations.[21] In either case, though, the PURPA Regulations essentially capped the rate paid to QFs at the purchasing electric utility's avoided costs.[22]

16. Order No. 69, in which the Commission promulgated the PURPA Regulations,[23] makes clear that the Commission also recognized that allowing the option for a fixed energy and capacity rate option for long-term contracts or other legally enforceable obligations could result in a rate that, at times, exceeded incremental or avoided cost of alternative electric energy. The Commission acknowledged in this regard that some commenters had asserted that, ''if the avoided cost of energy at the time it is supplied is less than the price provided in the contract or obligation, the purchasing utility would be required to pay a rate for purchases that would subsidize the qualifying facility at the expense of the utility's other ratepayers.'' [24] In response, the Commission stated that it ''recognize[d] this possibility, but is cognizant that in other cases, the required rate will turn out to be lower than the avoided cost at the time of purchase.'' [25] The Commission concluded that any over- and under-recoveries compared to avoided cost ''will balance out'' and, based on this conclusion, found that the fixed energy and capacity rate option applicable to long-term contracts or other legally enforceable obligations did not violate the statutory cap.[26] But, to be clear, the option the Commission implemented in 1980 was not based on any determination by the Commission that the rates in QF contracts may routinely exceed avoided costs in the ordinary course of events in order to encourage QFs.

2. Limitation on Small Power Production Facilities Located at the Same ''Site''

17. Another way in which Congress set boundaries on the Commission's ability to encourage development of QFs was to define small power production facilities, one of the categories of generators that under the statute is to be encouraged. The definition of small power production facilities applies to almost all renewable resources that wish to be QFs, requiring that those facilities have ''a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts.'' [27] In order to comply with this statutory requirement that the capacity of all small power production facilities ''located at the same site'' cannot exceed 80 MW, the Commission is required to define what constitutes a ''site.'' The Commission determined in 1980 that, essentially, those facilities that are owned by the same or affiliated entities and using the same energy resource should be deemed to be at the same site ''if they are located within one mile of the facility for which

[12] 16 U.S.C. 824a–3(b)(1).

[13] *Compare* 16 U.S.C. 824a–3(a) *with* 16 U.S.C. 796(17)(A)(ii).

[14] H.R. Rep. No. 95–1750, at 98 (1978) (Conf. Rep.).

[15] 16 U.S.C. 824a–3(b).

[16] *Id.*

[17] *Id.* (emphasis added). The statute defines an electric utility's ''incremental costs'' as ''the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.'' 16 U.S.C. 824a–3(d); *see also* 18 CFR 292.101(b)(6) (implementing same and defining such ''incremental costs'' as ''avoided costs'').

[18] Conf. Rep. at 98 (emphasis added).

[19] *Compare* 16 U.S.C. 824a–3(b) & (d) *with* 18 CFR 292.101(b)(6), 292.304(a)(2) & (b)(2).

[20] 18 CFR 292.304(d)(1).

[21] 18 CFR 292.304(d)(2) (providing QFs the right to elect avoided costs calculated at the time of delivery or avoided costs calculated at the time the obligation is incurred). In this final rule, we refer to the QF's option for avoided costs calculated at the time the obligation is incurred as the fixed energy and capacity rate option. 18 CFR 292.304(d)(2).

[22] The regulations, however, also allowed both for negotiated rates that differed from the rates that would otherwise be applicable, *see* 18 CFR 292.301(b), and for rates to be set based on estimates of avoided costs even though such rates might differ from avoided costs at the time of delivery. *See* 18 CFR 292.304(b)(5).

[23] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880 (cross-referenced 10 FERC ¶ 61,150), *order on reh'g,* Order No. 69–A, FERC Stats. & Regs. ¶ 30,160 (1980) (cross-referenced at 11 FERC ¶ 61,166), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp.* v. *FERC,* 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst., Inc.* v. *Am. Elec. Power Serv. Corp.,* 461 U.S. 402 (1983) (*API*).

[24] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[25] *Id.*

[26] *Id.*

[27] 16 U.S.C. 796(17)(A)(ii).

qualification is sought.'' [28] This definition, known as the ''one-mile rule,'' interpreted Congress's limitation of 80 MW located at the same site to apply to just those affiliated small power production qualifying facilities located within one mile of each other.

3. Termination of Purchase Obligation for QFs With Nondiscriminatory Access to Certain Competitive Markets

18. Finally, Congress amended PURPA in 2005 to further limit the statute. Congress amended PURPA section 210 to add section 210(m), which provides for termination of the requirement that an electric utility enter into a new obligation or contract to purchase from a QF if the QF has nondiscriminatory access to certain defined types of markets.[29] This amendment reflected Congress's judgment that non-discriminatory access to these markets provided adequate encouragement for those QFs.

19. Congress directed the Commission to implement this requirement, which it did in Order No. 688. In that order, the Commission identified certain markets in which utilities would no longer be subject to the PURPA mandatory purchase obligation under PURPA section 210(m) because certain QFs have nondiscriminatory access to such markets.[30] Although not required in the new PURPA section 210(m), the Commission established a rebuttable presumption that a QF with a net power production capacity at or below 20 MW does *not* have nondiscriminatory access to such markets.[31] In creating this rebuttable presumption, the Commission found persuasive arguments that some QFs may not have nondiscriminatory access to markets in light of their small size.

4. Final Rule's Updating of the PURPA Regulations

20. In this final rule, we are amending the PURPA Regulations, principally with regard to the three statutory provisions described above, *i.e.:* (1) The avoided cost cap on QF rates; (2) the 80 MW limitation applicable to the combined capacity of affiliated small power production QFs located at the same site; and (3) the termination of the mandatory purchase obligation for QFs with nondiscriminatory access to certain markets. Contrary to commenters' assertions that the Commission has determined that it no longer is necessary to encourage QFs and therefore that the Commission is making these changes in an impermissible attempt to undo PURPA,[32] we are modifying the PURPA Regulations based on demonstrated changes in circumstances since the current PURPA Regulations were first adopted to ensure that the regulations continue to comply with PURPA's statutory requirements established by Congress.

21. For example, as explained in more detail below, the Commission's expectation expressed in 1980 that over- and under-recovery in rates compared to avoided cost ''will balance out'' [33] was critical to the Commission's determination in 1980 that the fixed energy and capacity rate option applicable to long-term contracts or other legally enforceable obligations did not violate the statutory avoided cost cap on QF rates. However, record evidence now demonstrates that this expectation no longer is necessarily accurate. The Commission's change to the PURPA Regulations adopted in this final rule, giving states the ability to require variable energy rates in long-term contracts or other legally enforceable obligations, allows the states to better ensure that QF rates are at, but do not exceed, the statutory maximum rate established by Congress.

22. This change is important for purposes of compliance with PURPA's statutory mandates. As explained below, setting QF rates at avoided costs allows the Commission to comply with the statutory goals of encouraging QFs and providing for nondiscriminatory rates while at the same time ensuring that such rates are just and reasonable to consumers and do not subsidize QFs. The record shows that on some occasions long-term fixed QF rates were well above actual avoided costs, thereby causing consumers to subsidize those QFs in contravention of PURPA and the Commission's expectations.

23. Similarly, the changes implemented by the Commission in this final rule to the one-mile rule are intended to better ensure compliance with the statutory requirement that small power production facilities located at the same site cannot exceed 80 MW. And, 15 years after Congress added PURPA section 210(m), because the Commission can now make the determination, described below, that smaller QFs have non-discriminatory access to RTO/ISO markets, an update to the rebuttable presumption regarding non-discriminatory access to those markets is appropriate to better ensure compliance with the statute.

24. Some commenters incorrectly assert that the final rule impermissibly revises the PURPA Regulations in a way that no longer encourages QFs. PURPA section 210(a) provides not simply that the Commission is to prescribe rules that encourage QFs, but rather that the Commission is to ''prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage'' QFs. Carrying out Congress's directive to ''from time to time thereafter revise'' the rules is at the heart of what the Commission is doing in this final rule. Consistent with this directive, the Commission is considering revisions to ''such rules as it determines necessary to'' encourage QFs in light of current industry circumstances.[34]

25. The changes adopted in this final rule result from the need for the PURPA Regulations to continue to comply with the directives Congress established when it enacted PURPA in 1978, and then again when Congress amended PURPA in 2005. These changes are not based on any determination by the Commission that the encouragement directed by PURPA is no longer needed. The question of whether QFs should continue to be encouraged or not remains a question for Congress.

26. Moreover, PURPA also requires the Commission to insure that the rates for QF purchases be ''just and reasonable to the electric consumers of the electric utility and in the public interest[.]'' [35] The obligation to encourage is also limited by the requirement that, ''No such rule prescribed under subsection (a) [the encouragement provision] shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.'' [36]

27. We recognize that some of the comments opposing the NOPR may

[28] 18 CFR 292.204(a)(ii).

[29] *See* 16 U.S.C. 824a–3(m).

[30] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, 117 FERC ¶ 61,078, at PP 9–12 (2006), *order on reh'g,* Order No. 688–A, 119 FERC ¶ 61,305 (2007), *aff'd sub nom. Am. Forest & Paper Ass'n* v. *FERC,* 550 F.3d 1179 (D.C. Cir. 2008).

[31] 18 CFR 292.309(d)(1).

[32] Biomass Power Comments at 2; Biological Diversity at 12; EPSA Comments at 6 (''[T]he NOPR changes 'would effectively gut' PURPA.''); NIPPC, CREA, REC, and OSEIA Comments at 28–29; Public Interest Groups Comments at 25 (''[T]he changes proposed in the NOPR will gut PURPA-mandated measures to encourage QF development.''); Solar Energy Industries Comments at 8–14.

[33] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[34] We view the revisions to our rules implementing PURPA that we adopt in this final rule as consistent with Congress's explicit directive that the Commission ''from time to time thereafter [to] revise'' the rules. We do not view Congress as intending that the Commission only ever consider the circumstances that existed in the late 1970s and not current circumstances, 40 years later.

[35] 16 U.S.C. 824a–3(b).

[36] 16 U.S.C. 824a–3(b).

have been influenced by the Commission's recitation in the Background section of the NOPR of the broad changes in circumstances since the PURPA Regulations were first promulgated 40 years ago, including the discovery of significant new natural gas reserves, the evolution of the electric industry to include a significant independent power presence, the establishment of organized competitive markets, and the advances in renewable energy technologies.[37] We clarify that the Commission referenced this general background information in the NOPR primarily to explain why it decided to re-evaluate its PURPA Regulations at all and as Congress said we should, and not necessarily to support the individual proposals included in the NOPR. The facts we rely on to propose specific changes, which include some, but not all, of those background facts, were cited in the specific sections of the NOPR describing those proposed changes. And the facts on which we rely to promulgate the specific changes in this final rule again are cited in the specific sections describing those changes.

B. The Final Rule Ensures That the Commission's Implementation of PURPA Continues To Benefit QFs, Purchasing Electric Utilities, and Electric Consumers

28. The final rule implements additional changes consistent with PURPA that also are designed to benefit QFs, purchasing utilities, and electric consumers. The changes to the PURPA Regulations adopted in this final rule will enable the Commission to continue satisfying the statutory requirement that the Commission promulgate rules to encourage QF development consistent with PURPA's requirements. Claims to the contrary by commenters to the effect that the ''proposals are uniformly biased against QF development'' [38] have no merit.

29. As an initial matter, we are not changing the determination in the PURPA Regulations that QF rates must equal a purchasing electric utility's full avoided costs.[39] As the Supreme Court noted in *API,* the full avoided cost rate requirement represents the maximum rate permitted under PURPA, and thereby provides important encouragement to QFs.[40] The Court explained that the full avoided cost rate requirement encourages QF development because QFs ''retain an incentive to produce energy under the full-avoided-cost rule so long as their marginal costs did not exceed the full avoided cost of the purchasing utility.'' [41]

30. In addition, several of the changes to the current PURPA Regulations implemented by this final rule are based expressly on a finding that they are beneficial to QFs as well as to purchasing utilities and ratepayers. For example, the provisions of the final rule allowing for energy rates to be based on transparent, competitive market prices—in appropriate circumstances—are supported by comments submitted at the Technical Conference, where representatives of QFs and utilities both expressed a preference for transparent prices for QFs.[42] This conclusion is supported by the Fitch Report, cited by NIPPC, CREA, REC, and OSEIA, explaining how Fitch evaluates the financial strength of renewable energy projects. In this report, Fitch states that it gives a ''stronger'' evaluation to projects with power sales contract prices that are ''indexed using simple, broad-based publicly available indexation formulas.'' [43]

31. Setting prices that are indexed using simple, broad-based publicly available formulas is precisely what the Commission's changes permitting reference to competitive market prices will achieve. Such prices reflect avoided costs in a simpler, more transparent, and predictable manner than through an administrative process, which should encourage the development of QFs while at the same time providing benefits to utilities and consumers. Using transparent market prices to establish as-available avoided cost rates also allows QFs, utilities, and the states to avoid the expenditure of the time and resources involved in litigating administratively-set avoided cost rates, and allows those rates to automatically adjust—up and down—as avoided costs change.

32. Similarly, the provisions regarding competitive solicitations adopted herein were added at the suggestion of both NARUC and certain developers of renewable resource QFs, such as Solar Energy Industries. These competitive solicitations can provide a fair and transparent method for QFs to establish full avoided cost rates. As Solar Energy Industries stated in its comments, ''[c]ompetitive solicitations, with adequate safeguards, can deliver substantial value.'' [44] Competitive solicitations may be an especially appropriate tool in those regions outside of Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) where there are no organized competitive markets where QFs can make sales.

33. Likewise, the LEO provisions adopted herein provide important benefits to QFs. Under the current PURPA Regulations, a LEO gives QFs the enforceable right to require utilities to purchase the QFs' power at avoided cost rates.[45] This is an important right that contributes to a QF owner's ability to obtain financing, especially the development financing needed to engage in the activities necessary to subsequently obtain construction and permanent financing. However, the PURPA Regulations are silent as to when and how a LEO is established, which can leave QFs uncertain as to when this key right has been established. By providing more specific guidance as to when a LEO is established, the new rule creates greater certainty for QFs (and utilities) on this important element of QF development.

[37] NOPR, 168 FERC ¶ 61,184, at PP 15–27.

[38] Harvard Electricity Law Comments at 1.

[39] *See* 18 CFR 292.304(b)(2); NOPR, 168 FERC ¶ 61,184 at P 34.

[40] *API,* 461 U.S. at 413. PURPA does not use the terms ''avoided cost'' or ''full avoided cost''; rather, PURPA uses the term ''incremental cost of alternative electric energy.'' The Commission's regulations and subsequent decisions have used the term ''avoided cost'' to explain the Commission's application of the ''incremental cost'' standard. The *API* decision and early Commission precedents referred to ''full'' avoided costs to distinguish between the Commission's decision to set QF rates at avoided costs and proposals from certain parties that rates be set at something less than avoided costs. We continue to use the terms avoided costs and full avoided costs as being consistent with the statutory term incremental cost.

[41] *Id.* at 416.

[42] *See* American Forest & Paper Association, Comments, Docket No. AD16–16–000, at 8 (filed June 8, 2016) (''To the extent possible, these determinations [of avoided costs] should not be made in a 'black box', but rather, as part of an open and transparent method and process.''); Edison Electric Institute (EEI) Comments, Docket No. AD16–16–000, at 3 (filed June 30, 2016) (''Where transparent competitive markets with day ahead prices exist, there is no reason to adhere to second-best avoided cost pricing mechanisms.'').

[43] NIPPC, CREA, REC, and OSEIA Comments at 37–38 (citing FitchRatings, Global Infrastructure & Project Finance, *Renewable Energy Project Rating Criteria,*'' at 3 (Feb. 26, 2019), *https://www.fitchratings.com/site/re/10061770*).

[44] Solar Energy Industries Comments at 38. Solar Energy Industries agreed that the competitive solicitation provisions proposed in the NOPR ''set forth many important safeguards,'' but recommended that additional safeguards be implemented. Those comments are discussed below, and we have specifically adopted Solar Energy Industries request made earlier in this proceeding that all competitive solicitations must be conducted pursuant to the Commission's *Allegheny* standard. *See* Solar Energy Industries Supplemental Comments, Docket No. AD16–16–000, at 32–34 (filed Aug. 28, 2019).

[45] *See* 18 CFR 292.304(d)(2). Although the final rule gives states the flexibility to require that energy rates vary over the term of the LEO and be calculated at the time of delivery, the final rule retains the QF's option to choose a fixed capacity rate calculated at the time the LEO is established.

34. Some commenters assert that the guidance provided by the Commission may make it more difficult to obtain a LEO.[46] Their specific concerns are discussed in detail below. But what those commenters ignore is that, by establishing objective and reasonable state-determined criteria limited to demonstrating commercial viability and financial commitment, we also are protecting QFs against onerous requirements for a LEO that hinder financing, such as a requirement for a utility's execution of an interconnection agreement [47] or power purchase agreement,[48] or requiring that QFs file a formal complaint with the state commission,[49] or limiting LEOs to only those QFs capable of supplying firm power,[50] or requiring the QF to be able to deliver power in 90 days.[51] By making clear in the PURPA Regulations that such conditions are not permitted, but describing which prerequisites a state may impose to establish a LEO to determine which QFs are commercially viable and financially committed, we are providing objective criteria to clarify when a LEO commences, which we find will encourage the development of QFs.

C. The Commission Is Not Eliminating Fixed Rate Pricing for QFs, But Rather Is Giving States the Flexibility To Require the Same Variable Energy Rate/Fixed Capacity Rate Construct That Applies Throughout the Electric Industry

35. Another misconception reflected in several comments is that the Commission proposed in the NOPR to eliminate fixed rate pricing for QFs. Commenters argue that QFs cannot obtain financing without fixed rates, and from this they claim that the proposal to give states the flexibility to require variable energy rates would have a devastating effect on future QF development.[52]

36. This assertion that the Commission has eliminated fixed rates for QFs is not correct. The NOPR proposal (which we adopt in this final rule) gave states the flexibility, should they choose to take advantage of this flexibility, to require that the avoided cost *energy* rates in QF contracts must vary depending on avoided costs at the time of delivery (rather than being fixed at the time a LEO is incurred). The NOPR thus made clear: ''Under the proposed revisions to § 292.304(d), a QF would continue to be entitled to a contract with avoided *capacity* costs calculated and fixed at the time the LEO is incurred.'' [53] We are retaining in this final rule the option granted to QFs to fix their capacity rates for the term of their contracts at the time the LEO is incurred.

37. The fact that we are giving states the flexibility to either require QF contracts to have fixed capacity and variable energy rates or to continue as before to provide QFs the option of fixed capacity and fixed energy rates—has important consequences for the ability of QF owners to finance their projects. The energy rates of purchasing electric utilities, upon which avoided cost energy rates would be based, typically reflect mainly the variable costs of producing energy, such as the cost of fuel and variable operations and maintenance (O&M), especially for a fossil fuel generator. Meanwhile, a purchasing electric utility's capacity rates, upon which avoided cost capacity rates would be based, tend to reflect fixed costs, including the financing costs of facilities (*i.e.,* debt repayment and a return on the equity invested in the facility).[54] Consequently, a fixed capacity rate in a QF contract based on a purchasing electric utility's capacity rates should typically be sufficient to recover the QF's financing costs and should therefore continue to facilitate QF financing. We recognize that a QF's financing costs may be different from the purchasing electric utility's avoided costs and, therefore, the full avoided cost rate that the QF receives may not support the financing of a QF. But this is a consequence of how Congress structured PURPA, which sets rates based on the avoided costs of the purchasing utility rather than on the actual costs the QF incurs producing the power being sold.[55]

38. Another important aspect of the variable energy rate/fixed capacity rate construct is that this is the standard rate structure used throughout the electric industry for power sales agreements that include the sale of capacity.[56] That states will be allowed to require QF contracts to be structured similarly to the contract structure used in the rest of the electric industry has important implications. In particular, this provides flexibility to states to ensure that the avoided cost rate will be closer to the actual rate the purchasing electric utility and its customers would have paid if the purchasing electric utility had generated this electric energy itself or purchased such electric energy from another source. Furthermore, the record evidence demonstrating significant amounts of non-QF generation facilities in operation today shows that the owners of such facilities are able to obtain financing based on this same variable energy rate/fixed capacity rate

[46] *See* NIPPC, CREA, REC, and OSEIA Comments at 81 (''[A]ny requirement to demonstrate financing to create a LEO violates the fundamental rule that the utility's actions should not be allowed to deny the QF a LEO because the utility could prevent creation of a LEO simply by refusing to sign the PPA needed to secure such financing.''); Public Interest Organizations Comments at 98 (''[T]he Commission's proposal to require QFs to demonstrate commercial viability in order to obtain a LEO will prevent many QFs from ever attaining commercial viability at all. Creating a new administrative obstacle to QF financing in this way flies in the face of PURPA's mandate to reduce barriers to QF development.''); Solar Energy Industries Comments at 41 (''Establishing higher barriers to a determination of 'commercial viability' will only lead QF developers to invest additional development capital and will simply weed out those smaller companies that choose not to, or are unable to, invest heavily in early-stage development activity before an avoided cost rate is known. It is unjust and unreasonable to cause QFs to invest tens of millions of dollars in site control, permit acquisition, interconnection, and other development costs simply to secure the opportunity to negotiate with the purchasing utility for a contractual commitment.''); Southeast Public Interest Organizations Comments at 41 (describing proposal as ''discourag[ing] QF development since achieving some of the indicia suggested by the Commission often circularly requires that QF developers have *already* obtained financing'').

[47] *See, e.g., FLS Energy, Inc.,* 157 FERC ¶ 61,211, at P 26 (2016) (*FLS*) (stating that requiring signed interconnection agreement as prerequisite to LEO is inconsistent with PURPA Regulations).

[48] *See, e.g., Murphy Flat Power, LLC,* 141 FERC ¶ 61,145, at P 24 (2012) (finding that requiring a signed and executed contract with an electric utility as a prerequisite to a LEO is inconsistent with PURPA Regulations.

[49] *See, e.g., Grouse Creek Wind Park, LLC,* 142 FERC ¶ 61,187, at P 40 (2013).

[50] *Exelon Wind 1, L.L.C.* v. *Nelson,* 766 F.3d 380, 400 (5th Cir. 2014).

[51] *Power Resource Group, Inc.* v. *Public Utility Comm'n of Texas,* 422 F.3d 231, (5th Cir. 2005).

[52] *See, e.g.,* Public Interest Organizations Comments at 35–38 (allowing variable rates will further discourage wind and solar QF development); Allco Comments at 9–11 (without the ability to obtain a fixed long-term forecasted rate, QF solar energy development will not exist).

[53] *See* NOPR, 168 FERC ¶ 61,184 at P 66.

[54] *See* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,865.

[55] *See API,* 461 U.S. at 414, 415 (stating that ''Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities'' and that QFs ''would retain an incentive to produce energy under the full-avoided-cost rule so long as their marginal costs did not exceed the full avoided cost of the purchasing utility'').

[56] *Cf. Town of Norwood* v. *FERC,* 962 F.2d 20, 21, 24 (D.C. Cir. 1992) (''The rate design before us, like most wholesale electric rates, consists of separate monthly demand and energy charges. The demand component is calculated to recover NEPCO's fixed (or capacity-related) costs, such as construction and debt service, which it incurs regardless of how much electricity it produces. The energy charge is designed to recover the company's variable costs, which it incurs only in the course of actually producing electricity; fuel is a prime example. . . . With the cost outlook constantly in flux due to changing economic conditions, some degree of volatility is necessary if prices are to signal the market accurately—as accurately, that is, as current prices can anticipate future costs. Price volatility alone, therefore, cannot provide a ground for overturning a marginal cost rate structure.'').

construct.[57] This represents important evidence that QFs likewise should be able to obtain financing under the same rate construct, especially considering that QFs benefit from the statutory right to sell pursuant to a mandatory purchase obligation while non-QFs do not have that right.[58]

D. The Rate Changes Implemented by This Final Rule Put QF Rates on the Same Footing as Electric Utility Rates and Are Not Discriminatory

39. The fact that variable energy rate/fixed capacity rate contracts are standard in the electric industry also explains why, contrary to assertions made by a number of commenters, allowing states to require such contracts for QFs is not discriminatory.[59] QFs selling at wholesale pursuant to such contracts will be selling under the same rate structure employed in the power sales contracts typically used elsewhere in the electric industry, including by public utilities when they make sales at wholesale to each other, and QFs will be doing so at full avoided cost rates—the highest rates permitted under PURPA.

40. It is true that electric utilities with franchised service territories that make sales at retail are often effectively guaranteed the recovery of their energy costs in their retail rates by their state regulatory authorities—provided that such costs are prudently incurred. But the electric utilities' retail rates are cost-based, such that their rates are set based on costs they actually incur to produce electricity for their customers. Importantly, moreover, the incremental energy costs that an electric utility will recover from its retail customers at an incremental level would be the same energy costs that are used in determining the electric utilities' avoided costs that will, in turn, set the as-available avoided cost rates to be charged by QFs.

41. Thus, QF variable energy rate/fixed capacity rate contracts not only would be structured similarly to the standard wholesale power sales agreements used in the electric industry, but application of traditional cost-based ratemaking principles to sales by QFs is exactly what would be required in order to provide QFs with the same guaranteed cost recovery that applies to electric utilities. Guaranteeing QFs cost recovery is fundamentally inconsistent with PURPA, which sets the rate the QF is paid at the purchasing electric utility's avoided cost, not at the QF's cost. Such a rate structure is not discriminatory.

E. The PURPA Compliance Issues Raised by Some Commenters Are Outside the Scope of This Rulemaking Proceeding

42. Finally, several commenters assert that certain states located outside of RTO/ISO markets are dominated by large integrated public utilities whose state commissions do not implement PURPA correctly.[60] They argue that, as a consequence, there is little development of independent generation—QFs or otherwise—in those states. They assert that the proposals in the NOPR might be appropriate in states with RTO/ISO markets that are subject to significant competition, but would only make matters worse outside of the RTO/ISO markets.

43. As explained above, several changes implemented by this final rule ensure that the PURPA Regulations will continue to encourage QF development. Other changes, such as allowing variable energy rates in QF contracts, not only ensure the PURPA Regulations are consistent with PURPA but also address some states' primary concern with the current PURPA Regulations, *i.e.,* the Commission's now allowing states the flexibility to set variable energy rates could mitigate the states' reluctance to implement PURPA in a way that better encourages development of QFs. For example, the Idaho Commission has indicated that its current policy of limiting QF contracts to two years is based on its concern about fixed QF rates, and that the ability to require variable energy rates could lead to longer contract terms.[61] We expect that these changes could facilitate QF development in states where little QF capacity has been added to date.

44. Further, commenters' claims about lack of QF development outside of the RTO/ISO markets appear to be overstated. For example, the most recent data from the U.S. Energy Information Administration (EIA) on the total amount of wind and solar QF capacity in each state shows that 9 of the 20 states with the greatest combined wind and solar QF capacity are located outside of the RTO/ISO markets.[62] Of these 9 states, three are located in the Southeast—the region asserted by commenters to be the most hostile to PURPA—including North Carolina, which has the highest total amount of wind and solar QF capacity in the country.[63] Other states in the top 20 include Idaho—with the fourth most wind and solar QF capacity—and Oregon,[64] two states that have been criticized as being hostile to PURPA. EIA data also shows that five of the top 10 states in terms of renewable QF capacity additions from 2008–17 are located outside of the RTO/ISO markets, including North Carolina (with the most renewable QF capacity additions), Idaho, Georgia, and Oregon,[65] each of

[57] EIA, *Form EIA–860 detailed data with previous form data Early Release (EIA–860A/860B)* (June 2, 2020), *https://www.eia.gov/electricity/data/eia860/* shows 77.6 GW of operational QF nameplate capacity and 450.453.5 GW of operational non-QF independent power producer nameplate capacity as of end 2019.

[58] Some commenters raise concerns with the Commission's reliance on the financing of non-QF generation facilities to support the conclusion that QFs could obtain financing with variable energy rate contracts, pointing out that the Commission has not identified any QFs that have obtained financing under this structure. The reason for this, however, is that QFs typically do not employ this structure because currently they are entitled to a fixed energy rate/fixed capacity rate construct. Accordingly, evidence regarding the financing of similar types of independently owned generation projects by non-QFs using such a construct constitutes the best and most relevant evidence of how it would affect QF financing.

[59] *See, e.g.,* EPSA Comments at 9 (''The NOPR avoided rate proposal must therefore be rejected because it puts QFs at a disadvantage to utility-owned generation, in violation of the non-discrimination mandate under PURPA.''); Public Interest Organizations Comments at 51 (''[L]imiting QFs to contracts providing no price certainty for energy values, while non-QF generation regularly obtains fixed price contracts and utility-owned generation receives guaranteed cost recovery from captive ratepayers, constitutes discrimination.'').

[60] American Dams Comments at 5–6; Biological Diversity Comments at 13; CA Cogeneration Comments at 6–7; Con Edison Comments at 2; ELCON Comments at 7–8; EPSA Comments at 1–2; IdaHydro Comments at 5; NIPPC, CREA, REC, and OSEIA Comments at 14–15; Solar Energy Industries Comments at 15–20, 24; SC Solar Alliance Comments at 3–4; Two Dot Wind Comments at 14–19.

[61] *See* Idaho Commission Comments at 4 (stating that an energy rate established at the time of contract formation that provides for ''revisions to the energy rate at regular intervals, consistent with, for example, a purchasing electric utility's [integrated resource plan] to reflect updated avoided cost calculations'' would allow states to consider longer term contracts without putting ratepayers at risk).

[62] EIA, *Form EIA–860 detailed data with previous form data (EIA–860A/860B) Release date* (June 2, 2020), *https://www.eia.gov/electricity/data/eia860/.* The top 20 states with combined QF solar and wind nameplate capacity in 2018 were: (1) California, Texas, Minnesota, Oklahoma, Massachusetts, New Mexico, Nebraska, New Jersey, Michigan, New York, Illinois (all fully or partially inside RTOs/ISOs); and (2) North Carolina, Idaho, Utah, South Carolina, Georgia, Oregon, Colorado, Arizona, Wyoming(outside of RTOs/ISOs). We note that some of these states are located in both RTO/ISO and non-RTO/ISO regions.

[63] *Id.* We note that five of the 20 states with the most solar capacity—perhaps a better measure of the Southeast Region's PURPA compliance given the lack of wind resources in this region—are located in the Southeast.

[64] *Id.*

[65] *See* EIA, *PURPA-qualifying capacity increases, but it's still a small portion of added renewables* (Aug. 16, 2018), *https://www.eia.gov/todayinenergy/detail.php?id=36912.*

which commenters have identified as being hostile to PURPA.

45. But whether any individual state has or has not failed to implement the PURPA Regulations properly is not an issue for this final rule, which implements changes to the PURPA Regulations but does not modify Commission's rules for addressing claims that states are not complying with the Commission's existing PURPA Regulations. We promulgate this final rule based on the expectation that the states will fulfill their legal obligation to implement the Commission's PURPA Regulations as revised.[66]

46. Further, although Congress required the Commission to establish the general parameters for establishing QF rates, Congress delegated to the states—not the Commission—the role to set QF rates.[67] To the extent that any entity believes a state is failing to implement the Commission's PURPA Regulations, PURPA section 210(h) provides that entity an avenue to seek relief.[68]

III. Background

A. Passage of PURPA in 1978 and the Commission's Promulgation of Its PURPA Regulations in 1980

47. PURPA was enacted in 1978 as part of a package of legislative proposals intended to reduce the country's dependence on oil and natural gas, which at the time were in short supply and subject to dramatic price increases. PURPA sets forth a framework to encourage the development of alternative generation resources that do not rely on traditional fossil fuels (*i.e.,* oil, natural gas and coal) and cogeneration facilities that make more efficient use of the heat produced from the fossil fuels that were then commonly used in the production of electricity.

48. To accomplish this goal, PURPA section 210(a) directs that the Commission ''prescribe, and from time to time thereafter revise, such rules as [the Commission] determines necessary to encourage cogeneration and small power production,'' [69] including rules requiring electric utilities to offer to sell electricity to, and purchase electricity from, QFs. PURPA section 210(f) required each state regulatory authority and nonregulated electric utility (together, states) to implement the Commission's rules.

49. In 1980, the Commission issued Order Nos. 69 and 70, which promulgated the required rules that, with limited exceptions, remain in effect today.[70] The Commission explained that, at the time of the passage of PURPA, cogenerators and small power producers faced three major obstacles: (1) Electric utilities were not required to purchase these generators' electric output or to make purchases at an appropriate rate; (2) electric utilities sometimes charged discriminatorily high rates for backup services; and (3) cogenerators and small power producers ran the risk of being considered public utilities themselves and thus being subject to state and federal regulation as utilities.[71] Further, at that time, there was no open access transmission and little competition in electric wholesale markets. Electric utilities were vertically-integrated and held dominant market positions. As a result of their control over transmission access, it was virtually impossible for third parties—whether independent power producers or other electric utilities—to compete with them to make sales of electricity.

50. Given the Congressional mandate described above, the Commission determined in Order No. 69 to set rates for sales by QFs equal to the purchasing electric utilities' avoided costs.[72] The Commission also directed that electric utilities provide backup electric energy to QFs on a non-discriminatory basis and at just and reasonable rates,[73] and that electric utilities interconnect with QFs.[74] Pursuant to section 210(e) of PURPA,[75] the Commission further provided exemptions from many provisions of the FPA and state laws governing utility rates and financial organization.[76]

B. Circumstances Leading to the Commission's Re-Evaluation of the PURPA Regulations and the Issuance of the NOPR

51. In the NOPR, the Commission described three important changes in the circumstances that had originally prompted Congress to pass PURPA in 1978. First, as the Commission explained, the United States has seen an unprecedented change in the dynamics of the natural gas market and the relevant supply and demand.[77] Led by advancements in production technologies, primarily in accessing shale reserves, natural gas supplies increased dramatically.[78] Further, the EIA forecasted continued supply growth over the next 25 years.[79] In short, as the Commission found in issuing the NOPR, there no longer are shortages of natural gas supply.

52. Second, the Commission found that, since 1978, the outlook for the development of alternatives to natural gas and oil-fired generation resources, such as renewable resources, has changed equally dramatically.[80] The once-nascent renewables industry has grown and matured over the past 40

[66] 16 U.S.C. 824a–3(f)(1). The same obligation to implement the Commission's PURPA Regulations as revised, we note, is imposed on nonregulated electric utilities. 16 U.S.C. 824–3(f)(2).

[67] *See* 16 U.S.C. 824a–3(f)(1) (''[E]ach State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.'').

[68] If the Commission, in response to a petition for enforcement under PURPA section 210(h) against a state regulatory authority, chooses not to initiate an enforcement action within 60 days of the filing of the petition, the statute authorizes the petitioning electric utility or QF to itself initiate a suit directly against the state in U.S. District Court. 16 U.S.C. 824a–3(h)(2)(B). The same statutory provision similarly governs petitions for enforcement against nonregulated electric utilities. *Id.* PURPA section 210(g) also provides for review of state regulatory authorities and nonregulated electric utilities in state fora. 16 U.S.C. 824a–3(g). The Commission's policies with respect to PURPA enforcement are more fully set out in its *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304 (1983).

[69] 16 U.S.C. 824a–3(a).

[70] Order No. 69, FERC Stats. & Regs. ¶ 30,128; *Small Power Production and Cogeneration Facilities—Qualifying Status,* Order No. 70, FERC Stats. & Regs. ¶ 30,134 (cross-referenced at 10 FERC ¶ 61,230), *orders on reh'g,* Order No. 70–A, FERC Stats. & Regs. ¶ 30,159 (cross-referenced at 11 FERC ¶ 61,119) *and* FERC Stats. & Regs. ¶ 30,160 (cross-referenced at 11 FERC ¶ 61,166), *order on reh'g,* Order No. 70–B, FERC Stats. & Regs. ¶ 30,176 (cross-referenced at 12 FERC ¶ 61,128), *order on reh'g,* FERC Stats. & Regs. ¶ 30,192 (1980) (cross-referenced at 12 FERC ¶ 61,306), *amending regulations,* Order No. 70–D, FERC Stats. & Regs. ¶ 30,234 (cross-referenced at 14 FERC ¶ 61,076), *amending regulations,* Order No. 70–E, FERC Stats. & Regs. ¶ 30,274 (1981) (cross-referenced at 15 FERC ¶ 61,281).

[71] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,863. *See infra* P 78 & note 112 (addressing how the PURPA Regulations as revised continue to address these obstacles).

[72] 18 CFR 292.304(a)(2); *see API,* 461 U.S. at 412–18.

[73] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,887–90; *see also* 18 CFR 292.305.

[74] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,874; *see also* 18 CFR 292.303(c).

[75] 16 U.S.C. 824a–3(e).

[76] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,864; *accord id.* at 30,863, 30,894–96; *see also* 18 CFR 292.601–.602.

[77] NOPR, 168 FERC ¶ 61,184 at P 19.

[78] Domestic natural gas production, which appeared to peak in the early 1970s at 21.7 Tcf per year, increased from 18.1 Tcf in 2005 to 30.4 Tcf in 2018. EIA, Monthly Energy Review (Aug. 27, 2019) (in table 4.1 see column labeled ''Natural Gas Production (Dry)'' on the Annual tab of the xls version), *https://www.eia.gov/totalenergy/data/monthly/.*

[79] EIA's forecast showed supplies increasing to nearly 40 Tcf by 2035 and 43 Tcf by 2050. EIA, Annual Energy Outlook 2018, at tbl.13 (Jan. 24, 2019) (in table see row labeled ''Dry Gas Production'' under the reference case) (Annual Energy Outlook 2019), *https://www.eia.gov/outlooks/aeo/data/browser/#/?id=13-AEO2019&cases=ref2018&sourcekey=0.*

[80] NOPR, 168 FERC ¶ 61,184 at P 20.

years and has only accelerated subsequent to the Energy Policy Act of 2005's amendment of PURPA. The Commission noted that the cost of building renewable facilities has decreased substantially to the point that the cost of renewable resources is now or is shortly expected to approach the cost of traditional electric generation.[81] The Commission also recognized that renewable resources (including hydro) provide a significant share of the electricity currently generated in the United States,[82] that most renewable resources today are not QFs,[83] and that 65 percent of capacity additions in 2019 were expected to come from renewable resources.[84]

53. Third, the introduction of QFs as competing sources of electricity to the incumbent electric utilities has led to the development of significant non-QF independent power production.[85] In addition, RTOs and ISOs have developed competitive wholesale electric markets that serve roughly two-thirds of electricity consumers in the United States.[86]

54. In PURPA section 210(a), Congress directed not only that the Commission prescribe regulations, but that the Commission revise those regulations ''from time to time thereafter.'' [87] The Commission determined in the NOPR that, in light of these dramatic changes in circumstances since the passage of PURPA, it was appropriate to review the PURPA Regulations to determine whether changes to those regulations were warranted consistent with our statutory mandate.[88]

55. After identifying these three important changes in the industry that have taken place since 1980, we further identified evidence demonstrating that overestimations of avoided cost have not been balanced by underestimations, and that this trend may persist with the general decline in the cost of electricity.[89]

C. Summary of Changes to the PURPA Regulations Implemented by This Final Rule

56. We now are revising our PURPA Regulations based on the record of this proceeding, including comments submitted in the technical conference in Docket No. AD16–16–000 (Technical Conference),[90] the record evidence cited in the NOPR, and the comments submitted in response to the NOPR. These changes, including modifications to the proposals made in the NOPR, are summarized below.[91]

57. *First,* we grant states the flexibility to require that energy rates (but not capacity rates) in QF power sales contracts and other LEOs [92] vary in accordance with changes in the purchasing electric utility's as-available avoided costs at the time the energy is delivered. Under this change, if a state exercises this flexibility, a QF no longer would have the ability to elect to have its energy rate be fixed, but would continue to be entitled to a fixed capacity rate for the term of the contract or LEO.[93]

58. *Second,* we grant states additional flexibility to allow QFs to have a fixed energy rate, but to provide that such state-authorized fixed energy rate can be based on projected energy prices during the term of a QF's contract based on the anticipated dates of delivery.

59. *Third,* we grant states flexibility to set ''as-available'' QF energy rates as follows: We are establishing a rebuttal presumption, rather than a per se rule as proposed in the NOPR, that the LMP established in the organized electric markets defined in 18 CFR 292.309(e), (f), or (g) represents the as-available avoided costs of electric utilities located in these markets.[94] So long as this

[81] *Id.* (citing EIA, *Updated Capital Cost Estimates for Utility Scale Electricity Generating Plants, https://www.eia.gov/analysis/studies/powerplants/capitalcost/;* EIA, *Levelized Cost and Levelized Avoided Cost of New Generation Resources in the Annual Energy Outlook 2019* (Feb. 2019), *https://www.eia.gov/outlooks/aeo/pdf/electricity_generation.pdf;* Lawrence Berkeley National Lab, *Wind Technologies Market Report, https://emp.lbl.gov/wind-technologies-market-report/*). However, EIA has cautioned against directly comparing the costs of dispatchable and nondispatchable generation:

Because load must be continuously balanced, generating units with the capability to vary output to follow demand (dispatchable technologies) generally have more value to a system than less flexible units (nondispatchable technologies) such as those using intermittent resources to operate. The LCOE values for dispatchable and non-dispatchable technologies are listed separately in the tables because comparing them must be done carefully.

EIA, *Levelized Cost and Levelized Avoided Cost of New Generation Resources in the Annual Energy Outlook 2019,* at 2 (Feb. 2019), *https://www.eia.gov/outlooks/archive/aeo19/pdf/electricity_generation.pdf.*

[82] NOPR, 168 FERC ¶ 61,184 at P 21 (citing EIA, *August 2019 Monthly Energy Review* at Figure 7.2a, *https://www.eia.gov/totalenergy/data/monthly;* Office of Energy Projects, *Energy Infrastructure Update For July 2019* at 4 (July 2019), *https://www.ferc.gov/legal/staff-reports/2019/july-energy-infrastructure.pdf*).

[83] NOPR, 168 FERC ¶ 61,184 at P 22.

[84] *Id.* (citing EIA, Today in Energy, *New electric generating capacity in 2019 will come from renewables and natural gas* (Jan. 10, 2019), *https://www.eia.gov/todayinenergy/detail.php?id=37952* (Form EIA–860M, Preliminary Monthly Electric Generator Inventory).

[85] NOPR, 168 FERC ¶ 61,184 at P 25. The Commission cited to data showing that that net generation of energy by non-utility owned renewable resources in the United States escalated from 51.7 TWh in 2005 when EPAct 2005 was passed, to 340 TWh in 2018. This also included significant growth in non-utility renewable resources in states outside of RTOs. For example, net generation by non-utility renewable resources in the region defined by EIA as the Mountain State region increased from 3.6 TWh in 2005 to 19.5 TWh in 2012, and to 42.5 TWh in 2018. Pacific Northwest (Oregon and Washington) net non-utility generation from renewable resources increased from 1.5 TWh in 2005, to 8.7 TWh in 2012, and to 10.6 TWh in 2018. In the Southeast region of the country, non-utility renewable resources saw a lesser increase from 2.6 TWh in 2005 to 2.7 TWh in 2012, but expanded to 6.5 TWh in 2018. NOPR, 168 FERC ¶ 61,184 at P 27 (citing data taken from EIA's Electricity Data Browser, *www.eia.gov/electricity/data/browser* (select net generation, other renewables, independent power producers)).

[86] ISO/RTO Council, *The Role of ISOs and RTOs, https://isorto.org.*

[87] 16 U.S.C. 824a–3(a).

[88] 16 U.S.C. 824a–3(b).

[89] *See* NOPR, 168 FERC ¶ 61,184 at P 30. Evidence submitted in response to the NOPR shows that, as a result, customers may be paying more than avoided costs. *See infra* PP 265 (''Duke Energy claims that, among the factors contributing to this overpayment of $2.26 billion for the remainder of these QF contracts, the primary factor has been the requirement to offer fixed avoided cost energy rates during a period of rapidly declining energy prices''), 268 (''Massachusetts DPU argues that a 10-year, fixed energy rate based on current New England wholesale energy market prices is highly likely to diverge from actual energy market prices over the ten-year contract term and could significantly harm ratepayers'').

[90] Supplemental Notice of Technical Conference, *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Docket No. AD16–16–000 (May 9, 2016). The Technical Conference covered such issues as: (1) Various methods for calculating avoided cost; (2) the obligation to purchase pursuant to a LEO; (3) application of the one-mile rule; and (4) the rebuttable presumption the Commission has adopted under PURPA section 210(m) that QFs 20 MW and below do not have nondiscriminatory access to competitive organized wholesale markets.

[91] In its post-NOPR comments, Bloom Energy requested that the Commission ''[u]pdate the definition of 'useful thermal energy output' of a topping-cycle cogeneration facility to reflect the commercialization of solid oxide fuel cells that produce heat for the industrial purpose of producing hydrogen, a fuel that the fuel cells use to generate electricity.'' Bloom Energy Comments at 2. We do not take action on this request in this proceeding because we do not view this proposal as a logical outgrowth of the NOPR.

[92] The Commission has held that a LEO can take effect before a contract is executed and may not necessarily be incorporated into a contract. *JD Wind 1, LLC,* 129 FERC ¶ 61,148, at P 25 (2009), *reh'g denied,* 130 FERC ¶ 61,127 (2010) (''[A] QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.''). For ease of reference, however, references herein to a contract also are intended to refer to a LEO that is not incorporated into a contract.

[93] Moreover, any state—whether located in regions where energy prices are competitively based or whether located in regions where they are not—would be permitted to require that the fixed energy rate established at the time of the contract include provisions, established at the time the contract is established, providing for revisions to the energy rate at regular intervals, consistent with, for example, a purchasing electric utility's integrated resource plan, to reflect updated avoided cost calculations.

[94] These are the markets operated by Midcontinent Independent System Operator, Inc.

presumption is not rebutted, a state can at its option establish as-available energy avoided cost rates for QFs selling to such electric utilities at the LMP. With respect to QFs selling to electric utilities located outside of the organized electric markets defined in 18 CFR 292.309(e), (f), or (g), states have the option to set as-available energy avoided cost rates at competitive prices from liquid market hubs or calculated from a formula based on natural gas price indices and specified heat rates, provided that the states first determine that such prices represent the purchasing electric utilities' avoided costs. The states would have the flexibility to choose to adopt one or more of these options or to continue setting QF rates under the standards long established in the PURPA Regulations.

60. *Fourth,* states would have the flexibility to set energy and capacity rates pursuant to a competitive solicitation process conducted pursuant to transparent and non-discriminatory procedures consistent with the Commission's *Allegheny* standard, described in this final rule.

61. *Fifth,* we do not adopt the proposed rule permitting states with retail competition to allow relief from the purchase obligation. We instead clarify in this final rule that the Commission's existing PURPA Regulations already require that states, to the extent practicable, must account for reduced loads in setting QF capacity rates.

62. *Sixth,* we modify the Commission's ''one-mile rule'' for determining whether generation facilities are considered to be at the same site for purposes of determining qualification as a qualifying small power production facility. Specifically, we allow electric utilities, state regulatory authorities, and other interested parties to show that affiliated small power production facilities that use the same energy resource and are more than one mile apart and less than 10 miles apart actually are at the same site (with distances one mile or less apart still irrebuttably at the same site, and distances 10 miles or more apart irrebuttably at separate sites). We also allow a small power production facility seeking QF status to provide further information in its certification (whether a self-certification or an application for Commission certification) or recertification (whether a self-recertification or an application for Commission recertification) to defend preemptively against subsequent challenges, by identifying factors affirmatively demonstrating that its facility is indeed at a separate site from other affiliated small power production qualifying facilities. We further add a definition of the term ''electrical generating equipment'' to the PURPA Regulations to clarify how the distance between facilities is to be calculated.

63. *Seventh,* we allow an entity to challenge an initial self-certification or self-recertification without being required to file a separate petition for declaratory order and to pay the associated filing fee. However, we clarify in this final rule that such protests may be made to new certifications (both self-certifications and applications for Commission certification) but to only self-recertifications and applications for Commission recertifications making substantive changes to the existing certification.

64. *Eighth,* we revise the Commission's regulations implementing PURPA section 210(m), which provide for the termination of an electric utility's obligation to purchase from a QF with nondiscriminatory access to certain markets. Currently, there is a rebuttable presumption that QFs with a net capacity at or below 20 MW do not have nondiscriminatory access to such markets. We update the rebuttable presumption for small power production facilities (but not cogeneration facilities) from 20 MW to 5 MW and, in this final rule, revise the regulations to include examples of factors, among others, that QFs may argue show that they lack nondiscriminatory access to such markets.

65. *Finally,* we clarify that a QF must demonstrate commercial viability and a financial commitment to construct its facility pursuant to objective and reasonable state-determined criteria before the QF is entitled to a contract or LEO. States may not impose any requirements for a LEO other than a showing of commercial viability and a financial commitment to construct the facility. We also clarify in this final rule that, to the extent that the permitting factor is relied upon, a QF need only show that it has applied for all required permits and paid all applicable fees, and not that it has obtained such permits.

66. As explained in detail in the relevant sections below, these changes will enable the Commission to continue to fulfill its statutory obligations under sections 201 and 210 of PURPA. We emphasize that these changes are effective prospectively for new contracts or LEOs and for new facility certifications and recertifications filed on or after the effective date of this final rule; we do not by this final rule permit disturbance of existing contracts or LEOs or existing facility certifications.

IV. Discussion

A. General Legal Standards Under PURPA

67. Several comments were submitted regarding: (1) The requirement in PURPA section 210(a) that ''the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production''; and (2) the requirement in PURPA section 210(b) that rates paid by purchasing utilities to QFs ''shall not discriminate against qualifying cogenerators or qualifying small power producers.'' [95] In addition, a claim was made that the Commission has unlawfully delegated its authority to the states. These comments apply to several of the revisions implemented by this final rule and therefore are discussed prior to the discussion of specific revisions implemented herein.

1. Encouragement of QFs

a. Comments

68. Commenters make two general arguments regarding the statutory requirement that the Commission's PURPA Regulations should encourage QFs. First, they note that the statutory requirement that the PURPA Regulations encourage QFs is mandatory and that the Commission has no discretion to determine that such encouragement no longer is necessary. Harvard Electricity Law states that ''Congress'[s] mandate to encourage QFs is not contingent on industry conditions and does not expire.'' [96] Further, they assert, ''[t]he Commission may not overwrite Congress's instruction to issue rules that it 'determines necessary to encourage cogeneration and small power production.' '' [97] Public Interest Organizations similarly object to the NOPR as violating the encouragement requirement because, they assert, the NOPR ''reflect[s] a belief that the current rules support too much QF development and a desire to reduce the incentives in current rules for QF development.'' [98] NIPPC, CREA, REC, and OSEIA assert that ''[t]he Commission cannot take it

(MISO); PJM Interconnection, L.L.C. (PJM); ISO New England Inc. (ISO–NE); New York Independent System Operator, Inc. (NYISO); Electric Reliability Council of Texas (ERCOT); California Independent System Operator, Inc. (CAISO); and Southwest Power Pool, Inc. (SPP).

[95] 16 U.S.C. 824a–3(a), (b).

[96] Harvard Electricity Law Comments at 1.

[97] *Id.* at 4 (quoting PURPA section 210(a)).

[98] Public Interest Organizations Comments at 10.

upon itself to change the underlying policy directives to encourage QFs.'' [99]

69. Public Interest Organizations advance a second general argument based on the encouragement requirement, arguing that ''[t]o amend the rules, the Commission must first determine that the actual changes it proposes increase development and utilization of QFs.'' [100] Similarly, Allco attacks the NOPR on the grounds that ''the proposed changes do not encourage QF generation.'' [101]

b. Commission Determination

70. We agree with commenters that PURPA does not provide discretion to the Commission to determine whether QFs should be encouraged. That is a determination left to Congress, and we have not premised this final rule on a belief that QFs should not be encouraged. However, the requirement that the Commission promulgate regulations necessary to encourage QFs is not unbounded. Instead, as noted briefly earlier, there are statutory limitations on the extent that the PURPA Regulations can encourage QFs.

71. First, PURPA section 210(b) sets out standards with which the Commission must comply in setting QF rates. The last sentence of PURPA section 210(b) sets out an upper limit on such rates. ''No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.'' [102]

72. If there were any doubt from the statutory language that incremental costs (avoided costs) are intended to be a hard cap on QF rates, such doubt is dispelled by the Conference Report to PURPA, which provided: ''This limitation on the rates which may be required in purchasing from a cogenerator or small power producer *is meant to act as an upper limit on the price* at which utilities can be required under this section to purchase electric energy.'' [103] The Conference Report also described the reason for the avoided cost cap on QF rates. ''The provisions of this section *are not intended to require the rate payers of a utility to subsidize* cogenerators or small power produc[er]s.'' [104]

73. Therefore, PURPA section 210(b) imposes an important limit on the Commission's ability to encourage QFs by imposing an upper boundary on the rates at which QFs may require electric utilities to purchase their electric energy. The Commission cannot require QF rates that exceed the avoided costs of the purchasing electric utility.[105]

74. Second, another way in which Congress limited the Commission's ability to encourage QFs was to define small power production facilities, the PURPA category applicable to almost all renewable resources that wish to be QFs, as having ''a power production capacity which, together with any other facilities *located at the same site* (as determined by the Commission), is not greater than 80 megawatts.'' [106] The statutory 80 MW limitation, as well as any definition of ''the same site'' that may be established by the Commission, will of necessity have an effect on the encouragement of QFs, because it will limit the capacity of QFs both *ab initio* and also for those located at the same site to 80 MW.

75. Third, Congress amended PURPA section 210 to add section 210(m), which provides for termination of the requirement that an electric utility enter into a new obligation or contract to purchase from a QF if the QF has nondiscriminatory access to certain defined types of markets.[107] We interpret this amendment as reflecting Congress's judgment that these markets provide adequate encouragement for those QFs having nondiscriminatory access to such markets. To the extent that a party asserts that the termination of the purchase obligation for QFs with nondiscriminatory access to these markets discourages QFs, that party's argument is not with the Commission, but rather with Congress. PURPA section 210(m) obligates the Commission to grant any request to terminate a utility's obligation to purchase from a QF with nondiscriminatory access to the specified markets.[108]

76. Finally, we disagree with any suggestion that a rule originally adopted in 1980 cannot be changed once adopted, or that our revised regulations cannot be different in how they encourage QFs than the regulations the Commission issued in 1980.[109] For one thing, as explained above, PURPA itself includes certain limitations on the Commission's ability to encourage QFs, and a provision in the final rule intended to comply with these statutory limitations cannot be found to violate PURPA even if such a provision individually does not affirmatively encourage QFs to the same degree now as in 1980. As explained herein, we do not seek, through this final rule, to cease encouraging the development of QFs. Instead, this final rule is intended to ensure that the Commission is compliant with the statute in how it does encourage the development of QFs. In doing so, the Commission may end up encouraging QF development differently from the current PURPA Regulations, but the Commission's regulations continue to encourage QF development, as contemplated by PURPA.

77. Many of the commenters' assertions seem to be based on a reading of the statute that requires that every individual change made to the PURPA Regulations in isolation must individually encourage QFs notwithstanding the statute's provisions. But, as discussed above, Congress established boundaries in PURPA that must be considered, such as the ''cap'' on incremental costs; just and reasonable rates for electric customers; the 80 MW limit; and whether QFs have nondiscriminatory access to markets. Furthermore, the statutory requirement to encourage QF development applies to the PURPA Regulations—''such *rules* as [the Commission] determines necessary''—as a whole.[110]

78. In that regard, we find that the Commission's PURPA Regulations as a whole when modified by this final rule continue to encourage the development of QFs, consistent with PURPA. The PURPA Regulations in particular, continue to require that QF rates be set at full avoided costs, a provision the Supreme Court described as ''provid[ing] the maximum incentive for the development of cogeneration and small power production.'' [111] In addition, this final rule retains provisions of the PURPA Regulations adopted in 1980 that provide encouragement through other means

[99] NIPPC, CREA, REC, and OSEIA Comments at 29.

[100] Public Interest Organizations Comments at 11.

[101] Allco Comments at 8.

[102] Furthermore, PURPA section 210(b)(1) requires that QF rates be ''just and reasonable to the electric consumers of the electric utility and in the public interest.'' 16 U.S.C. 824a–3(b)(1). Although the exact scope of the ''just and reasonable to the electric consumers'' criterion has never been addressed explicitly, the Supreme Court held in *API* that the requirement in the PURPA Regulations that QF rates be set at full avoided costs does not violate this criterion. *API,* 461 U.S. at 415–16. This ''just and reasonable to the electric consumers'' criterion likely would be violated if the Commission were to allow a rate above the purchasing electric utility's avoided costs.

[103] Conf. Rep. at 98 (emphasis added).

[104] *Id.* (emphasis added).

[105] 16 U.S.C. 824a–3(b)(1).

[106] 16 U.S.C. 796(17)(A)(ii).

[107] *See* 16 U.S.C. 824a–3(m).

[108] *Id.* (''[N]o electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a [QF] if the Commission finds that the [QF] has nondiscriminatory access to [specified markets].'').

[109] *See* 18 U.S.C. 824a–3(a).

[110] *See* 16 U.S.C. 824a–3(a) (emphasis added).

[111] *API,* 461 U.S. at 418.

recognized by the Supreme Court in *FERC* v. *Miss.*[112] (*e.g.,* certain regulatory relief,[113] interconnection provisions,[114] and requirements that utilities sell power to QFs that will enable QFs to continue operations).[115] Moreover, several of the changes implemented by this final rule also provide additional encouragement for QFs as described in more detail below.

2. Discrimination

a. Comments

79. Commenters opposing the proposals in the NOPR also cite to the statutory requirement in PURPA section 210(b)(1) that QF rates ''shall not discriminate against'' QFs. EPSA asserts that ''[n]otably, this standard is more restrictive than the [FPA's] prohibition against 'unduly discriminatory' rates.'' [116] Public Interest Organizations state that ''[i]n other statutes, prohibiting price discrimination without the modifiers 'unreasonable' or 'undue,' means any difference in price for the same commodity.'' [117]

80. In discussing the requirement that QF rates not be discriminatory, some commenters compare the treatment afforded to QFs under the NOPR with the rate treatment applicable to public utilities. For example, NIPPC, CREA, REC, and OSEIA point out that ''[u]tilities can rate-base long-term investments, thereby ensuring that they can recover their capital investments plus an authorized return, and then also recover their actual operating costs under traditional cost-of-service ratemaking.'' [118] By contrast, Harvard Electricity Law asserts, ''QFs do not have the same ability that the electric utilities have to 'rate base' their facilities and, thereby, guarantee capital recovery.'' [119]

81. Based on this difference between utilities and QFs, commenters allege that certain aspects of the NOPR are discriminatory, including those provisions of the NOPR regarding the use of LMPs and other competitive rates to set as-available energy rates,[120] to allow for variable energy rates in QF contracts,[121] and to allow avoided costs to be set through competitive solicitations (*i.e.,* requests for proposals (RFPs)).[122]

b. Commission Determination

82. As an initial matter, we agree with EPSA that the statutory requirement in PURPA section 210(b)(1) that QF rates ''shall not discriminate against'' QFs is more restrictive than the FPA's prohibition against 'unduly discriminatory' rates.[123] However, the avoided cost cap on QF rates that limits the Commission's ability to encourage QFs, discussed above, also applies to the Commission's ability to address these claims of discrimination under PURPA. PURPA section 210(b) makes clear that ''[n]o such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.'' [124]

83. We are retaining in this final rule the requirement that QF rates be set at a purchasing utility's full avoided costs. The Supreme Court held in *API* that ''the full-avoided-cost rule plainly satisfies the nondiscrimination requirement.'' [125] Although the Court did not provide a detailed explanation for this holding, the reasoning is apparent. If the purchasing utility is paying the same rate to a QF for power that it otherwise would have paid for incremental power, by definition such a rate could not be discriminatory. But even if it were possible to posit a situation where the payment of a full avoided cost rate to a QF somehow were discriminatory, the Commission nevertheless would be prohibited by PURPA section 210(b) from requiring a rate to be paid to the QF that is *above* the full avoided costs of the purchasing electric utility.

84. For the same reasons, Public Interest Organizations are mistaken when they assert that, without the modifiers ''unreasonable'' or ''undue,'' any difference in price for the same commodity violates PURPA.[126] So long as a QF's rate is set at the purchasing utility's full avoided cost, the QF's rate should be the same as the rate the purchasing utility otherwise would be paying or the cost it would be incurring, and such a rate would not be discriminatory. And, in any event, as noted above, the Commission cannot require a rate that is any higher.

85. With respect to comparisons between QFs, with no guarantee of cost recovery, and electric utilities, which if they have a franchised service territory and sell at retail in that territory are effectively guaranteed the opportunity to seek to recover prudently-incurred costs in their retail rates, we observe that Congress acknowledged this difference when enacting PURPA. As emphasized in the PURPA Conference Report:

> The conferees recognize that cogenerators and small power producers are different from electric utilities, *not being guaranteed a rate of return on their activities* generally or on the activities vis a vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise *is not guaranteed to be recoverable.*[127]

86. In recognizing this difference and yet not seeking to eliminate it, Congress also made clear its intent not to treat QFs like electric utilities in this regard:

> It is not the intention of the conferees that [QFs] become subject . . . to the type of examination that is traditionally given to electric utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power.[128]

87. Based on this legislative history, the Supreme Court concluded in *API* that, ''Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities.'' [129] But application of traditional cost-based ratemaking principles to sales by QFs is

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[112] 456 U.S. 742, 750–51 (1982) (holding that Congress ''felt that two problems impeded the development of nontraditional generating facilities: (1) Traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development'' (internal citations omitted)).

[113] 18 CFR 292.601–02.

[114] 18 CFR 292.303(c).

[115] 18 CFR 292.305.

[116] EPSA Comments at 8.

[117] Public Interest Organizations Comments at 47 (citing *FTC* v. *Anheuser-Busch, Inc.,* 363 U.S. 536, 549 (1960)).

[118] NIPPC, CREA, REC, and OSEIA Comments at 36; *see also* IdaHydro Comments at 11; Industrial Energy Consumers Comments at 12–13; SC Solar Alliance Comments at 5–10; Solar Energy Industries Comments at 33, 36–38.

[119] Harvard Electricity Law Comments at 28.

[120] *See, e.g.,* Public Interest Organizations Comments at 64 (stating that the use of competitive prices to set as-available energy avoided cost rates is discriminatory because non-QF generators are not limited to competitive prices and utilities can, and regularly do, pay effective prices for energy that exceed the price determined by competitive prices).

[121] *See, e.g.,* EPSA Comments at 9 (''The NOPR avoided rate proposal must therefore be rejected because it puts QFs at a disadvantage to utility-owned generation, in violation of the non-discrimination mandate under PURPA.''); Public Interest Organizations Comments at 51 (''[L]imiting QFs to contracts providing no price certainty for energy values, while non-QF generation regularly obtains fixed price contracts and utility-owned generation receives guaranteed cost recovery from captive ratepayers, constitutes discrimination.'').

[122] *See, e.g.,* Allco Comments at 12 (stating that allowing a state commission to use a competitive solicitation price is simply giving another tool to a state commission to kill QF projects).

[123] EPSA Comments at 8.

[124] Furthermore, as noted above, PURPA section 210(b)(1) requires that QF rates also be ''just and reasonable to the electric consumers of the electric utility and in the public interest.'' *See supra* note 102.

[125] *API,* 461 U.S. at 413.

[126] Public Interest Organizations Comments at 47 (citing *FTC* v. *Anheuser-Busch, Inc.,* 363 U.S. at 549).

[127] Conf. Rep. at 97–98 (emphasis added).

[128] *Id.* at 97.

[129] *API,* 461 U.S. at 414.

exactly what would be required in order to provide QFs with the same guaranteed cost recovery that applies to electric utilities. Also, guaranteeing QFs cost recovery is fundamentally inconsistent with PURPA, which sets the rate the QF is paid at the utility's avoided cost, not at the QF's cost.

88. It therefore is clear that Congress did not intend for the PURPA nondiscrimination criterion to require that QF rates be set in a way that guarantees recovery of a QF's own costs, even as Congress recognized that franchised electric utilities selling at retail typically do have such guarantees for their own costs. Congress thus withheld from the Commission the authority to provide to QFs the same opportunity to recover costs at retail that franchised electric utilities have to recover their costs at retail; it was done by Congress intentionally and cannot be impermissibly discriminatory.[130]

3. Unlawful Delegation and the Role of Nonregulated Electric Utilities

a. Comments

89. Allco argues that PURPA section 210(f) requires states to "implement" the Commission's rules, and that those rules cannot redelegate the Commission's authority. Allco claims that the statutory requirement to implement the Commission's rules cannot simply be a façade for delegating broad authority to states to undercut PURPA's directive that QF small power production must be encouraged. Allco concludes that Congress intended for the Commission to adopt actual rules rather than "a menu of factors" that essentially leaves states with all the discretion as to what to implement in order to encourage QF generation.[131]

90. Allco also asserts that the NOPR's proposed delegation of authority to nonregulated electric utilities is an unconstitutional delegation. According to Allco, such a delegation would mean that nonregulated electric utilities (some of which are among the largest utilities in the United States) were regulating themselves. Allco argues that a private entity such as a nonregulated electric utility cannot constitutionally be delegated regulatory power.[132]

91. Nebraska Board states that there is no state agency in Nebraska that has ratemaking authority over retail electric suppliers and that all retail electric suppliers are consumer-owned. Nebraska Board states its understanding that each retail electric supplier in Nebraska would have jurisdiction to exercise flexibilities provided to states in the NOPR.

92. Public Interest Organizations argue that the Commission failed to comply with PURPA section 210's requirement to consult with federal and state regulatory agencies with ratemaking authority.[133]

b. Commission Determination

93. Allco's unlawful delegation claims are misplaced. By enacting PURPA section 210(f)(1), Congress delegated to the states the obligation to implement the Commission's PURPA rules, and the Commission is acting consistent with that delegation. Congress's delegation to the states was upheld in *FERC* v. *Miss.*[134] and we are ensuring that the rules we have imposed abide by all the terms of the statute. Further, the Commission's current PURPA Regulations, promulgated in 1980, set forth a list of factors that the states are to consider, "to the extent practicable," in setting QF rates.[135] In so doing, the Commission emphasized that states have "great latitude in determining the manner of implementation of the Commission's rules, provided that the manner chosen is reasonably designed to implement the requirements of Subpart C [which includes the pricing rules of 18 CFR 292.304]."[136] This final rule adds factors that must be taken into account to the extent practicable in setting rates, while retaining the "great latitude" the states always have had to implement the PURPA Regulations and which have been an important feature of the Commission's PURPA Regulations since their inception.

94. With respect to Allco's claim that the NOPR proposed an unconstitutional delegation to nonregulated electric utilities, we note that PURPA section 210(f)(2) specifically provides that "each nonregulated electric utility shall, after notice and opportunity for public hearing, implement" the Commission's rules regarding the rates to be paid to QFs. Consistent with this statutory provision, the PURPA Regulations regarding the setting of QF rates have applied to nonregulated electric utilities since those regulations were promulgated in 1980.[137] The final rule does nothing more than continue to implement this statutory requirement in the same way it always has been implemented. Given PURPA's unique statutory scheme involving state regulatory authorities, nonregulated electric utilities, QFs, and the Commission, we therefore reject Allco's assertion that the rules proposed in the NOPR—and adopted in this final rule—establish an unconstitutional delegation of authority to a private entity.[138] And it is beyond the Commission's purview to consider whether this statutory grant is constitutional.[139] Accordingly, when we refer to states in this final rule, we usually are referring to both state regulatory authorities and nonregulated electric utilities.

95. Regarding Public Interest Organizations assertion that the Commission failed to comply with PURPA section 210's requirement to consult with federal and state regulatory agencies with ratemaking authority, we find that the 2016 Technical Conference's invitation to the public (including state regulatory authorities) to speak, as well as the notice and comment process on the NOPR itself, encompasses the required consultation.[140] The notices soliciting

[130] *See* 16 U.S.C. 824a–3(a) (rules Commission is directed to prescribe "may not authorize a [QF] to make any sale for purposes other than resale").

[131] Allco Comments at 39–40.

[132] *Id.* at 40 (citing *Ass'n of Am. R.R.* v. *DOT,* 721 F.3d 666, 677 (D.C. Cir. 2013), *vacated on other grounds,* 135 S. Ct. 1225 (2015)).

[133] Public Interest Organizations Comments at 19 (citing 16 U.S.C. 824a–3(a)).

[134] 456 U.S. at 760 ("FERC has declared that state commissions may implement this by, among other things, 'an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [PURPA].' ").

[135] 18 CFR 292.304(e).

[136] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,891–92. The Commission explained that "[s]uch latitude is necessary in order for implementation to accommodate local conditions and concerns, so long as the final plan is consistent with statutory requirements." *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304,at 61,646.

[137] *See* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,864 ("The implementation of these rules is reserved to the State regulatory authorities and nonregulated electric utilities.").

[138] *See* Allco Comments at 40.

[139] *Finnerty* v. *Cowen,* 508 F.2d 979, 982 (2d Cir. 1974) (explaining that administrative agencies "have neither the power nor the competence to pass on the constitutionality of administrative or legislative action") (quoting *Murray* v. *Vaughn,* 300 F. Supp. 688, 695 (D. R.I. 1969)); *see also Gibas* v. *Saginaw Mining Co.,* 748 F.2d 1112, 1117 (6th Cir. 1984) ("[A]dministrative bodies like the Board do not have the authority to adjudicate the validity of legislation which they are charged with administering."); *Spiegel, Inc.* v. *FTC,* 540 F.2d 287, 294 (7th Cir. 1976) (finding that the federal agency erred by making a constitutional determination); *Downen* v. *Warner,* 481 F.2d 642, 643 (9th Cir. 1973) ("Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board."); *cf. Woodrow* v. *FERC,* 2020 WL 2198050, at *9 (D.D.C. May 6, 2020) ("When Congress creates an intricate statutory-review process that incorporates agency consideration and ultimately an avenue to petition an Article III court, we assume it wants that scheme to control.").

[140] *See* Notice Inviting Post-Technical Conference Comments, *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Docket No. AD16–16–000 (Sept. 6, 2016); Supplemental Notice of Technical Conference, *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Docket No. AD16–16–000 (Mar. 4, 2016)

comments were open to all state authorities. Indeed, since the Commission first announced that technical conference and up to our receipt of comments on the NOPR, representatives from several states have filed comments expressing their views on how the Commission should implement PURPA.

B. QF Rates

1. Overview

96. PURPA requires that the Commission promulgate rules, to be implemented by the states,[141] that ''shall insure'' that the rates electric utilities pay for purchases of electric energy from QFs meet the statutory criteria described above, including that ''[n]o such rule . . . shall provide for a rate which exceeds'' the purchasing utility's ''incremental cost . . . of alternative electric energy.'' [142] Under PURPA, such rates must: (1) Be just and reasonable to the electric consumers of the electric utility and in the public interest; (2) not discriminate against qualifying cogenerators or qualifying small power producers; [143] and, as noted above, (3) not exceed ''the incremental cost to the electric utility of alternative electric energy,'' [144] which is ''the cost to the electric utility of the electric energy which, *but for* the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.'' [145] The ''incremental cost to the electric utility of alternative electric energy'' referred to in prong (3) above, which sets out a statutory upper bound on a QF rate, has been consistently referred to by the Commission and industry by the short-hand phrase ''avoided cost,'' [146] although the term ''avoided cost'' itself does not appear in PURPA.

97. In addition, the PURPA Regulations currently provide a QF two options for how to sell its power to an electric utility. The QF may choose to sell as much of its energy as it chooses when the energy becomes available, with the rate for the sale calculated at the time of delivery (frequently referred to as a so-called ''as-available'' sale and rate).[147] Alternatively, the QF may choose to sell pursuant to a legally enforceable obligation or LEO (such as a contract) over a specified term.[148]

98. If the QF chooses to sell under the second option, the PURPA Regulations then provide the QF the further option of receiving, in terms of pricing, either: (1) The purchasing electric utility's avoided cost calculated at the time of delivery; [149] or (2) the purchasing electric utility's avoided cost calculated and fixed at the time the LEO is incurred.[150]

99. In implementing the PURPA Regulations, the Commission recognized that a contract with avoided costs calculated at the time a LEO is incurred could exceed the electric utility's avoided costs at the time of delivery in the future, thereby seemingly violating PURPA's requirement that QFs not be paid more than an electric utility's avoided costs. But the Commission believed that the fixed avoided cost rate might also turn out to be lower than the electric utility's avoided costs over the course of the contract and that, ''in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out.'' [151] The Commission's justification for allowing QFs to fix their rate at the time of the LEO for the entire life of the contract was that fixing the rate provides ''certainty with regard to return on investment in new technologies.'' [152]

100. In the NOPR, the Commission proposed to revise its PURPA Regulations to permit states to incorporate competitive market forces in setting QF rates. Specifically, the Commission proposed to revise its PURPA Regulations with regard to QF rates to provide states with the flexibility to:

- Require that ''as-available'' QF energy rates paid by electric utilities located in RTO/ISO markets be based on the market's LMP, or similar energy price derived by the market, in effect at the time the energy is delivered.
- require that ''as-available'' QF energy rates paid by electric utilities located outside of RTO/ISO markets be based on competitive prices determined by: (1) liquid market hub energy prices; or (2) formula rates based on observed natural gas prices and a specified heat rate.
- require that energy rates under QF contracts and LEOs be based on as-available energy rates determined at the time of delivery rather than being fixed for the term of the contract or LEO.
- implement an alternative approach of requiring that the fixed energy rate be calculated based on estimates of the present value of the stream of revenue flows of future LMPs or other acceptable as-available energy rates at the time of delivery.
- require that energy and/or capacity rates be determined through a competitive solicitation process, such as an RFP, with processes designed to ensure that the competitive solicitation is performed in a transparent, non-discriminatory fashion.[153]

101. Although the Commission proposed to modify how the states are permitted to calculate avoided costs, it did not propose to terminate the requirement that the states continue to calculate, and to set QF rates at, such avoided costs.

102. We adopt these proposals in this final rule, with certain modifications. Each such proposal, and our final determination, is discussed further below.

2. Use of Competitive Market Prices To Set As-Available Avoided Cost Rates

103. In addition to commenting on the specific methods for determining as-available avoided cost rates, several

(announcing preliminary agenda and inviting interested speakers).

[141] Nonregulated electric utilities implement the requirements of PURPA with respect to themselves. An electric utility that is ''nonregulated'' is any electric utility other than a ''state regulated electric utility.'' 16 U.S.C. 2602(9). The term ''state regulated electric utility,'' in contrast, means any electric utility with respect to which a state regulatory authority has ratemaking authority. 16 U.S.C. 2602(18). The term ''state regulatory authority,'' as relevant here, means a state agency which has ratemaking authority with respect to the sale of electric energy by an electric utility. 16 U.S.C. 2602(17).

[142] 16 U.S.C. 824a–3(b).

[143] 16 U.S.C. 824a–3(b)(1)–(2).

[144] 16 U.S.C. 824a–3(b).

[145] 16 U.S.C. 824a–3(d) (emphasis added).

[146] *See* 18 CFR 292.101(b)(6) (defining avoided costs in relation to the statutory terms); *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,865 (''This definition is derived from the concept of 'the incremental cost to the electric utility of alternative electric energy' set forth in section 210(d) of PURPA. It includes both the fixed and the running costs on an electric utility system which can be avoided by obtaining energy or capacity from qualifying facilities.'').

[147] 18 CFR 292.304(d)(1).

[148] 18 CFR 292.304(d)(2)(i)–(ii); *see also FLS,* 157 FERC ¶ 61,211 at P 21 (citing 18 CFR 292.304(d)). The LEO or contract is frequently referred to as a long-term transaction, when contrasted with an ''as available'' sale and rate.

[149] 18 CFR 292.304(d)(2)(i).

[150] 18 CFR 292.304(d)(2)(ii). Rates calculated at the time of a LEO (for example, a contract) do not violate the requirement that the rates not exceed avoided costs if they differ from avoided costs at the time of delivery. 18 CFR 292.304(b)(5).

[151] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880. *See also* 18 CFR 292.304(b)(5) (''In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.''); *Entergy Servs., Inc.,* 137 FERC ¶ 61,199, at P 56 (2011) (''Many avoided cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. In such circumstances, the utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost.'').

[152] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[153] NOPR, 168 FERC ¶ 61,184 at PP 32–33.

commenters addressed more generally the Commission's proposal in the NOPR that states be given the flexibility to use competitive market prices to set such rates. Before discussing the specific methods proposed in the NOPR, we first discuss the determination that the use of competitive market prices, however determined, can be an appropriate approach to determining as-available avoided cost rates.

a. NOPR Proposal

104. In the NOPR, the Commission proposed to give the states the flexibility to use competitive market prices to set as-available avoided cost rates. The Commission stated its belief that consideration of transparent, competitive market prices in appropriate circumstances would help to identify an electric utility's avoided costs in a simpler, more transparent, and more predictable manner that would, in conjunction with the Commission's other existing and proposed PURPA Regulations, act to encourage QFs.[154]

105. For those utilities located in RTO/ISO markets, the NOPR identified LMP as a competitive market price that states could choose to adopt as representing an as-available avoided energy cost. The Commission explained that LMP could provide an accurate measure of the varying actual avoided costs for each receipt point on an electric utility's system where the utility receives power from QFs.[155] In addition to these benefits, the Commission observed that LMPs, in contrast to the administrative pricing methodologies used to set as-available QF rates by many states, could promote the more efficient use of the transmission grid, promote the use of the lowest-cost generation, and provide for transparent price signals.[156]

106. For utilities located outside of RTO/ISO markets, the NOPR proposed to allow states to use two other potential competitively priced measures of a utility's as-available avoided cost rates: (1) Energy rates established at liquid market hubs; or (2) energy rates determined pursuant to formulas based on natural gas price indices and a proxy heat rate for an efficient natural gas combined-cycle generating facility. In each such case, though, the state would need to find that that price reasonably represents a competitive market price that represents the avoided costs of the purchasing electric utility.[157]

b. Comments

107. Allco argues that the only reason for including the use of competitive market prices to set as-available energy rates is to create a menu of prices from which a state regulatory authority or unregulated electric utility can choose the lowest price. Allco claims this proposal would not encourage QF generation, would be inconsistent with the rules of economic dispatch, and would be inconsistent with the language of PURPA.[158] BluEarth makes similar arguments.[159] In contrast, El Paso Electric argues that state regulatory authorities should be able to set avoided cost rates based on the lesser of a market hub price or a combined cycle price.[160] Similarly, the California Commission argues that utilities located in organized markets (not just non-organized markets) should also be expressly permitted to use any competitive price (whether derived from a market hub, competitive solicitation, or a combined cycle price) to set avoided cost rates. The California Commission also argues that states should have the ability to use competitive prices for not just as-available energy pricing, but also for capacity pricing, and proposes minor modifications to the relevant regulation text proposed in the NOPR in order to clarify these points.[161]

108. The California Commission argues that the proposed regulations should be modified to: (1) Define the newly permissible avoided cost methodologies within the definitions section of Part 292; (2) eliminate any perception that the new methodologies can only be used to set avoided costs for as-available energy; (3) allow any appropriate market-based methodology to set avoided-cost rates for energy, capacity or both; and (4) define ''Organized Electric Market.'' [162] The California Commission believes that the new regulations should indicate: (1) That they do not provide states any more flexibility than they already have; (2) that utilities located in organized markets may use any Market Hub Price, Competitive Solicitation Price, or Combined Cycle Price to establish avoided-cost rates; and (3) that a price based on LMP or a Competitive Price is just and reasonable and nondiscriminatory.[163]

109. Some commenters object to the use of competitive markets prices on the grounds that these competitive prices represent only short-term, or spot prices that do not reflect the long-term marginal costs and other costs avoided by purchasing utilities.[164] Similarly, some commenters assert that competitive prices cannot support the financing of QFs.[165]

110. Public Interest Organizations argue that using competitive prices to set as-available energy avoided cost rates is discriminatory because non-QF generators are not limited to competitive prices and utilities can, and regularly do, pay effective prices for energy that exceed the price determined by competitive prices.[166] Several other commenters express concern about setting QF prices by referencing short-term liquid hub prices while allowing utilities to rate base and recover their long-term investments.[167] Industrial Energy Consumers argue that, if the Commission implements the liquid market hub proposal, there must be assurances that utilities' self-builds face the same market risk exposure as QFs. For example, they argue, if states expose QFs to variable rates for their energy output, utility-owned generation should also be exposed to variable rates for their energy output.[168]

111. Several commenters assert that QF rates should reflect benefits other than the avoided cost of energy.[169] For example, Biogas and Biomass Power state that non-energy benefits, like waste reduction and economic development must be incorporated into avoided cost determinations.[170] Biogas and Resources for the Future state that locational values should be incorporated into avoided cost calculations.[171] American Dams states that utilities' avoided

[154] *Id.* P 13.

[155] *Id.* P 45.

[156] *Id.* P 48 (citing *Cal. Indep. Sys. Operator Corp.,* 105 FERC ¶ 61,140, at PP 48–50 (2003); *Cf. Price Formation in Energy and Ancillary Servs. Mkts Operated by Reg'l Transmission Orgs. and Indep. Sys. Operators,* 153 FERC ¶ 61,221, at P 2 (2015)).

[157] NOPR, 168 FERC ¶ 61,184 at P 51.

[158] Allco Comments at 8.

[159] BluEarth Comments at 2.

[160] El Paso Electric Comments at 3–4.

[161] California Commission Comments at 23–27.

[162] *Id.* at 11–14.

[163] *Id.* at 23–25.

[164] IdaHydro Comments at 11; Southeast Public Interest Organizations Comments at 19; NIPPC, CREA, REC, and OSEIA Comments at 52, 55 (citing *Exelon Wind I, LLC,* 140 FERC ¶ 61,152, at P 52 (2012)); Union of Concerned Scientists Comments at 6.

[165] BluEarth Renewables Comments at 2; Biological Diversity at 8; Covanta Comments at 9; Public Interest Organization Comments at 43–44.

[166] Public Interest Organizations Comments at 64.

[167] IdaHydro Comments at 11; Industrial Energy Consumers Comments at 12–13.

[168] Industrial Energy Consumers Comments at 12–13.

[169] Biogas Comments at 1–2; Biomass Power Comments at 1; EPSA Comments at 14–16; Resources for the Future Comments at 4; Xcel Comments at 3–5.

[170] Biogas Comments at 2; Biomass Power Comments at 1.

[171] Biogas Comments at 1; Resources for the Future Comments at 4.

transmission charges should be included in avoided cost determinations.[172] Xcel states that hidden integration and utility planning costs should also be incorporated into avoided cost calculations.[173] American Dams argues that for high capital projects like hydro, the Commission should consider longer-term public benefits and not just short-term market pricing.[174]

112. Solar Energy Industries asserts that payments based on the LMP should not relieve the purchasing utility of the requirement to compensate the QF for any values in addition to electricity (*e.g.,* renewable energy credits, frequency response capabilities, pro-rated capacity value, etc.).[175]

113. California Utilities request that the Commission clarify that states may but are not required to consider state policies when establishing avoided costs.[176] Harvard Electricity Law requests that the Commission clarify its rule allowing states to set tiered rates.[177]

c. Commission Determination

114. As an initial matter, we observe that some of the concerns raised by commenters about the use of competitive market prices to set as-available energy rates for QFs are based on the incorrect assumption that the NOPR proposal would permit states to use competitive market prices to set as-available energy rates for QFs even when competitive market prices are below the purchasing utility's avoided costs. In fact, however, the use of competitive market prices to set QF rates is explicitly subject to the requirement that such prices are equal to the purchasing utility's avoided energy costs.[178] As the Supreme Court noted in *API,* the full avoided cost rate requirement represents the maximum rate permitted under PURPA, and thereby provides important encouragement to QFs.[179] And as the Supreme Court also noted in the same decision, ''the full-avoided-cost rule plainly satisfies the nondiscrimination requirement.'' [180] Further, in requiring full avoided cost rates, ''[t]he Commission did not ignore the interest of electric utility consumers 'in receiving electric energy at equitable rates.' '' [181]

115. For this reason, Allco is incorrect when it claims that the competitive price proposal represents a menu of prices that a state can select to choose the lowest rate. In the event that more than one competitive price option potentially could apply, the state would be required to select the option that reasonably reflects the purchasing utility's avoided costs, which is what PURPA requires.[182]

116. Further, the record supports the conclusion that the use of transparent, competitive market prices provides encouragement to QFs, represents the avoided cost, and can ensure that the rate does not exceed the incremental cost to the purchasing electric utility. In addition to the testimony to this effect presented at the technical conference and cited in the NOPR,[183] the conclusion is further supported by comments submitted in response to the NOPR. For example, NIPPC, CREA, REC, and OSEIA cite to a report by Fitch, which explains how Fitch evaluates the financial strength of renewable energy projects. In this report, Fitch states that it gives a ''stronger'' evaluation to projects with power sales contract prices that are ''indexed using simple, broad-based publicly available indexation formulas.'' [184] In addition, Solar Energy Industries notes the difficulties QFs face in expending large sums to develop their projects ''[f]or states that do not publish the avoided costs, or for utilities that treat their avoided cost methodologies as confidential trade secrets.''[185]

117. We agree with commenters who assert that competitive market prices represent only short-run spot prices that do not reflect electric utilities' long-run costs that QFs can displace. However, we are authorizing states to use competitive market prices only to establish as-available energy rates for QFs. The comments misunderstand the fundamental difference between the value to a purchasing utility of such as-available energy and the value to a purchasing utility of capacity.

118. A QF has no obligation under the as-available avoided cost rate provisions to deliver any set amount of electric energy at any point in the future, but merely is paid for the amount of electric energy actually delivered. Therefore, the delivery of as-available energy does not displace any long-term energy the purchasing electric utility would generate itself or purchase from another source but rather allows the purchasing utility to reduce the amount of energy it otherwise would generate itself or purchase from another entity at the time the QF delivers the energy. Because the QF has no obligation to deliver any energy in the future, the utility is unable to avoid constructing or contracting for capacity to meet its future needs as a consequence of the delivery of energy by the QF. As-available energy rates therefore appropriately reflect only the short-run value of energy delivered at the particular moment in time when and if the QF has energy available to be delivered to the utility.

119. A QF can displace an electric utility's own generation or purchases from alternative sources over the long-run when a QF sells capacity to a utility in addition to as-available energy. In contrast to as-available energy, a sale of capacity would typically compensate the QF for maintaining the capability to deliver a set amount of energy in the future (*i.e.,* capital costs),[186] and thus allows the purchasing utility to avoid the cost of making alternative arrangements, either through a self-build or an alternative purchase, to obtain that amount of energy. Consequently, the price of capacity purchased from a QF would reflect this long-run avoided cost. And this final rule does not alter a purchasing utility's

[172] American Dams Comments at 4.

[173] Xcel Comments at 3–5.

[174] American Dams Comments at 2.

[175] Solar Energy Industry Comments at 27–28.

[176] California Utilities Comments at 18–19.

[177] Harvard Electricity Law Comments at 32–33.

[178] Arguments that the various competitive market prices identified in this final rule do not represent avoided energy costs are addressed below with respect to each such specific market price.

[179] *API,* 461 U.S. at 413.

[180] *Id.*

[181] *Id.* at 415 (quoting Conf. Rep. at 97).

[182] In a competitive market, the transportation costs between any such two hubs and a QF would be such that they would make the QF rate the same, no matter which hub was selected. *See* FERC, *Energy Primer, A Handbook of Market Basics,* at 64 (June 2020), *https://www.ferc.gov/market-assessments/guide/energy-primer-2020.pdf* (Energy Primer) (''If there are no transmission constraints, or congestion, LMPs will not vary significantly across the RTO footprint. However, when transmission congestion occurs, LMPs will vary across the footprint because operators are not able to dispatch the least-cost generators across the entire region and some more expensive generation must be dispatched to meet demand in the constrained area.'').

[183] *See* American Forest & Paper Association Comments, Docket No. AD16–16–000, at 8 (filed June 8, 2016) (''To the extent possible, these determinations [of avoided costs] should not be made in a 'black box', but rather, as part of an open and transparent method and process.''); EEI Comments, Docket No. AD16–16–000, at 3 (filed June 30, 2016) (''Where transparent competitive markets with day ahead prices exist, there is no reason to adhere to second-best avoided cost pricing mechanisms.'').

[184] NIPPC, CREA, REC, and OSEIA Comments at 37–38 (citing *FitchRatings, Global Infrastructure & Project Finance, Renewable Energy Project Rating Criteria,* at 3 (Feb. 26, 2019), *https://www.fitchratings.com/site/re/10061770*).

[185] Solar Energy Industries Comments at 41.

[186] *See* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,885 (''Energy costs are the variable costs associated with the production of electric energy (kilowatt-hours). They represent the cost of fuel, and some operating and maintenance expenses. Capacity costs are the costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities.'').

existing obligation to pay QFs for any avoided capacity benefit that allows the utility to avoid acquiring capacity.[187]

120. For these reasons, we decline to grant the California Commission's request to allow using competitive prices for not just as-available energy pricing, but also for capacity pricing.[188] We also reject the California Commission's request to permit all electric utilities, both those located in organized markets and those located in non-organized market areas, to use any competitive price (whether a Market Hub Price or Combined Cycle Price, or alternatively a Competitive Solicitation Price) to set avoided cost rates. The Market Hub Price and Combined Cycle Price, as well as the Competitive Solicitation Price are options that should generally reflect a purchasing electric utility's avoided as-available energy costs in non-RTO/ISO areas, while the LMP should generally reflect a purchasing electric utility's avoided as-available energy costs in RTO/ISO market areas.

121. With respect to the discrimination claims, our decision to give states the flexibility to use competitive prices is driven by the fact that the competitive market price represents the purchasing utility's avoided costs. And, as explained in Section IV.A.2 above, a rate set at full avoided costs by definition cannot be discriminatory and, in any event, the Commission is without authority under PURPA section 210(b) to require a rate above avoided costs.

122. Further, Industrial Energy Consumers are incorrect when they suggest that public utility energy rates do not vary with costs in the same way that the competitive market prices potentially applicable to QFs under the final rule vary. To the contrary, the Commission and most states provide for fuel adjustment clauses applicable to rates, which allow utility rates to adjust automatically with changes in utility fuel and purchased power costs.[189] And even utilities whose rates do not include fuel and purchased power adjustment clauses nevertheless typically must charge their retail customers cost-based rates, which means that their energy charges will vary from one rate case to the next as their fuel and purchased power costs vary from year to year. These mechanisms for ensuring that utility rates vary with the cost of energy result in variances in utility energy rates that are similar to the variance in QF energy rates for those states that elect a Competitive Price option (either a Market Hub Price or a Combined Cycle Price) for as-available avoided cost rates.

123. Finally, although we are sympathetic to the claims of certain QFs that they provide non-energy benefits (such as environmental benefits, waste reduction benefits, and economic development benefits) that are not reflected in avoided cost rates, PURPA section 210(b) prohibits the Commission from requiring QF rates to be set above full avoided costs. Because the Commission already requires states to set QF rates at full avoided costs, it is barred from requiring QF rates set higher than that based on the non-energy benefits that QFs may also provide. However, nothing in PURPA, the PURPA Regulations as they currently exist, or this final rule would prevent states from rewarding QFs for such non-energy benefits so long as that is done outside of PURPA, such as is now done for renewable energy credits (RECs) to compensate QFs for providing unique environmental or other non-PURPA benefits.[190] We address in the sections below each type of competitive price that could be used as an acceptable energy avoided cost.

3. LMP as a Permissible Rate for Certain As-Available Avoided Cost Rates

a. NOPR Proposal

124. The Commission proposed to revise 18 CFR 292.304 to add subsections (b)(6) and (e)(1). In combination, these subsections would permit a state the flexibility to set the as-available energy rate paid to a QF by an electric utility located in an RTO/ISO at LMPs calculated at the time of delivery.

125. The Commission explained that RTO/ISO markets calculate a LMP at each location on the RTO/ISO-controlled grid, and that all sellers receive the LMP for their location and all buyers pay the market clearing price for their location. The Commission further recognized that LMPs reflect the true marginal cost of production, taking into account all physical system constraints, and these prices would fully compensate all resources for the variable cost of providing service,[191] and explained that prices in such an LMP-based rate structure are designed to reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid in each period, and thus such prices can vary based on location and time.[192]

126. The Commission therefore preliminarily found that LMP is an accurate measure of avoided costs. Unlike, for example, average system-wide cost measures of avoided cost used by many states, LMP could provide an accurate measure of the varying actual avoided costs for each receipt point on an electric utility's system where the utility receives power from QFs; LMP is the per MWh cost of obtaining incremental supplies at each point. Further, the Commission explained that these prices are not rigid, long-lasting prices as tends to be the case currently for administratively-determined avoided costs, but prices that are calculated daily (for the day-ahead markets) and/or every five minutes (for real-time markets) and they vary to reflect changing system conditions (*e.g.,* they tend to rise as demand increases and the system operator dispatches increasingly expensive supplies to meet that higher demand). In addition, the Commission observed that LMPs, in contrast to the administrative pricing methodologies used to set as-available QF rates by many states, could promote the more efficient use of the transmission grid, promote the use of the lowest-cost generation, and provide for transparent price signals.[193] Finally, the Commission also noted that Congress, through enactment of PURPA section 210(m), appears to have recognized that RTO/ISO LMP pricing provides sufficient encouragement for QFs.

127. The Commission requested comment on whether the real-time prices established in the CAISO-administered Energy Imbalance Market

[187] *See* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,881–86 (describing how states must calculate avoided capacity costs).

[188] *See infra* sections IV.B.3–5. We note that states may use competitive solicitations to set both energy and capacity avoided cost rates. *See infra* section IV.B.8.

[189] *See* 18 CFR 35.14 (Fuel Cost and Purchased Economic Power Adjustment Clauses); ELCON, *Fuel Adjustment Clauses & Other Cost Trackers, https://elcon.org/fuel-adjustment-clauses-cost-trackers* (''Fuel adjustment clauses are in effect in almost all states.''); NARUC, Staff Subcommittee on Accounting and Finance, *Fuel and Purchased Power Survey Results* (Sept. 23, 2015), *https://pubs.naruc.org/pub/4AA28D50-2354-D714-5149-B773EFC3EFEF* (stating that only one state surveyed said that it did not employ a fuel adjustment clause).

[190] *See, e.g., American Ref-Fuel Co.,* 105 FERC ¶ 61,004, at PP 22–24 (2003), *denying reh'g,* 107 FERC ¶ 61,016 at PP 12, 15–16 (2004), *dismissing pet. for review sub nom. Xcel Energy Servs. Inc.* v. *FERC,* 407 F.3d 1242 (D.C. Cir. 2005).

[191] *Offer Caps in Mkts Operated by Reg'l Transmission Orgs. and Independent Sys. Operators,* Order No. 831, 157 FERC ¶ 61,115, at P 7 (2016), *order on reh'g and clarification,* Order No. 831–A, 161 FERC ¶ 61,156 (2017).

[192] *Sacramento Mun. Util. Dist.* v. *FERC,* 616 F.3d 520, 524 (D.C. Cir. 2010) (*SMUD*); *see also FERC* v. *Elec. Power Supply Ass'n,* 136 S. Ct. 760, 768–69 (2016) (describing how LMP is typically calculated).

[193] *See, e.g., Cal. Indep. Sys. Operator Corp.,* 105 FERC ¶ 61,140, at PP 48–50 (2003); *cf. Price Formation in Energy and Ancillary Servs. Mkts Operated by Reg'l Transmission Orgs. and Indep. Sys. Operators,* 153 FERC ¶ 61,221, at P 2.

(EIM) [194] are similar for these purposes to the LMP in RTOs/ISOs. In this regard, the Commission requested comment on whether ''prices developed in the EIM similarly 'reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid,' as the Commission has found to be the case with LMP rates.'' [195]

128. The Commission understood that some states already use LMP to establish avoided cost energy rates under the existing PURPA Regulations.[196] The Commission thus proposed also to clarify that, while a state in the past may have been able to conclude that LMP was an appropriate measure of the energy component of avoided costs,[197] a state would, under the proposal in the NOPR, be able to adopt LMP as a per se appropriate measure of the as-available energy component of avoided costs.[198]

b. Comments

i. Comments in Opposition

129. Several commenters oppose the NOPR's LMP proposal.[199] American Biogas asserts that, by definition, LMP rates assume that generating facilities are receiving other compensation to fund their operations and that the marginal rate reflects only the value of the energy. American Biogas asserts that LMP ignores biogas facilities' unique municipal infrastructure role and multiple benefits to the community.[200] Covanta argues that avoided costs paid to small baseload QFs should incorporate all long-run avoided costs for capacity and energy and include other externalities such as the value of renewable baseload energy, greenhouse gas mitigation, landfill diversion, reliable and resilient power and other benefits of small baseload QFs.[201] Biological Diversity argues that LMP pricing ignores variability across the country and is inappropriate in regions like the Southeast which lack RTOs and ISOs and are instead still dominated by vertically-integrated monopolies.[202]

130. CA Cogeneration argues that LMP may not represent a truly competitive price for electricity because, in California, the majority of supply is through bilateral contracts, not through competitive bidding in the market. CA Cogeneration states that rooftop solar distorts LMP by reducing load and not bidding in its full long-term marginal cost.[203] CA Cogeneration states that LMPs can be well below the operating cost of conventional generation and combined heat and power, and even negative, especially when there is an abundance of procured resources such as hydro, solar, and wind.[204] CA Cogeneration asserts that combined heat and power can survive only if: (1) Fixed capacity prices are sufficiently high to cover the energy price risk; (2) the market price reflects the full cost of contracted power and includes all sources of supply; or (3) 18 CFR 292.304(f)(1) is modified to provide QF operations first priority, except in special circumstances related to reliability.[205]

131. ELCON argues that allowing utilities to use LMP and other competitive market prices would allow states to ignore long-standing factors established by Commission regulation in determining the avoided cost rates, including: (1) Availability of capacity or energy from a QF during the system daily and seasonal peak periods; (2) dispatchability and reliability; (3) the relationship of the availability of energy or capacity from the QF to the ability of the utility to avoid costs; (4) costs or savings from variations in line losses; and (5) application of technology-specific avoided cost rates.[206] ENGIE argues that allowing states to set energy rates at LMP, while also allowing them to set capacity rates at zero if it is determined that a utility has no need for capacity, could allow traditional utilities to corner the market on capacity, leaving smaller independent QFs to fill energy-only contracts at LMP.[207]

132. New England Small Hydro states that the Commission has not supported the NOPR's assertion that LMP is an accurate measure of avoided costs because the NOPR: (1) Inappropriately relies on the Energy Policy Act of 2005's changes in PURPA section 210(m) to support its proposed changes to calculation of the avoided cost rate; (2) ignores the costs that the utility pays to procure power (*i.e.,* RFPs, other power contracts, planned retirements); and (3) ignores the fact that LMP and the default service rates that exist in ISO–NE-based states are quite different.[208] In addition, New England Hydro states that, for the avoided cost calculation, the appropriate LMP is the day-ahead LMP, not the real-time LMP, because utilities primarily purchase energy in the day-ahead market pursuant to bilateral contracts or RFPs, not in the real-time market.[209] New England Hydro also believes that utilities or state regulatory bodies should be required to establish and maintain long-term avoided energy forecasts upon which

[194] The Commission noted that, by seeking comment regarding the Western EIM prices, the Commission did not mean to imply that real-time energy prices established by CAISO within its balancing authority area do not already satisfy the requirement for setting as-available QF rates.

[195] NOPR, 168 FERC 61,184 at P 47 (quoting *SMUD,* 616 F.3d at 524). Use of real time prices in the Western EIM was addressed at the Technical Conference, but only in the context of whether that market could satisfy the requirements for termination of the mandatory purchase obligation under PURPA section 210(m)(1)(C). *See* Supplemental Notice of Technical Conference, *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Docket No. AD16–16–000 (May 9, 2016). The Commission here requested comments on whether it would be appropriate to use the Western EIM price to develop an as-available energy rate.

[196] *See Exelon Wind 1, LLC,* 140 FERC ¶ 61,152, at P 11, *reconsideration denied,* 155 FERC ¶ 61,066 (2016) (recognizing that the Texas Public Utility Commission has permitted Southwestern Public Service Company to set avoided costs at LMP); Xcel Energy Services Inc., Request for Reconsideration, Docket No. EL12–80–001, at 13 & n.23 (filed Sept. 27, 2012) (stating that Maryland, New Jersey, North Carolina, Virginia, Connecticut, New Hampshire, Kentucky, and Michigan have set avoided costs at LMP).

[197] *See* 18 CFR 292.304(e).

[198] The Commission recognized in the NOPR that this proposal could be seen as a departure from the Commission's statement in *Exelon Wind 1, LLC,* 140 FERC ¶ 61,152 at P 52, *reconsideration denied,* 155 FERC ¶ 61,066 (''The problem with the methodology proposed by [Southwestern Public Service Company] and adopted by the Texas Commission is that it is based on the price that a QF would have been paid had it sold its energy directly in the [Energy Imbalance Service] Market, instead of using a methodology of calculating what the costs to the utility would have been for self-supplied, or purchased, energy 'but for' the presence of the QF or QFs in the markets, as required by the Commission's regulations.''). The Commission has since found that this statement was overtaken by events, namely SPP's evolution from an energy imbalance service market into an Integrated Marketplace, with day-ahead and real-time energy and operating reserve markets and the Texas Commission's approving a separate request from Southwestern Public Service Company to substitute LMP for Locational Imbalance Prices in calculating avoided costs. *Exelon Wind 1, LLC,* 155 FERC ¶ 61,066 at P 11. The Commission also has acknowledged that, if adopted in a final rule, the reasoning in the NOPR supported a departure from precedent. *See Cal. Pub. Utils. Comm'n* v. *FERC,* 879 F.3d 966, 977 (9th Cir. 2018) (''When an agency changes policy, the requirement that it provide a reasoned explanation for its action demands, at a minimum, that the agency 'display awareness that it *is* changing position.''') (citing *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

[199] Biogas Comments at 2; Covanta Comments at 8–9; Biological Diversity Comments at 8–9; CA Cogeneration Comments at 8–9; ELCON Comments at 23–25; ENGIE Comments at 4; New England Small Hydro Comments at 8–11; NIPPC, CREA, REC, and OSEIA Comments at 53–60; Public Interest Organizations Comments at 52–64; Union of Concerned Scientists Comments at 4–9; Southeast Public Interest Organizations Comments at 21–25.

[200] Biogas Comments at 2.

[201] Covanta Comments at 8.

[202] Biological Diversity Comments at 8–9.

[203] CA Cogeneration Comments at 8–9.

[204] *Id.*

[205] *Id.*

[206] ELCON Comments at 23–24.

[207] ENGIE Comments at 4.

[208] New England Small Hydro Comments at 8–10.

[209] *Id.* at 10.

QF PURPA power purchase rates would be based.[210]

133. NIPPC, CREA, REC, and OSEIA claim that LMPs only promote more efficient use of the transmission grid in the short-term because factors such as temporary outages, equipment failures, weather extremes, and the like can cause LMPs to spike, but these have no impact on long-term transmission availability.[211] NIPPC, CREA, REC, and OSEIA believe that, while LMPs are a useful tool for developers to identify points on the grid where transmission is relatively more or less congested, developers have strong incentives to avoid congestion, and they will generally be guided to areas of low congestion during the transmission interconnection process, whether or not they face LMP-based contract prices. NIPPC, CREA, REC, and OSEIA claim that if transmission constraints prevent a generator from delivering power to a specific node, the LMP at that node cannot be an appropriate measure of costs avoided by purchase of power from that generator. NIPPC, CREA, REC, and OSEIA argue that LMP or Western EIM prices at the time of delivery are not a true measure of the long-term avoided costs of incumbent utilities unless those utilities are relying on those markets as a means to obtain long-term resources.[212]

134. NIPPC, CREA, REC, and OSEIA assert that the NOPR proposal fails to recognize: (1) the Commission's struggle to develop effective capacity markets in the RTO/ISO regions; (2) the fact that the merchant generation model is now in serious question; and (3) that the Commission's claim that Congress endorsed the use of LMP to set avoided cost rates by adoption of section 210(m) cannot be squared with the plain language of the statute.[213] NIPPC, CREA, REC, and OSEIA argue that there is substantial evidence that LMP prices are distorted by certain practices, such as zero-cost bids, so that plants operate uneconomically.[214] NIPPC, CREA, REC, and OSEIA further maintain that the 2000–01 California market demonstrated that these volatile short-term markets can reach extreme and unpredictable highs under stress conditions.[215]

135. Similarly, Public Interest Organizations cite to studies by the Sierra Club[216] and Bloomberg New Energy Finance,[217] for the proposition that the use of LMP as the QF price discriminates against QFs where utility-owned generation and non-QF generators are not limited to the LMP for recovery of their costs, and where utilities depress LMP through uneconomic dispatch of their own generation facilities.[218] Union of Concerned Scientists states that LMPs are not an accurate measure of avoided costs and should not be used to set QF rates because the practice of providing utility-owned generation with out-of-market cost-recovery in areas like MISO, PJM, SPP, the SERC Reliability Corporation, and the Western Electricity Coordinating Council suppresses the clearing prices in the markets where this is allowed.[219]

136. Southeast Public Interest Organizations argue that the NOPR's proposed avoided cost methodology does not take into account: (1) Long-term or seasonal purchases made from third parties or affiliates; (2) adjustments for transmission and distribution losses; (3) capacity deferrals; (4) avoided environmental compliance costs; or (5) a QF's dispatchability.[220] Southeast Public Interest Organizations state that LMP-based rates for QFs in Virginia have enticed little-to-no QF development in Virginia.[221] Southeast Public Interest Organizations urge the Commission either to rescind the NOPR's LMP provisions or at least to implement this provision on a case-by-case basis.[222]

(a) Utilizing Western EIM To Establish Avoided Costs

137. Solar Energy Industries argues that, because as-available QF resources are not eligible to participate in the Western EIM (also known as the CAISO EIM), either directly or through the purchasing utility, it would be inappropriate to use the Western EIM price as a proxy because that market does not factor in the participation of the QF resource.[223] ELCON asserts that the Western EIM is not a complete measure of avoided energy costs because the Western EIM merely covers imbalance conditions, and therefore does not capture the vast majority of unit commitment and dispatch scheduling cost parameters.[224] Union of Concerned Scientists asserts that allowing a state to adopt real-time prices established in the Western EIM as an accurate measure of avoided costs will be discriminatory.[225]

ii. Comments in Support

138. Several commenters support the Commission's proposal to permit a state the flexibility to use LMPs to set the as-available energy rate paid to a QF by an electric utility located in an RTO/ISO.[226]

139. CA Utilities state that the NOPR's LMP proposal is a return to the Commission's policy as expressed in *Winding Creek,*[227] and will facilitate payments to QFs that more accurately represent a utility's actual avoided costs. CA Utilities assert that the NOPR's LMP proposal affirms that a formula energy price contract complies with PURPA if coupled with a fixed capacity price. CA Utilities state that a formula energy price contract will have the additional benefit of avoiding the need to develop and administer a new PURPA contract.[228]

140. NRECA supports the Commission's proposal because many utilities that participate in the RTO/ISO markets offer the entirety of their generation into the market, and purchase all of their requirements to serve load from that market, at LMP prices.[229]

141. The Pennsylvania Commission supports the NOPR proposal because LMP prices vary through the day based on changing system conditions, such as changes in electricity demand, supply, congestion, and line losses. The Pennsylvania Commission asserts that, because some utilities in Pennsylvania

[210] *Id.* at 11.

[211] NIPPC, CREA, REC, and OSEIA Comments at 57–59.

[212] *Id.* at 55 (citing *Exelon Wind I,* 140 FERC ¶ 61,152 at P 52).

[213] *Id.* at 57–59.

[214] *Id.* at 55.

[215] *Id.* at 57.

[216] Public Interest Organizations Comments at 53–56 (citing Jeremy Fisher, Sierra Club, *Playing with Other People's Money, How Non-Economic Coal Operations Distort Energy Markets,* Sierra Club, Oct. 2019, at 4).

[217] *Id.* at 57 (citing William Nelson & Sophia Liu, *Half of U.S. Coal Fleet on Shaky Economic Footing; Coal Plant Operating Margins Nationwide,* Bloomberg New Energy Finance, March 26, 2018).

[218] *Id.* at 52–64.

[219] Union of Concerned Scientists Comments at 3–8.

[220] Southeast Public Interest Organizations Comments at 22.

[221] *Id.* at 23.

[222] *Id.* at 24.

[223] Solar Energy Industries Comments at 27.

[224] ELCON Comments at 24.

[225] Union of Concerned Scientists Comments at 9.

[226] APPA Comments at 11; Arizona Public Service Comments at 5; CA Utilities Comments at 17; Conn. Authority Comments at 13; DTE Electric Comments at 4; EEI Comments at 22–24; Comments at 4–5; Idaho Commission Comments at 3–4; Indiana Municipal Comments at 5; Kentucky Commission Comments at 4–5; NorthWestern Comments at 4–7; NRECA Comments at 6–7; Ohio Commission Energy Advocate Comments at 4–5; Pennsylvania Commission Comments at 7–9; South Dakota Commission Comments at 2; US Chamber of Commerce Comments at 4; We Stand Comments at 1; Xcel Comments at 5.

[227] CA Utilities Comments at 15–17 (citing *Winding Creek Solar LLC,* 151 FERC ¶ 61,103, at P 6 (2015)).

[228] *Id.* at 17.

[229] NRECA Comments at 6.

(and other states) have already incorporated LMP elements in their as-available energy rates, a corresponding revision to the Commission's regulations that incorporates such practices and harmonizes state and federal regulations would bring greater predictability to suppliers, electric utilities and customers.[230]

142. The Ohio Commission Energy Advocate believes that, in the parts of the country with organized nodal wholesale electricity markets, LMP is an appropriate and fair means by which to calculate avoided costs because electricity supply and demand must be balanced in real time. The Ohio Commission Energy Advocate notes that Ohio has nodal LMPs that reflect the true value of energy at the place and the time it is produced or delivered, and this value can change dramatically, even within a day or an hour. The Ohio Commission Energy Advocate concludes that reflecting the dynamic nature of electricity pricing in avoided cost calculations will send the most accurate price signals to QFs and will appropriately and fairly value the energy they produce.[231]

143. The South Dakota Commission supports using LMP for certain as-available QF energy sales because using LMP will increase states' flexibility. The South Dakota Commission regulates six vertically integrated electric utilities, five of which are RTO members, and five of which are multi-jurisdictional.[232]

144. Xcel submits that compensating QFs based on LMPs at the time of delivery will not impair QFs' ability to obtain financing because other factors can drive the ability to obtain financing, including other project options, location, size, interconnection costs, experience of the developer, current economic conditions, creditworthiness of the developer, economies of scale, and other factors. Xcel states that some resource specific information generally suggests that the right project in the right location can obtain financing if the project receives hourly payment based on LMPs.[233]

(a) Utilizing Western EIM To Establish Avoided Costs

145. NorthWestern and EIM Entities agree that the Western EIM real-time prices are similar to LMPs and reflect the least cost of meeting an incremental megawatt-hour of demand at each location on the grid.[234] Xcel asserts that prices in the Western EIM are calculated using the same methodology as LMPs because, in both cases, units are dispatched on a least-cost basis that respects applicable transmission constraints. Xcel requests that the Commission allow avoided costs to be based on Western EIM prices at the time of delivery absent a showing that prices would be suppressed in comparison to an LMP-style-market.[235] Arizona Public Service states that it is a participant in the Western EIM, and requests that states be given flexibility to set the as-available energy rate to be paid to a QF by an electric utility that participates in the Western EIM at the LMP.[236]

iii. Comments in Support With Requested Modifications/Clarifications

146. APPA urges the Commission to clarify that nothing in the proposed rule is intended to call into question state regulatory authorities' existing implementation of PURPA's avoided cost requirements, such as their existing use of LMP.[237]

147. Industrial Energy Consumers do not object to the use of LMP as the avoided cost rate for electric utilities' purchases of QF energy in RTO/ISO regions,[238] but they maintain that in non-RTO/ISO regions, there must be assurance that utilities' self-builds face the same market risk exposure as QFs.[239]

148. The Kentucky Commission supports the NOPR's LMP proposal but prefers that the Commission in the final rule allow states to determine whether the LMP calculation should use the generator LMP or the load LMP on a case-by-case basis.[240]

149. Solar Energy Industries assert that, where the purchasing utility has demonstrated that it procures its marginal energy from an LMP market, the utility may use the LMP price as a proxy for avoided energy costs calculated at the time the obligation is incurred, so long as there are published prices at the location.[241] Solar Energy Industries request that the Commission make clear that: (1) The flexibility to set QF payment rates for as-available energy at the applicable LMP requires an on-the record determination that the purchasing utility procures incremental energy from the identified LMP market at those prices; (2) payments based on an LMP do not relieve the purchasing utility of the requirement to compensate the QF for any values in addition to electricity (*e.g.,* renewable energy credits, frequency response capabilities, pro-rated capacity value, etc.); and (3) the state's flexibility to allow utilities to set QF payment rates for as-available energy at the applicable LMP does not in any way limit QFs' rights to establish a LEO or contract for a longer-term sale at fixed, full avoided costs.[242]

150. NorthWestern believes that as-available rates based on LMPs should accurately capture current events impacting prices, including times when there is a high saturation of energy available causing prices to be negative. However, NorthWestern believes that it is appropriate to deduct from the avoided cost rate the cost for ancillary services to balance and integrate energy resources.[243]

c. Commission Determination

151. We affirm with one modification the NOPR proposal to allow LMP to be used as a measure of as-available energy avoided costs for electric utilities located in RTO/ISO markets for the reasons set forth in the NOPR[244] and those provided by various commenters.

152. We recognize that an LMP selected by a state to set a purchasing utility's avoided energy cost component might not always reflect a purchasing utility's actual avoided energy costs. Accordingly, we find that it is appropriate to modify the option for a state to set avoided energy costs using LMP from a per se appropriate measure of avoided cost to a rebuttable presumption that LMP is an appropriate means to determine avoided cost. While a state could rely on the presumption, an aggrieved entity (such as a QF) may attempt to rebut the presumption that LMP reflects the purchasing electric utility's avoided costs. The aggrieved entity would be able to challenge the state's decision to rely on LMP in the appropriate forum, which could include any one or more of the following: (1) Initiating or participating in proceedings before the relevant state commission or governing body; (2) filing for judicial review of any state regulatory proceeding in state court (under PURPA section 210(g)); or, alternatively (3)) filing a petition for enforcement against the state at the Commission and, if the Commission declines to act, later filing a petition against the state in U.S.

[230] Pennsylvania Commission Comments at 7–8.

[231] Ohio Commission Energy Advocate Comments at 4–5.

[232] South Dakota Commission Comments at 2.

[233] Xcel Comments at 5–7.

[234] EIM Entities Comments at 2–3, 7–13; NorthWestern Comments at 4–5.

[235] Xcel Comments at 7–8.

[236] Arizona Public Service Comments at 5–6.

[237] APPA Comments at 9.

[238] Industrial Energy Consumers Comments at 11.

[239] *Id.* at 12.

[240] Kentucky Commission Comments at 4–5.

[241] Solar Energy Industries Comments at 25–26.

[242] *Id.* at 27–28.

[243] NorthWestern Comments at 4–5.

[244] NOPR, 168 FERC ¶ 61,184 at PP 44–45.

district court (under PURPA section 210(h)(2)(B)).[245]

153. Commenters have not persuaded us that LMP may not presumptively reflect a purchasing electric utility's avoided energy costs. LMP sets day-ahead and real-time energy prices through competitive auctions in RTOs/ISOs that optimally dispatch resources to balance supply and demand, while taking into account actual system conditions including congestion on the transmission system. We continue to find that: (1) LMPs reflect the true marginal cost of production of energy, taking into account all physical system constraints; (2) these prices would fully compensate all resources for their variable cost of providing service; (3) LMP prices are designed to reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid, and thus prices vary based on location and time; and (4) unlike average system-wide cost measures of the avoided energy cost used by many states, LMP should provide a more accurate measure of the varying actual avoided energy costs, hour by hour, for each receipt point on an electric utility's system where the utility receives power from QFs.[246]

154. Various commenters have provided additional reasons for supporting the NOPR proposal concerning LMP. NRECA explains that LMP rates for energy are appropriate because many utilities that participate in the RTO/ISO markets offer the entirety of their generation into the market at LMP prices and buy all of their load requirements from the market at LMP prices.[247] This scenario described by NRECA is a common one, and it demonstrates that the market itself, with its LMP pricing, can be the electric utility resource that would be displaced by a QF purchase. Furthermore, as argued by Pennsylvania Commission, because some utilities in Pennsylvania and other states have already incorporated LMP in their as-available energy rates, a corresponding revision to the Commission's regulations that incorporates such practices and harmonizes state and federal regulations would bring greater predictability to suppliers, electric utilities and customers.[248]

i. Arguments Against the NOPR Proposal

155. Commenters have not offered persuasive arguments for rejecting the use of LMP for avoided cost energy rate determination. We disagree with the argument made by Union of Concerned Scientists,[249] NIPPC, CREA, REC, and OSEIA,[250] and Public Interest Organizations[251] that LMP should not be used as a measure of avoided energy costs because LMP prices are depressed in many markets where self-scheduling rights and state cost-recovery mechanisms for fuel and operating costs create the opportunity for market participation at a loss. We recognize that, all other things being equal, self-scheduling of resources may impact market clearing prices. This potential price effect, however, does not mean that the LMP is not an accurate measure of avoided energy costs. The Commission's regulations, using language from PURPA section 210(d), define avoided costs as ''the incremental costs to an electric utility of electric energy or capacity or both which, *but for* the purchase from the qualifying facility or qualifying facilities, such electric utility would generate for itself *or purchase from another source.*''[252]

156. In organized wholesale electric market areas, the electric utility purchases that would be displaced by QF purchases would, as NRECA explains, in all likelihood be priced at the relevant LMP. These LMPs are impacted by many factors, such as self-scheduling, generator outages, and transmission outages, that may result in LMPs that are lower or higher than they might otherwise have been. Thus, while self-scheduling or other factors may impact LMPs, in any case, an electric utility's purchases during periods when these price impacts are occurring would be made at the resulting LMPs, whatever those LMPs may be. Therefore, LMPs meet the Commission's long-standing definition of avoided costs for a purchasing electric utility, even if they happen to reflect price impacts from self-scheduling or other factors.

157. Furthermore, while commenters discuss the possibility that utility-owned coal-fired resources are self-scheduling only because retail ratepayers are subsidizing such activities, even if such claims were true they would not alter the above analysis. The LMPs that result from a market that includes self-scheduled resources still represent the price of purchases in the market that would be displaced by the QF purchase.

158. In addition, we reject the related request for clarification made by Solar Energy Industries,[253] *i.e.,* that the flexibility to set QF payments for as-available energy at the applicable LMP should require an on-the-record determination that the purchasing utility procures incremental energy from the identified LMP market at those prices. Unless an aggrieved entity seeks to rebut this presumption in a state avoided cost adjudication, rulemaking, legislative determination, or other proceeding, that state would not need to make such an on-the-record determination before it decides to use LMP.

159. Entities may seek to rebut the presumption in particular cases, as described earlier, and whether the utility actually procures energy from the identified LMP market or from resources with prices tied to the identified LMP may be a relevant factor in such rebuttal arguments. Consistent with the reasons described above for why there should be such a rebuttable presumption in favor of LMP, this delineation of rights appropriately places the initial burden on entities seeking to rebut the presumption, rather than on the states who wish to rely on LMP for setting avoided cost rates for as-available energy. The Commission could consider such issues if and when they may arise in individual cases appropriately brought to the Commission, including whether the state has adequately justified its use of that rebuttable presumption.

160. We reject the arguments made by NIPPC, CREA, REC, and OSEIA that, more generally, prices for long-term QF contracts should be set by reference to long-term price indices or other indicators that genuinely reflect the long-term costs of generation avoided by the purchasing utility.[254] This final rule only addresses as-available energy, and as-available energy prices by definition are short term, as explained below in Section IV.B.7.c.

161. We also reject the arguments made by NIPPC, CREA, REC, and OSEIA that, while the NOPR is correct that LMPs are intended to promote more efficient use of the transmission grid,

[245] *See Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304.

[246] *See* NOPR, 168 FERC ¶ 61,184 at PP 44–45 (citing *SMUD,* 616 F.3d at 524; *FERC* v. *Elec. Power Supply Ass'n,* 136 S. Ct. at 768–69 (describing how LMP is typically calculated); Order No. 831, 157 FERC ¶ 61,115, at P 7, *order on reh'g and clarification,* Order No. 831–A, 161 FERC ¶ 61,156).

[247] NRECA Comments at 6.

[248] Pennsylvania Commission Comments at 7–8.

[249] Union of Concerned Scientists Comments at 3–8.

[250] NIPPC, CREA, REC, and OSEIA Comments at 52.

[251] Public Interest Organizations Comments 52–64.

[252] 18 CFR 292.101(b)(6) (emphasis added).

[253] Solar Energy Industry Comments at 27–28.

[254] NIPPC, CREA, REC, and OSEIA Comments at 53.

that is true only in the short term since factors such as temporary outages, equipment failures, weather extremes, and the like can cause LMPs to spike, but these have no impact on long-term transmission availability. LMPs promote efficient use of the transmission grid in the long term as well as the short term. Persistence of significant price separation between different LMP nodes provides an indication of the value of various possible transmission system upgrades and can show transparently how system efficiencies may be improved by such transmission system upgrades. Developers may have some incentive to avoid congestion without LMPs, but LMPs provide an important price signal as to how economic or uneconomic a particular production site may be. In any event, the potential for more efficient use of the transmission grid is merely an additional benefit of using LMP for avoided energy cost determinations. Our adoption of LMP as a measure of avoided energy costs in the RTO/ISO markets is based principally on the fact that, in RTO/ISO markets, LMP accurately represents the purchasing electric utility's avoided energy cost at the time the energy is delivered, for the reasons described earlier.

162. We also are not persuaded by arguments that, if transmission constraints prevent a generator from delivering power to a specific node, the LMP at that node cannot be an appropriate measure of costs avoided by purchase of power from that generator. As discussed above, an avoided cost rate should reflect not only the cost of energy that was avoided by the purchasing electric utility, but also the cost to deliver the QF energy to the purchasing electric utility's load, such that the total cost avoided is reflected in the rate. In an RTO/ISO market, a state appropriately is entitled to consider whether the cost of delivery from the QF node to the load node (including any redispatch costs necessary to facilitate such delivery over a system that is otherwise constrained between those nodes) should be reflected in the LMP at the QF supply node. In instances commenters refer to where transmission constraints prevent a generator from delivering power to a specific node, we disagree that such delivery is actually ''prevented.'' Rather, redispatch of system resources would be necessary to facilitate the delivery, and the respective LMPs reflect those redispatch costs.

163. We also reject the argument made by NIPPC, CREA, REC, and OSEIA that the 2000–01 California market demonstrated that volatile short-term markets can reach extreme and unpredictable highs under stress conditions.[255] First we note that, in the wake of the 2000–2001 California energy crisis, all RTO/ISO markets developed more comprehensive *ex ante* market power mitigation measures than existed in CAISO at that time, including offer caps and reference level replacement offers, meant in part to moderate such extremes.[256] In any event, any price volatility that may currently exist in LMP markets, regardless of the reason for the price volatility, and regardless of whether the volatility causes LMPs to be lower or higher, nevertheless accurately represents the avoided cost of the purchasing electric utilities in those markets in those hours, as explained elsewhere in this final rule.

164. Finally, we remain convinced that Congress recognized that RTO/ISO LMP pricing provides sufficient encouragement for QFs through the enactment of PURPA section 210(m) with its directive that, essentially, the mandatory purchase obligation can be lifted upon QFs having non-discriminatory access to RTO/ISO markets. As noted earlier, however, our decision to grant states the flexibility to rely on a rebuttable presumption that RTO/ISO LMP pricing is an appropriate measure of avoided energy costs (and thus set as-available energy rates in reliance on LMPs) reflects our view that, in RTO/ISO markets, as a general matter LMP indeed accurately represents the purchasing electric utility's avoided energy costs.

165. We also disagree with ELCON's [257] argument that LMP should not be used to measure avoided costs because that would allow states to ignore long-standing factors established by the Commission that should be used to determine avoided costs. The factors referenced by ELCON are relevant to the traditional administrative determination of avoided cost, and our revisions to the regulations preserve these factors for that purpose and for avoided capacity costs. If a state chooses instead to rely on LMP to set avoided energy cost rates, then it will necessarily not be using those administrative means of determining avoided costs, and these factors thus will not be relevant.

166. We are not persuaded by the arguments of various commenters that LMP cannot be used for avoided cost rates because it ignores the unique municipal infrastructure role and the multiple benefits of the community of biogas facilities,[258] including the value of renewable baseload energy, greenhouse gas mitigation, landfill diversion, reliable and resilient power and other benefits of small baseload QFs.[259] PURPA frames the determination of QF rates in terms of avoided cost and does not authorize the Commission in determining QF rates, particularly as-available energy rates, to consider non-energy-related factors such as a generator's unique municipal infrastructure role, greenhouse gas mitigation, and landfill diversion.

167. We also are not persuaded by the argument of CA Cogeneration that LMP may not represent a truly competitive price for electricity in California since the majority of California supply is through bilateral contracts, not through competitive bidding in the market, and that other factors also distort LMP such as roof top solar. CA Cogeneration, in essence, objects to the state of California's decision to award preferred resource status to some resources, such as solar and wind, and not others, such as cogeneration. These are procurement decisions made at the state level in connection with resource planning and retail ratemaking. Even if those decisions impact the resulting LMPs, as CA Cogeneration claims, that impact would not invalidate the arguments made above for why LMP is presumptively an appropriate measure of as-available energy avoided costs in RTO/ISO markets. The aggrieved entity would be able to challenge the state's decision to rely on LMP in the appropriate forum, which could include any one or more of the following: (1) Initiating or participating in proceedings before the relevant state commission or governing body; (2) filing for judicial review of any state regulatory proceeding in state court (under PURPA section 210(g)); or, alternatively (3) filing a petition for enforcement against the state at the Commission and, if the Commission declines to act, later filing a petition against the state in U.S. district court (under PURPA section 210(h)(2)(B)).[260]

[255] NIPPC, CREA, REC, and OSEIA Comments at 57. Curiously, these commenters here essentially take the position that higher LMPs and resulting higher avoided cost energy rates, which would normally seem to be beneficial to QFs, are instead now anathema.

[256] *See generally Wholesale Competition in Regions with Organized Elec. Mkts.,* Order No. 719, 125 FERC ¶ 61,071 (2008), *order on reh'g,* Order No. 719–A, 128 FERC ¶ 61,059, *order on reh'g,* Order No. 719–B, 129 FERC ¶ 61,252 (2009).

[257] ELCON Comments at 23–24.

[258] Biogas Comments at 2.

[259] Covanta Comments at 8.

[260] *See Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304.

168. We reject the argument made by New England Small Hydro that the Commission has not supported its view that LMP is an accurate measure of avoided costs since LMP ignores the costs that the utility pays to procure power, including through competitive solicitations, other power contracts, planned retirements and other factors that are considered in a utility's long-term plans; and ignores the fact that LMP and the default service rates that exist in ISO–NE-based states are quite different.[261] The costs that a purchasing utility pays to procure power, including through competitive solicitations, other power contracts, planned retirements and other factors that are considered in a utility's long-term plans may be relevant to the utility's purchase of capacity using long-term contracts, but not to the determination of the proper as-available energy avoided cost rate to be paid to QFs, which rates will necessarily vary as system conditions vary over time, as reflected by variances in LMP over time. The fact that LMP and the default service rates that exist in ISO–NE-based states may diverge is to be expected because the latter, unlike the as-available energy rates charged by QFs in RTO/ISO markets that LMP is being used to price, normally include transmission and distribution costs (and possibly firm supplier capacity costs) necessary to ensure that firm supply is continually available to residential customers.[262] While utilities or state regulatory authorities continue to have the authority to establish and maintain long-term avoided energy forecasts upon which QF PURPA power purchase rates may be based, and to recognize the actual future energy costs incorporated in new power contracts that are being signed by New England utilities, elsewhere in this final rule the Commission explains why the use of variable prices can be appropriate for long-term energy contracts.

169. We are not persuaded by the argument of Southeast Public Interest Organizations that the NOPR does not establish a framework for just and reasonable and nondiscriminatory rates because the proposed avoided cost methodology does not take into account any long-term or seasonal purchases made from third parties or affiliates, adjustments for transmission and distribution losses, capacity deferrals, avoided environmental compliance costs, or dispatchability of the QF.[263] LMP pricing, in fact, does reflect transmission and distribution losses. The other factors that the Southeast Public Interest Organizations mention here, such as environmental compliance costs, dispatchability, long-term or seasonal purchases and capacity deferrals, are factors that are more applicable to the pricing of capacity and long-term contracts, not the pricing of as-available energy, which is what the Commission's NOPR proposal as adopted in this final rule addresses.

170. The Commission rejects the argument made by Biological Diversity[264] that LMP pricing ignores the variability of conditions across the country. LMP prices by definition vary as supply, demand, and system conditions change across the country. In any event, the Commission agrees that LMP pricing would not currently be applicable in regions like the Southeast that lack RTOs and ISOs and thus that do not use LMP.

171. We further reject the argument made by ENGIE that allowing states to set energy rates using LMPs combined with the ability to set capacity rates at zero if it is determined that a utility has no need for capacity has the potential to allow traditional utilities to corner the market on capacity, leaving smaller independent QFs to provide only energy-only service.[265] PURPA does not direct the Commission to guarantee that QF sales make up some specified share of utilities' capacity needs nor does it require that each QF receive compensation for providing capacity. PURPA instead focuses on the purchasing electric utility's avoided costs and provides that the Commission cannot require that prices charged by a QF exceed the purchasing electric utility's avoided cost, if a purchasing electric utility has no need for additional capacity (and thus the purchasing utility's avoided cost for capacity would be zero),[266] the only service that QFs (and other suppliers) would need to provide that utility is energy. However, a utility's ability to ''corner the market'' on capacity depends not uniquely on the pricing of QF sales to the utility, but on a host of factors including the utility's analysis of its need for capacity and, without a specific inquiry into the circumstances of each utility, it cannot be concluded that any utility's decision will always be deficient or that it has been adversely and inappropriately affected by the Commission's action here.

172. Several commenters maintain that reliance on LMP will make it difficult for QFs to obtain financing.[267] This argument is addressed below in section IV.B.7 of this final rule.

ii. Requests for Modification or Clarification of the NOPR

173. We will not provide the clarifications requested by New England Small Hydro that the Commission require the use of the day-ahead LMP for QF rates set at LMP, or Southeast Public Interest Organizations' request to require the use of real-time LMP rather than average LMP. States that choose to use LMP will determine the LMP most representative of the avoided cost of the relevant purchasing utility.

174. While the Kentucky Commission requests that the Commission allow the use of the LMP at a delivery (load) node rather than a receipt (generator or QF) node, we find that this decision should be made by the state as it determines which particular LMP best reflects the avoided cost of the purchasing electric utility.

175. We grant APPA's request for clarification that, while the NOPR provides greater clarity as to states' entitlement to rely on competitively-set prices as a measure of avoided cost rates, nothing in the final rule is intended to call into question any particular state's existing implementation of PURPA's avoided cost requirements, such as their existing use of LMP.[268] While in the past a state

[261] New England Small Hydro Comments at 8–10.

[262] *Compare* ISO–NE, Transmission, Markets, and Services Tariff, LMPs and Real-Time Reserve Clearing Prices Calculation, § III.2.5 (describing how nodal real-time prices are calculated in ISO–NE at each node using energy offers and bids, transmission constraints, and other factors) *with* National Grid, Investigation as to the Propriety of Proposed Tariff Changes, Docket No. DPU 18–150, Exh. NG–HSG–1, Gorman Test. 3:18–4:6 (Nov. 15, 2018), *https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/10043215* (''The Company's filing is based on its investments and costs incurred to provide distribution service to its customers. An [Allocated Cost of Service Study] directly assigns or allocates each element of the revenue requirement, including plant and other investments, operating expenses, depreciation and taxes, among the rate classes, in order to determine the costs of providing service to each rate class. Each element of the total revenue requirement is analyzed and assigned to or allocated among the rate classes, so the utility can establish rates that, subject to assumptions such as kilowatt-hour ('kWh') delivery volumes and the number of customers, provide it with a fair opportunity to recover its costs and to earn an appropriate return.'').

[263] Southeast Public Interest Organizations Comments at 22.

[264] Biological Diversity Comments at 8–9.

[265] ENGIE Comments at 4.

[266] *See, e.g.,* NOPR, 168 FERC ¶ 61,184 at P 33 n.58; *see also City of Ketchikan, Alaska,* 94 FERC ¶ 61,293 at 62,061 (2001) (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'').

[267] Biogas Comments at 2; BluEarth Renewables Comments at 2; Biological Diversity at 8; Covanta Comments at 9; Distributed Sun Comments at 1–2; New England Small Hydro Comments at 10; NIPPC, CREA, REC, and OSEIA Comments at 53.

[268] APPA Comments at 9.

may have been able to conclude that LMP was an appropriate measure of the avoided cost for energy, a state can now also rely on a rebuttable presumption that LMP is an appropriate measure of the as-available avoided cost for energy to be used in determining a QF's as-available avoided cost energy rate.

176. We provide the following clarification in response to the Solar Energy Industries' request that the Commission make clear that payments based on LMP do not relieve the purchasing utility of the requirement to compensate the QF for any values in addition to electricity (*e.g.,* RECs, etc.), and that the state's flexibility to allow utilities to set QF payment rates for as-available energy at the applicable LMP does not in any way limit QFs' rights to establish a LEO or contract for a longer-term sale at fixed, full avoided costs.[269] In *Windham Solar LLC,*[270] the Commission summarized its precedent concerning RECs. The Commission stated that the states have the authority to determine who owns RECs in the initial instance and how they are transferred, and that the automatic transfer of RECs within a sale of power at wholesale must find its authority in state law, not PURPA. But the Commission also held that a state may not assign ownership of RECs to utilities based on a logic that the avoided cost rates in PURPA contracts already compensate QFs for RECs in addition to compensating QFs for energy and capacity, because under PURPA the avoided cost rates are, in fact, compensation just for energy and capacity.[271] We see no reason to disturb that precedent in this final rule. With regard to the right of QFs to establish a LEO, that right is neither limited nor expanded by a state's choice of LMP as the measure of avoided costs for energy.

iii. Western EIM

177. We hereby find that the Western EIM prices, like other LMP prices, may presumptively be used as a measure of as-available energy avoided costs for utilities able to participate in the Western EIM market. As Xcel points out, ''prices in the EIM are calculated using the same methodology as LMPs'' since, ''in both cases, units are dispatched on a least-cost basis that respects applicable transmission constraints (*i.e.,* congestion),'' and ''[t]he formula for price calculation involves determination of the system marginal energy cost, which is the cost of providing the next increment of energy to the system, minus congestion costs, minus losses, and, in some cases, minus the cost of carbon.'' [272] As with LMP, these Western EIM price components presumptively reflect the avoided cost of as-available energy incurred by purchasing electric utilities that are able to participate in the Western EIM region.

178. We reject arguments that Western EIM prices should not be used to establish as-available avoided cost energy rates for sales by QFs. With respect to the unit commitment and dispatch scheduling cost parameters ELCON refers to, it is true that the Western EIM is a real-time imbalance market built on a decentralized unit commitment that may not result in exactly the same real-time dispatch and LMP as would result from an RTO market with centralized day-ahead unit commitment and co-optimized energy and reserves. Nonetheless, Western EIM prices represent quite precisely the avoided cost of as-available energy for utilities operating in that market structure since those prices show the cost of obtaining an additional unit of energy at any particular place and time. With regard to the argument of Union of Concerned Scientists concerning the cost recovery mechanisms available to utility-owned and -affiliated generation,[273] as discussed above with respect to the rebuttable presumption that LMP may be used for avoided cost rate determination, we do not find these unproven allegations of use of retail cost recovery mechanisms to subsidize wholesale RTO/ISO market participation at a loss sufficient to make a blanket finding prohibiting the use of Western EIM prices to set as-available avoided cost energy rates for sales by QFs.

179. With regard to the argument concerning the ability to participate in the Western EIM raised by Solar Energy Industries,[274] for PURPA rate purposes, it is not relevant whether QFs are able to participate in the Western EIM. The rates at issue here are intended, per the statute, to reflect the costs of alternative electric energy that the purchasing utility is avoiding. In this context, all that matters is whether the Western EIM's prices accurately reflect a purchasing electric utility's avoided costs for energy. Thus, as long as the purchasing electric utility is able to participate in the Western EIM, a rebuttable presumption should apply that Western EIM prices reflect the purchasing electric utility's avoided costs for energy.

4. Use of Market Hub Prices as a Permissible Rate for Certain As-Available QF Energy Sales

a. NOPR Proposal

180. In the NOPR, the Commission recognized that competitive bilateral energy markets have arisen outside of the RTO/ISO energy markets. Particularly in the Western United States, price hubs such as the Mid-Columbia (Mid-C) and Palo Verde hubs are liquid markets with prices the Commission has recognized as representing competitive market prices at those hubs.[275] For the same reasons that LMPs could represent an appropriate avoided cost energy rate for QFs selling to electric utilities located in RTO/ISO markets, the Commission proposed to find that liquid market hubs can represent appropriate rates for QFs selling to electric utilities located outside of RTO/ISO markets. Like LMP, liquid market hubs would rely on competition to derive an avoided cost. From a price determination perspective, liquid market hub prices differ from LMP mainly in that they measure price at only one or a few points, whereas RTOs/ISOs derive unique LMPs for all receipt and delivery points on a specific area of the system.[276]

181. Consequently, the Commission proposed in the NOPR to revise the PURPA Regulations in 18 CFR 292.304 to add a subsection (b)(7) which, in combination with new subsection (e)(1), would permit a state to set the as-available energy rate paid to a QF by electric utilities located outside of RTO/ISO markets at energy rates established at liquid market hubs. The Commission proposed to define Market Hub Prices as prices determined at a liquid market hub to which the purchasing electric utility has reasonable access. States electing to set QF energy rates using a Market Hub Price also would identify the particular market hub used to set the

[269] Solar Energy Industry Comments at 27–28.

[270] 156 FERC ¶ 61,042 (2016).

[271] *Id.* P 4.

[272] Xcel Comments at 7–8.

[273] Union of Concerned Scientists Comments at 9.

[274] Solar Energy Industry Comments at 27.

[275] NOPR, 168 FERC ¶ 61,184 at P 52 (citing *Price Discovery in Nat. Gas and Elec. Mkts.,* 109 FERC ¶ 61,184, at P 66 (2004) (approving the use of published prices at market hubs with sufficient liquidity to set prices charged in tariffs); *El Paso Elec. Co.,* 148 FERC ¶ 61,051, at P 7 (2014) (approving the use of the Palo Verde price to set imbalance charges); *Idaho Power Co.,* 121 FERC ¶ 61,181 at P 27 (2007) (approving use of Mid-Columbia prices to set energy imbalance charge); *PacifiCorp,* 95 FERC ¶ 61,467, at 62,676 (2001) (approving setting energy imbalance rate at average of four market hub prices); *Pinnacle West Energy Corp.,* 92 FERC ¶ 61,248, at 61,791 (2000) (accepting the use of the Palo Verde price to set prices for affiliate transactions because the Palo Verde Index is a recognized market hub with competitive prices)).

[276] NOPR, 168 FERC ¶ 61,184 at P 53.

price. Such determination would require the state to find that the prices at such hub are competitive prices that reflect the costs an electric utility would avoid but for the purchase from the QF.[277]

b. Comments

i. Comments in Support

182. Arizona Public Service and El Paso Electric state that the Palo Verde/Hassayampa hub represents a regional liquid market hub that could be used to set as-available energy avoided costs.[278] Portland General likewise asserts that the Mid-C price hub should be approved as appropriate for use in establishing as-available energy avoided costs.[279]

183. Xcel provides two additional factors to support the liquid market hub proposal. First, Xcel cites to the 2018 State of the Market report issued by the Commission's Office of Enforcement's Division of Energy Market Oversight, which states that trading hub prices generally align with energy prices associated with competitive, market-based sales. Second, Xcel cites to wholesale power sales contracts providing for the purchase of excess energy based on a combination of day-ahead prices at Palo Verde and at Four Corners, which Xcel asserts demonstrates that prices at Palo Verde and Four Corners are reasonably representative of the value of energy.[280]

ii. Comments in Opposition

184. Several commenters argue that liquid market hubs are short-term spot markets and do not represent long-term energy rates or the other costs associated with that energy including, but not limited to, congestion, transmission, and capacity costs.[281] Other commenters express concern with setting QF prices at short-term liquid hub prices while allowing utilities to rate base and recover their long-term investments.[282]

185. Public Interest Organizations assert that the liquid market hub proposal is discriminatory because non-QF generators are not limited to the liquid market hub price and utilities can, and regularly do, pay effective prices for energy that exceed the price determined by regional trading.[283] Union of Concerned Scientists similarly asserts that liquid market hub prices are distorted by the participation of integrated utilities that submit bids below their total costs.[284]

186. Industrial Energy Consumers oppose the liquid market hub pricing proposal because such markets are not sufficiently competitive, nondiscriminatory, and transparent to be used as the basis for calculating a utility's avoided cost payment.[285] Industrial Energy Consumers urge the Commission not to assume that non-competitive markets are, in fact, competitive.[286] Southeast Public Interest Organizations state that no southeast state could credibly identify a particular market hub that is reasonably accessible and has competitive prices that actually relate to the costs an electric utility would avoid but for the purchase from the QF.[287] Southeast Public Interest Organizations also assert that the liquid market hub proposal does not require states to determine whether liquid market hub prices represent a utility's avoided costs, and therefore the proposal would allow liquid market hubs to set avoided energy prices even when they do not represent avoided energy costs.[288]

187. ELCON asserts that a liquid regional hub does not necessarily imply liquidity at a more granular level.[289] According to ELCON, the basis spread resulting from transmission congestion outside of RTO/ISOs is often opaque in real time and poorly documented in hindsight, and this is a clear indication that discriminatory treatment and barriers to the bulk transmission system persist under current conditions outside of RTO/ISOs.[290] ELCON states that for these and other reasons, bilateral markets alone are insufficient to serve as complete avoided cost measures.[291]

188. Allco states that prices at liquid market hubs would suffer from shortcomings with respect to small QFs connected to the distribution system, because purchases from such QFs also allow the purchasing utility to avoid transmission costs, including line losses.[292]

iii. Commission Determination

189. We adopt the proposal in the NOPR to give the states flexibility to set as-available avoided cost energy rates using prices from a liquid market hub to which the purchasing electric utility has reasonable access. For the reasons explained in the NOPR, we find that liquid market hubs can represent appropriate as-available avoided cost energy rates for QFs selling to electric utilities located outside of RTO/ISO markets. However, as the Commission also found in the NOPR, before relying on prices from liquid market hubs, a state must find that the liquid market hub price in question represents the purchasing utility's avoided cost for as-available energy.[293]

190. Examples of factors a state reasonably could consider in making this determination (in addition to the core finding that the liquid market hub represents the purchasing utility's avoided cost for as-available energy) are: (1) Whether the hub is sufficiently liquid that prices at the hub represent a competitive price;[294] (2) whether the prices developed at the hub are sufficiently transparent; (3) whether the electric utility has the ability to deliver power from such hub to its load, even if its load is not directly connected to the hub; and (4) whether the hub represents an appropriate market to derive an energy price for the electric utility's purchases from the relevant QFs given the electric utility's physical proximity to the hub. These factors are not intended to be exhaustive, and states reasonably could consider other factors in identifying a relevant liquid market hub for setting as-available QF energy rates.

191. In order for prices at market hubs to represent a purchasing electric utility's avoided costs, the market hub price may need to be subject to adjustments to account for transmission costs the electric utility would incur before such prices could serve as a factor in determining appropriate QF rates.[295] In addition, market prices in a region may be determined based on a formula that includes adjustments to the market hub price or that incorporates prices at more than one market hub located in the region, when such prices represent standard pricing practice in the region where the purchasing electric utility is located.[296] Such adjustments may be necessary to ensure that the

[277] *Id.* P 56.

[278] Arizona Public Service Comments at 6–8; El Paso Electric Comments at 2–3.

[279] Portland General Comments at 6–7.

[280] Xcel Comments at 8.

[281] IdaHydro Comments at 11; Southeast Public Interest Organizations Comments at 19.

[282] IdaHydro Comments at 11; Industrial Energy Consumers Comments at 12–13.

[283] Public Interest Organizations Comments at 64.

[284] Union of Concerned Scientists Comments at 8.

[285] Industrial Energy Consumers Comments at 12.

[286] *Id.*

[287] Southeast Public Interest Organizations Comments at 18.

[288] *Id.* at 19.

[289] ELCON Comments at 25.

[290] *Id.*

[291] *Id.*

[292] Allco Comments at 7–8.

[293] *See* NOPR, 168 FERC ¶ 61,184 at PP 53, 56.

[294] In considering whether a hub is sufficiently liquid, states could, for example, consider such factors as those identified by the Commission in *Price Discovery in Nat. Gas and Elec. Mkts.,* 109 FERC ¶ 61,184, at P 66.

[295] Other adjustments also may be necessary in other situations in order for the adjusted hub price to reasonably reflect the purchasing electric utility's avoided cost.

[296] NOPR, 168 FERC ¶ 61,184 at P 58.

competitive market price reflects a purchasing utility's actual avoided costs for as-available energy.

192. Arguments regarding the short-term nature of liquid market hubs and claims that use of such prices is discriminatory are addressed in Section IV.B.2 above.

193. We will not address in this final rule arguments about whether particular market hubs should be found to represent avoided costs or, to the contrary, that particular market hubs may be too illiquid or insufficiently granular, or that prices at particular market hubs may not reflect avoided costs. We are not making any determination in this final rule that the prices at any specific market hub do or do not represent the avoided costs of any specific utility. Rather, we are allowing the states the flexibility to rely on prices at liquid market hubs to set as-available avoided cost energy rates for QF sales in regions outside RTO/ISO markets upon a state finding that it is appropriate to do so given the specific circumstances governing a particular market hub and the purchasing utility involved. The aggrieved entity would be able to challenge the state's decision to use a liquid market hub price in the appropriate forum, which could include any one or more of the following: (1) Initiating or participating in proceedings before the relevant state commission or governing body; (2) filing for judicial review of any state regulatory proceeding in state court (under PURPA section 210(g)); or, alternatively (3) filing a petition for enforcement against the state at the Commission and, if the Commission declines to act, later filing a petition against the state in U.S. district court (under PURPA section 210(h)(2)(B)).[297]

194. With respect to Southeast Public Interest Organizations' assertion that the liquid market hub proposal in the NOPR does not require states to determine whether liquid market hub prices represent a utility's avoided costs, the Commission intended to impose such a requirement as a prerequisite before a liquid market hub may be relied on as a measure of a purchasing utility's avoided cost of as-available energy. However, we acknowledge that the regulatory text in the NOPR was ambiguous in that regard. Therefore, the regulatory text of 18 CFR 292.304(b)(7)(i) in the final rule has been revised to make this more clear.

c. Proposed Modifications

i. Comments

195. APPA requests that the Commission clarify that, in addition to liquid market hubs, as-available energy avoided costs could be determined based on prices of comparable competitive quality.[298] APPA states that amending the proposed regulation in this fashion would also enable utilities proximate to (or embedded within) RTO/ISO markets to reference prices in those markets as viable alternatives in establishing avoided costs.[299]

196. The California Commission requests that the Commission clarify that states previously were permitted to use liquid market hub prices under the current PURPA Regulations and that the proposed revisions simply codify and confirm the validity of this past practice.[300] The California Commission and Massachusetts DPU further request that the proposed rules be modified to permit states to use competitive prices to set both energy and capacity costs, and to not be limited to using such mechanisms only for as-available energy prices.[301]

197. EEI notes that some states may be located in regions with access to more than one market hub and those states should have the flexibility to use an average of market hub prices or develop a formula correlated to the appropriate market hubs to develop the electric utility's avoided cost.[302] EEI notes that this proposal is not new, but its inclusion in the Commission's regulations will provide certainty to states.[303]

198. NIPPC, CREA, REC, and OSEIA assert that the liquid market hub proposal should not be adopted without making significant changes.[304] For example, they argue, only long-term contract prices reported at market hubs should be used.[305] Even with respect to market-hub prices for long-term contracts, they assert that the Commission should include safeguards to ensure that prices are set based on liquid trading with a sufficient number of competitors to assure effective price discovery, that prices are not subject to manipulation, and that reported price indices are accurate and not subject to mis-reporting or other forms of manipulation.[306] Finally, they argue that the Commission should require avoided costs to include the costs of transmission to and from such hubs except in cases where the utility's system directly interconnects with that hub.[307] Resources for the Future makes similar arguments.[308]

199. In contrast, NorthWestern asserts that liquid market hub prices should be adjusted downward by a transmission differential to reflect the cost of getting energy from the market to load.[309] NorthWestern states that reliance on the market hub to establish avoided costs only remains a valid option if the prices are less than what it would cost a utility to build a resource to supply its customers' needs.[310]

ii. Commission Determination

200. We clarify that, in adopting a rule allowing states to use liquid market hubs to determine as-available avoided energy costs, we are not finding that the use of liquid market hubs for this purpose prior to the issuance of this final rule was not permitted. Depending on the specific circumstances, a state may appropriately have determined, prior to the final rule, that a liquid market hub price represented a purchasing utility's as-available avoided energy cost. After the effective date of this final rule, an aggrieved entity may seek review of a state's determination to use liquid market hubs in the appropriate forum.[311]

201. We confirm that: (1) States located in regions with access to more than one market hub have the flexibility to use an appropriate average of market hub prices or to develop an appropriate formula that relies on data from relevant market hubs to develop an electric utility's as-available avoided energy cost, so long as doing so yields a price that accurately reflects the purchasing electric utility's as-available avoided energy cost;[312] (2) states must determine that a liquid market hub is sufficiently liquid that its prices represent a competitive price;[313] and (3) the market hub price may need to be subject to adjustments to account for transmission costs the electric utility would incur.[314]

[297] *See Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304.

[298] APPA Comments at 13.

[299] *Id.* at 13.

[300] California Commission Comments at 24.

[301] California Comments at 25; Massachusetts DPU Comments at 8–10.

[302] EEI Comments at 26.

[303] *Id.* at 27.

[304] NIPPC, CREA, REC, and OSEIA Comments at 60.

[305] *Id.*

[306] *Id.*

[307] *Id.*

[308] Resources for the Future Comments at 8.

[309] NorthWestern Comments at 5.

[310] *Id.*

[311] *See Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304.

[312] NOPR, 168 FERC ¶ 61,184 at P 58.

[313] *Id.* P 57.

[314] *Id.* P 58.

202. Finally, we find that the general ruling requested by APPA regarding the use of "prices of comparable competitive quality" to set as-available avoided cost rates is beyond the scope of this rulemaking in that here we were proposing only particular discrete changes to our regulations for setting as-available avoided cost energy rates charged by QFs.

5. Use of Formulas Based on Natural Gas Prices To Establish a Permissible Rate for Certain As-Available QF Energy Sales

a. NOPR Proposal

203. The Commission observed in the NOPR that, in regions where there are no RTOs/ISO or liquid market hubs, the price of electricity generated by efficient combined-cycle natural gas generation facilities would appear to represent a reasonable measure of a competitive energy price.[315]

204. The Commission therefore proposed to revise the PURPA Regulations in 18 CFR 292.304 to add a subsection (b)(7) which, in combination with new subsection (e)(1), would permit a state to set the as-available energy rate paid to a QF by electric utilities located outside of RTO/ISO markets at Combined Cycle Prices, defined as a formula rate established by the state using published natural gas price indices and a proxy heat rate for an efficient natural gas combined-cycle generating facility. The state would need to determine that the resulting Combined Cycle Price represents an appropriate approximation of the purchasing electric utility's avoided costs. This determination would involve consideration of such factors as, for example: (1) Whether the cost of energy from an efficient natural gas combined-cycle generating facility represents a reasonable approximation of a competitive price in the purchasing electric utility's region; (2) whether natural gas priced in accordance with a particular proposed natural gas price index would be available in the relevant market; (3) whether there should be an adjustment to the natural gas price to appropriately reflect the cost of transporting natural gas to the relevant market; and (4) whether the proxy heat rate used in the formula should be updated regularly to reflect improvements in generation technology. The Commission described the above factors as not exhaustive and proposed providing states the flexibility to apply other factors that also might be appropriate for consideration.[316]

205. The Commission stated that natural gas price indices coupled with the heat rate of an efficient natural gas combined-cycle generating facility may be a reasonably accurate measure of avoided cost, at least in those markets where natural gas-fired resources are commonly the marginal units. In such markets, the Commission stated that it would expect that new supplies of energy would need to be offered at a price equal to or less than the incremental cost of using these efficient gas units in order to displace them economically. Thus, the Commission found preliminarily that using natural gas price indices and the heat rate of an efficient combined-cycle natural gas generating facility to establish an avoided cost energy rate relies on competitive market forces, in this case competitive forces in natural gas markets for the fuel used by natural gas combined-cycle generating facilities that the purchasing electric utility, but for the purchase from the QF, would generate itself or purchase from another source.[317]

b. Comments

206. Several entities oppose the NOPR's Combined Cycle Prices proposal.[318] Allco asserts that this is exactly the type of administrative avoided cost determination about which NARUC and utilities have complained.[319] Allco also argues that the only reason for including the Combined Cycle Prices proposal in the Commission's regulations is to create a menu of prices from which a state commission or unregulated utility can choose the lowest price, which Allco claims would not encourage QF generation, and would be inconsistent with the rules of economic dispatch and the language of PURPA.[320] Public Interest Organizations argue that the Combined Cycle Price proposal is discriminatory to QFs for all the same reasons that restricting QF rates to LMP is discriminatory (*i.e.,* because utilities can, and allegedly do, pay effective prices for energy that exceed the calculation from natural gas prices and assumed combined cycle heat rates).[321] Southeast Public Interest Organizations argue that the Combined Cycle Prices proposal does not require states to include variable O&M costs in the proxy combined cycle plant or an adjustment for natural gas transportation, even though a utility-owned combined cycle gas plant would be allowed to recover both types of costs.[322]

207. In contrast, R Street opposes the proposal because using natural gas combined cycle plants as the basis for QF rates in non-RTO/ISO regions could lead to the overpayment of a QF. R Street argues that regions without organized wholesale markets should instead price QF rates at the lowest cost resource based on an administratively determined avoidable cost.[323]

208. Similarly, ELCON argues that the proposal is complicated by the fact that natural gas units are not always marginal, especially in export-constrained subregions when renewables output is high. ELCON believes this proposal would be subject to extensive forecasting error, and therefore argues that careful assessment should precede its adoption.[324]

209. Other entities support the NOPR's Combined Cycle Price proposal.[325] The California Commission and EEI argue that states already had this flexibility under the current regulations, and request that the Commission acknowledge this fact in a final rule.[326] Similarly, other supporters of the Combined Cycle Price proposal argue that states should have the ability to develop as-available energy price formulas based on technologies other than combine cycle gas plants, if doing so would more accurately reflect the relevant purchasing utility's avoided cost.[327]

210. El Paso Electric argues that: (1) The gas index price should be adjusted to account for the basis differential between the price at the natural gas hub and the price of natural gas in or near the utility's service area; and (2) states should be allowed to update the formula periodically to reflect improved

[315] *Id.* P 59.

[316] *Id.*

[317] *Id.* P 54.

[318] Allco Comments at 8; BluEarth Comments at 1–2; ELCON Comments at 25–26; Industrial Energy Consumers Comments at 10–11; Public Interest Organizations Comments at 64; R Street Comments at 5; Southeast Public Interest Organizations Comments at 19–20.

[319] Allco Comments at 8.

[320] *Id.*

[321] Public Interest Organizations Comments at 64.

[322] Southeast Public Interest Organizations Comments at 19–20.

[323] R Street Comments at 5.

[324] ELCON Comments at 26.

[325] APPA Comments at 12–13; Arizona Public Service Comments at 6; California Commission Comments at 23; Chamber of Commerce Comments at 4; Duke Energy Comments at 9–10; EEI Comments at 27; El Paso Electric Comments at 3; Idaho Commission Comments at 3; Southern Comments at 9.

[326] California Commission Comments at 23; EEI Comments at 27–28.

[327] APPA Comments at 13; Duke Energy Comments at 10; EEI Comments at 27; Idaho Commission Comments at 3; Southern Comments at 9–11.

efficiencies in combined cycle generating facilities.[328]

c. Commission Determination

211. We adopt the NOPR proposal to revise 18 CFR 292.304 to add a subsection (b)(7) which, in combination with new subsection (e)(1), would permit a state to set the as-available energy rate paid to a QF by electric utilities located outside of RTO/ISO markets at Combined Cycle Prices, defined as a formula rate established by the state using published natural gas price indices and a proxy heat rate for an efficient natural gas combined-cycle generating facility. We also clarify that the formulas used to set as-available energy rates based on natural gas prices should include recovery of variable O&M costs.

212. While some commenters oppose allowing states to use Combined Cycle Prices (or other competitive prices) to set avoided energy cost rates, states already had the flexibility to determine avoided costs in this manner under the current regulations, as the California Commission and EEI observe.[329] If Combined Cycle Prices accurately represent a particular purchasing utility's avoided energy costs, their use would be consistent with the Commission's existing definition of avoided costs as ''the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.'' [330] Furthermore, as noted above in section IV.B.2, the use of competitive market prices, including Combined Cycle Prices, to set QF rates is explicitly subject to the requirement that such prices are equal to the purchasing utility's avoided energy costs. Therefore, this proposal merely codifies more explicitly an option for determining avoided cost rates that already existed, *i.e.,* where a state determines that a Combined Cycle Price is a measure of the purchasing electric utility's avoided cost for as-available energy.

213. The concerns of R Street, ELCON, and others that Combined Cycle Prices may not reflect a particular purchasing electric utility's avoided cost are addressed by the requirement that the state would need to determine that the Combined Cycle Price indeed represents the purchasing electric utility's avoided cost for as-available energy.

214. While some commenters requested that we expand the proposed regulation explicitly to include technologies other than combined cycle natural gas generating facilities, we decline to do so for two reasons. First, as already mentioned, the current regulations are already flexible enough to accommodate states calculating avoided costs based on the cost of the generating units or technology that accurately reflects the relevant purchasing utility's avoided cost.[331] Second, this proposal focused specifically on combined cycle technology, as opposed to other generating technologies, because combined cycle generation makes up such a large portion of the nation's generation fleet.[332] This relative ubiquity, coupled with the fact that combined cycle natural gas generation facilities are often the marginal units in many regions, justifies an elevated profile in the PURPA Regulations for combined cycle technology compared to other technologies. This final rule does not foreclose other technologies from being used for avoided cost determination, upon an appropriate finding by the state that they accurately measure a purchasing electric utility's avoided cost for as-available energy.

215. Southeast Public Interest Organizations support their opposition to Combined Cycle Prices in part by claiming that the Commission did not specifically require states to include variable O&M in the formula. We agree that variable O&M expenses are an appropriate cost component of formula rates and should be included in any Combined Cycle Price formulae in order to accurately reflect the relevant purchasing electric utility's avoided costs.

216. With respect to the arguments of Southeast Public Interest Organizations regarding natural gas transportation costs, the regulation we adopt in this final rule, 18 CFR 292.304(b)(7)(ii)(C), specifically requires that states consider whether there should be an adjustment to the natural gas price to appropriately reflect the cost of transporting natural gas to the relevant market. As to El Paso Electric's arguments regarding index price adjustments using basis differentials, and periodic formula updates to reflect efficiency improvements, we note that the revisions to the PURPA Regulations, which we adopt in this final rule, provide that states which choose to rely on Combined Cycle Prices must consider, when designing their formulae, whether and to what extent to include these costs, based on their assessment of how best to identify a relevant purchasing electric utility's avoided cost for as-available energy.[333]

6. Permitting the Energy Rate Component of a Contract To Be Fixed at the Time of the LEO Using Forecasted Values of the Estimated Stream of Market Revenues

217. The NOPR noted that, frequently, price forecasts are available for LMPs in RTOs/ISOs, for liquid market hubs located outside of RTOs/ISOs, and for natural gas pricing hubs. Accordingly, the NOPR suggested that such forecasts could be used to allow QFs to request a fixed energy rate component calculated at the time a LEO is incurred. The Commission therefore proposed to add a new option in 18 CFR 292.304(d)(1)(iii) permitting fixed energy rates to be based on forecasted estimates of the stream of revenue flows during the term of the contract.[334] In other words, states could rely on estimates of forecasted energy prices at the time of delivery over the anticipated life of the contract—such estimates are commonly referred to as forward price curves—to develop a fixed energy rate component for that contract when such estimates reflect the purchasing electric utility's avoided costs.

218. The NOPR stated that the fixed energy rate component of the contract could be a single energy rate, based on the amortized present value of the forecast energy prices, or it could be a series of specified energy rates that are different in future years (or other periods).[335] Under this proposal, the QF would be able to establish, at the time the LEO is incurred, the applicable energy rate(s) for the entire term of a contract; however, the energy rate in the contract could be different from year-to-

[328] El Paso Electric Comments at 3–4.

[329] States could have used any of the competitive prices adopted in this final rule to set avoided cost energy rates as long as such prices met, to the extent practicable, the factors described 18 CFR 292.304(e).

[330] *See* 18 CFR 292.101(b)(6).

[331] *See* 18 CFR 292.101(b)(6).

[332] According to EIA data, the nameplate capacity of natural gas-fired combined cycle generation technology, exceeds the nameplate capacity of generation from any other fuel source. *See* EIA, *Electric Power Annual Table 4.7.A Net Summer Capacity of Utility Scale Units by Technology and by State, 2018 and 2017 (Megawatts), https://www.eia.gov/electricity/annual/html/epa_04_07_a.html,* and *4.7.C Net Summer Capacity of Utility Scale Units Using Primarily Fossil Fuels and by State, 2018 and 2017 (Megawatts), https://www.eia.gov/electricity/annual/html/epa_04_07_c.html.*

[333] *See* new 18 CFR 292.304(b)(7)(ii).

[334] NOPR, 168 FERC ¶ 61,184 at P 61.

[335] *Id.* P 62 (noting that the PURPA Regulations already require that the fixed energy rate would need to account for the operating characteristics of the QF, including the QF's ability to deliver energy during peak periods and the utility's ability to dispatch energy from the QF (citing 18 CFR 292.304(e)(2)).

year (or some other period) and nevertheless comply with the current requirement in 18 CFR 292.304(d)(2)(ii) that the energy rate be fixed for the term of the contract.[336]

a. Comments

219. Two commenters oppose the NOPR proposal to add a new option in 18 CFR 292.304(d)(1)(iii) permitting fixed energy rates to be based on forecasted estimates of the stream of revenue flows during the life of the contract.[337] Southeast Public Interest Organizations and Mr. Mattson state that the NOPR proposal is a departure from past precedent.[338] Southeast Public Interest Organizations state that this proposal suffers the same deficiencies as the LMP and liquid market hub price proposals. Furthermore, according to Southeast Public Interest Organizations, the NOPR provides no analysis as to how or whether the forward price curves result in just and reasonable and non-discriminatory rates as required by PURPA.[339]

220. Other commenters support the NOPR proposal to add a new option in 18 CFR 292.304(d)(1)(iii) permitting fixed energy rates to be based on forecasted estimates of the stream of revenue flows during the term of the contract.[340] The South Dakota Commission and Pennsylvania Commission state that they support the NOPR proposal on forecasted values of the estimated stream of revenues because it forecasts a steady stream of revenue and provides built-in flexibility.[341] According to these commenters, the proposal also balances the QF's need for a steady stream of revenue with the purchasing electric utility's responsibility to have a prudent mix of supply contracts for its provider of last resort obligations.[342] The Chamber of Commerce states that, while future rates are not guaranteed to materialize, the projected rates will more accurately reflect those realized than a single avoided cost rate set at the inception of a QF contract.[343]

221. Arizona Public Service states that it supports the proposal because it grants states additional flexibility, which helps protect utilities' customers from over-paying for generation due to QFs need for sales guarantees and financing.[344] NRECA agrees that states must have flexibility in determining forecasted market prices including appropriate discounting to ensure that utilities and consumers are not locked into contracts with fixed prices that are higher than prevailing market prices.[345]

222. NRECA requests that the Commission clarify proposed revisions to 18 CFR 292.304(d)(1)(i), (ii), and (iii) to state that an electric utility is exempt from offering a stream of market revenue as payment, even if there is a market hub price that could be relevant.[346] The Connecticut Authority also suggests that the Commission modify 18 CFR 292.304(d)(1)(ii) to specify that a state may set a series of energy rates. For this option, Connecticut Authority argues, the regulatory text should provide greater regulatory and commercial certainty to QF developers, avoiding disputes with distribution utilities and states.[347]

223. Connecticut Authority supports revisions to 18 CFR 292.304(d)(2) because the rule would permit a state to limit a QF's option to select a preferred energy rate methodology.[348] Connecticut Authority also supports the proposed 18 CFR 202.304(d)(iii) that permits states to set a stated or fixed rate for energy that is calculated using the present value of the expected stream of revenue from as-available energy rates during the life of the contract or LEO.

224. EEI states that this proposal is not novel, and as an example notes that the Commission and a federal district court have already found that the Connecticut Authority could set avoided cost rates based on a forecast of future avoided costs.[349] According to EEI, the Commission has not ruled either that any form of forecasting is mandated or that any is unacceptable.[350]

225. Allco states that the proposed new option in 18 CFR 292.304(d)(1)(iii) permitting fixed energy rates to be based on forecasted estimates of the stream of revenue flows during the life of the contract is consistent with PURPA section 210 and is already permitted. Allco also states that forecasts need to be non-discriminatory. According to Allco, utilities and states frequently use one forecast when dealing with QFs and another when obtaining approval for their favored projects; Allco asserts that this practice is discriminatory.[351]

226. APPA states that the proposed change is a logical extension of the conclusion that market options are a legitimate alternative means of specifying avoided costs.[352] Distributed Sun states that it supports permitting states to set fixed energy rates with forward curves or through competitive solicitations.[353] NorthWestern supports the proposal to permit fixed energy rates to be on a forward price curve developed from prices in either the organized markets or liquid market hubs.[354]

b. Commission Determination

227. We adopt the proposal to add a new option in 18 CFR 292.304(d)(1)(iii) permitting fixed energy rates to be based on forecasted estimates of the stream of revenue flows during the term of the contract. The Commission has previously permitted the use of this method to establish energy and capacity rates over the term of a contract or LEO.[355] Nevertheless, given the flexibilities we adopt in this final rule with respect to competitive market prices and variable energy rates, we clarify here that a state may use competitive market prices and/or variable energy rates in the context of a more fixed estimated avoided cost energy rate (together with a fixed avoided capacity rate) that is determined at the time an LEO or contract is incurred. The fixed energy rate component of the contract could be

[336] *Id.* (noting that this is permissible under the Commission's existing PURPA Regulations (citing *Windham Solar LLC,* 157 FERC ¶ 61,134, at PP 5–6 (2016) (*Windham Solar*) (''[A]lthough state regulatory authorities cannot preclude a QF . . . from obtaining a legally enforceable obligation with a forecasted avoided cost rate, we remind the parties that the Commission's regulations allow state regulatory authorities to consider a number of factors in establishing an avoided cost rate. These factors which include, among others, the availability of capacity, the QF's dispatchability, the QF's reliability, and the value of the QF's energy and capacity, allow state regulatory authorities to establish lower avoided cost rates for purchases from intermittent QFs than for purchases from firm QFs.'' (citing 18 CFR 292.304(e)–(f)) (footnote omitted))).

[337] Southeast Public Interest Organizations Comments at 25; Mr. Mattson Comments at 26.

[338] Southeast Public Interest Organizations Comments at 25; Mr. Mattson Comments at 26.

[339] Southeast Public Interest Organizations Comments at 25.

[340] Allco Comments at 8; APPA Comments at 14; Arizona Public Service Comments at 2–3; Chamber of Commerce Comments at 4–5; Connecticut Authority at 13; Distributed Sun Comments at 2; EEI Comments at 28–30; Idaho Commission Comments at 4; NorthWestern Comments at 6; NRECA Comments at 8; Pennsylvania Commission Comments at 8; Resources for the Future Comments at 8; South Dakota Commission Comments at 3.

[341] Pennsylvania Commission Comments at 8–9; South Dakota Commission Comments at 3.

[342] Pennsylvania Commission Comments at 8–9.

[343] Chamber of Commerce Comments at 4–5.

[344] Arizona Public Service Comments at 2–3.

[345] NRECA Comments at 8.

[346] *Id.* at 9.

[347] Connecticut Authority Comments at 14.

[348] *Id.* at 13.

[349] EEI Comments at 28 (citing *Allco Renewable Energy Ltd.* v. *Mass. Elec. Co.,* 208 F. Supp. 3d. 390, 395 (D. Mass. 2016); *Windham Solar,* 157 FERC ¶ 61,134 at P 5.

[350] EEI Comments at 28–30.

[351] Allco Comments at 8.

[352] APPA Comments at 14.

[353] Distributed Sun Comments at 2.

[354] NorthWestern Comments at 6.

[355] *Windham Solar,* 157 FERC ¶ 61,134 at P 4 (citing 18 CFR 292.304(d)(2)).

a single rate, based on the amortized present value of forecast energy prices, or it could be a series of specified rates that change from year-to-year (or other periods) in future years. We also will allow the state to establish the applicable energy rate(s) for the QF for the entire term or the rate may change from year-to-year (or some other period) of the contract at the time the LEO is incurred.

228. Southeast Public Interest Organizations and Mr. Mattson state that the NOPR proposal is a departure from past precedent. The very purpose of a proceeding like this is to consider changes to our regulations and our doing so is not impermissible.

229. Southeast Public Interest Organizations also state that the proposal suffers the same deficiencies as the LMP and liquid market hub pricing proposals and that the NOPR provides no evidence as to how or if the forward price curves present just and reasonable and non-discriminatory rates as required by PURPA. Given that we find above that LMPs and liquid market hub prices may reflect avoided as-available energy costs and that estimates of such prices over the term of a contract can therefore reflect a purchasing electric utility's avoided as-available costs over time, we do not believe Southeast Public Interest Organizations and Mr. Mattson's concerns are justified.

230. Although, as described below, we allow states to require variable avoided cost energy rates, allowing forward price curves determined at the time an LEO is incurred provides an additional option for states to calculate avoided energy costs in advance while also using transparent metrics for those calculations. Use of the forward price curve does not deter the adoption of just and reasonable and non-discriminatory rates required by PURPA, moreover, and insofar as we require that states determine that the estimated stream of revenues reflects the purchasing electric utility's avoided energy, such pricing is fully consistent with the statute's requirements. With regard to forecasts, we acknowledge that the forecast used to set the avoided cost rate must meaningfully and reasonably reflect the utility's avoided costs over time.[356]

231. We decline to modify this proposal expressly either to permit or prohibit a state from setting a series of estimated avoided energy costs over time. Each state will be required to determine whether a particular estimated stream of revenues represents a purchasing electric utility's avoided costs over a specified term. Similarly, in order to provide states flexibility to use LMPs and other competitive market prices to establish as-available avoided energy costs, we will not require a state to use this option to guarantee a stream of revenues.

7. Providing for Variable Energy Rates in QF Contracts

a. Background

232. As explained above, if a QF chooses to sell energy and/or capacity pursuant to a contract, the PURPA Regulations currently provide the QF the option of receiving the purchasing electric utility's avoided cost calculated and fixed at the time the LEO is incurred.[357] The Commission's justification in Order No. 69 for allowing QFs to fix their rate at the time of the LEO for the entire term of a contract was that fixing the rate provides certainty necessary for the QF to obtain financing.[358] The Commission stated that its regulations pertaining to LEOs ''are intended to reconcile the requirement that the rates for purchases equal the utilities' avoided costs with the need for qualifying facilities to be able to enter contractual commitments based, by necessity, on estimates of future avoided costs.'' [359] Further, the Commission agreed with the ''need for certainty with regard to return on investment in new technologies.'' [360] The Commission stated its belief that any overestimations or underestimations ''will balance out.'' [361]

233. The provision that QFs be permitted to fix their rates for the entire term of a contract or other LEO has proved to be one of the most controversial aspects of the Commission's PURPA Regulations. Some commenters at the Technical Conference submitted data indicating that energy prices have declined in recent years, leaving the fixed energy portion of the QF rate, even when levelized, well above market prices that likely would represent the purchasing electric utility's actual avoided energy costs at the time of delivery.[362] Based on this concern, some commenters recommended that the Commission allow states to ''price generation [energy] from QFs at market prices, and to update those prices regularly so that the prices for [QFs] are not burdensome on customer rates'' and that the Commission should limit avoided cost energy rates in a LEO to no higher than avoided cost rates at the time of delivery.[363] QFs, in turn, argued that elimination of the option to fix QF rates for the term of a contract would threaten a QF's ability to obtain financing.[364]

b. NOPR Proposal

234. In the NOPR, the Commission proposed to revise 18 CFR 292.304(d) to permit a state to limit a QF's option to elect to fix at the outset of a LEO the energy rate for the entire length of its contract or LEO, and instead allow the state the flexibility to require QF energy

[356] *See* 18 CFR 292.304(b)(5). Rates calculated at the time of a LEO (for example, a contract) do not violate the requirement that the rates not exceed avoided costs if they differ from avoided costs at the time of delivery.

[357] 18 CFR 292.304(d)(2)(ii).

[358] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 (justifying the rule on the basis of ''the need for certainty with regard to return on investment in new technologies'').

[359] *Id.*

[360] *Id.*

[361] *Id.*

[362] *See* Alliant Energy Comments, Docket No. AD16–16–000, at 5 (Nov. 7, 2016) (''Current market-based wind prices in the Iowa region of MISO are approximately 25 [percent] lower than the PURPA contract obligation prices [Interstate Power and Light Company] is forced to pay for the same wind power for long-term contracts entered into as of June 2016. As a result, PURPA-mandated wind power purchases associated with *just one project* could cost Alliant Energy's Iowa customers an incremental $17.54 million above market wind prices over the next 10 years.'') (emphasis in original); EEI Supplemental Comments, Docket No. AD16–16–000, attach. A at 3–4 (June 25, 2018) (EEI Supplemental Comments) (''On August 1, 2014, a 10-year fixed price contract at the Mid-Columbia wholesale power market trading hub was priced at $45.87/MWh. On June 30, 2016, the same contract was priced as $30.22/MWh, a decline of 34 [percent] in less than two years. However, over the next 10 years, PacifiCorp has a legal obligation to purchase 51.9 million MWhs under its PURPA contract obligations at an average price of $59.87/MWh. The average forward price curve for the Mid-Columbia trading hub during the same period is $30.22/MWh, or 50 [percent] below the average PURPA contract price that PacifiCorp will pay. The additional price required under long-term fixed contracts will cost PacifiCorp's customers $1.5 billion above current forward market prices over the next 10 years.''); Comm'r Kristine Raper, Idaho Commission Comments, Docket No. AD16–16–000, at 3–4 (filed June 30, 2016) (''Idaho Power demonstrated that the average cost for PURPA power since 2001 has exceed the Mid-Columbia (Mid-C) Index Price and is projected to continue to exceed the Mid-C price through 2032. Likewise, PacifiCorp's levelized avoided cost rates for 15-year contract terms in Wyoming shows a decrease of approximately 50 [percent] from 2011 through 2015 (from approximately $60 per megawatt-hour to less than $30 per megawatt-hour).'').

[363] EEI Supplemental Comments, attach. A at 4; *see also* Southern Company Comments, Docket No. AD16–16–000, at 7 (filed June 30, 2016) (''[T]he avoided energy cost payment to the QF should be based on actual avoided energy cost at the time the QF delivers energy.'').

[364] *See* Technical Conference, Docket No. AD16–16–000, Tr. 26:22–25, 27:1–3 (June 29, 2016) (filed July 8, 2016) (Technical Conference Tr.) (Solar Energy Industries) (''The Power Purchase Agreement is the single most important contract of the development and financing of an energy project that's not owned by a utility. Without the long-term commitment to buy the output of that agreement at a fixed price, there is no predictable stream of revenue. Without a predictable stream of revenues, there is no financing. Without any financing, there is no project.'').

rates to vary during the term of the contract. However, under the proposed revisions to 18 CFR 292.304(d), a QF would continue to be entitled to a contract with avoided *capacity* costs calculated and fixed at the time the contract or LEO is incurred. Only the *energy* rate in the contract or LEO could be required by a state to vary. Further, the NOPR did not propose to obligate states to require variable avoided cost energy rates—they would retain the ability to allow the QF's energy rate be fixed at the time the LEO is incurred.[365]

235. The Commission preliminarily found compelling the record evidence that overestimations have not been adequately balanced by underestimations in past years. Further, it appeared to the Commission that this trend may persist into the future with the continuing general decline in the cost of both wind and solar generation.[366] Consequently, the Commission found that it may be necessary to allow states to provide for a variable energy rate in order to reflect more accurately the purchasing electric utility's avoided costs and therefore to satisfy the statutory requirement that QF rates not exceed the utility's avoided cost and ''be just and reasonable to the electric consumers of the electric utility and in the public interest.'' [367]

236. The Commission acknowledged that the current PURPA Regulations allowing a QF to fix its rates for the life of a contract or LEO were based on the recognition that fixed rates are beneficial for obtaining financing for QF projects. The Commission also recognized that QF developers have continued to assert that they require fixed rates to finance new projects. However, the Commission stated that it did not view the proposed modification to the PURPA Regulations as materially affecting the ability of QFs to obtain financing for several reasons.[368]

237. First, the Commission expressed its understanding that fixed energy rates are not generally required in the electric industry in order for electric generation facilities to be financed. For example, RTO/ISO capacity markets provide only for fixed capacity payments, leaving capacity owners to sell their energy into the organized electric markets at LMPs that vary based on market conditions at the time the energy is delivered. The Commission stated that these fixed capacity and variable energy payments have been sufficient to permit the financing of significant amounts of new capacity in the RTOs and ISOs.[369] Testimony presented at the Technical Conference similarly showed that non-QF independent power projects located outside of RTOs enter into contracts with fixed capacity and variable energy prices.[370] Other comments at the Technical Conference suggested that a fixed capacity charge likewise would be adequate for financing a QF project.[371]

238. The Commission further noted that there are financial products available, such as contracts for differences, which allow generation owners to hedge their exposure to fluctuating energy prices.[372] The Commission stated that financial products can provide additional comfort to lenders regarding the level of energy rate revenues that a QF can expect from the energy it delivers, in addition to the fixed capacity payments the QF is entitled to receive under its contract.[373]

239. The Commission also explained that, although it may have been true at the time the Commission promulgated its PURPA Regulations in 1980 that QFs needed to fix their energy rate for the term of their contract in order to obtain financing of their facilities, there is evidence that this no longer is true. This evidence comes in the form of data, described below, showing that independent generators that have not qualified as QFs under PURPA (including renewable resources that could qualify as QFs but have not sought QF status) have been able to obtain financing for new facilities. The Commission stated that the fact that owners of such facilities, which do not have recourse to the avoided cost rate provisions of PURPA, have been able to obtain financing for new projects is relevant to the question of whether the existing PURPA avoided cost provisions—including the requirement to enter into contracts with fixed energy rates—are necessary for QFs to obtain financing.[374]

240. For example, EIA data showed that, since 2005, QFs have made up only 10% to 20% of all renewable resource capacity in service in the United States, demonstrating that most renewable resources no longer need to rely on PURPA avoided cost rates to sell their output economically.[375] EIA data also showed that net generation of energy by non-utility owned renewable resources in the United States escalated from 51.7 terawatt hours (TWh) in 2005 when EPAct 2005 was passed, to 340 TWh in 2018. The Commission further observed that, while much of this growth was in states located in RTOs/ISOs, there also was significant growth of non-utility renewable generation in other states. For example, net generation by non-utility renewable resources in the region defined by EIA as the Mountain State region [376] increased from 3.6 TWh in 2005 to 19.5 TWh in 2012, and to 42.5 TWh in 2018. Pacific Northwest (Oregon and Washington) net non-utility generation from renewable resources increased from 1.5 TWh in 2005, to 8.7 TWh in 2012, and to 10.6 TWh in 2018.[377]

241. The Commission found that EIA data on independently-owned natural gas-fired generation capacity told a similar story. Natural gas-fired capacity without the requisite cogeneration technology cannot qualify as qualifying small power production or cogeneration, and thus most of this capacity would not be within the scope of the PURPA avoided cost rate provisions. The Commission cited to EIA data showing that, in 2018,

[365] NOPR, 168 FERC ¶ 61,184 at P 67.

[366] *Id.* P 68 (citing EIA, Today in Energy, *Average U.S. construction costs for solar and wind continued to fall in 2016* (Aug. 8, 2018), *https://www.eia.gov/todayinenergy/detail.php?id=36813* (''Based on 2016 EIA data for newly constructed utility-scale electric generators (those with a capacity greater than one megawatt) in the United States, annual capacity-weighted average construction costs for solar photovoltaic systems and onshore wind turbines declined . . . .'')).

[367] *Id.* P 68 (internal quotations omitted) (citing 16 U.S.C. 824a–3(b)(1)).

[368] *Id.* P 69.

[369] *Id.* P 70 (citing Monitoring Analytics, LLC., *Third Quarter, 2018 State of the Market Report for PJM, January through September,* at 249, Table 5–6 (Nov. 8, 2018), *http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2018/2018q3-som-pjm.pdf* (over 23,000 MW of new capacity constructed in PJM Interconnection, L.L.C. since 2007–2008; including over 16,000 MW of new capacity added in the last four years)).

[370] *Id.* (citing Technical Conference Tr. at 167–69 (Southern Company) (''So if we enter into a bilateral contract with an independent power producer for combustion turbine or combined cycle capacity, we don't fix the energy price. The capacity payment is a fixed payment. That's their fixed [stream]. The energy price is typically indexed to the price of natural gas.''); *id.* at 178 (American Forest & Paper Association) (''Now, you sign a long-term IPP contract. That contract [has] got a variable energy cost in it.'')).

[371] *Id.* P 70 (citing Solar Energy Industries Comments, Docket No. AD16–16–000, at 3 (filed June 30, 2016) (''Developers need rates for such sales of *energy and/or capacity* to be fixed.'') (emphasis added)).

[372] *Id.* P 72 (citing *Elec. Storage Participation in Mrkts. Operated by Reg'l Transmission Org. and Independent Sys. Operators,* Order No. 841, 162 FERC ¶ 61,127, at P 299 (2018) (noting that ''market participants that purchase energy from the RTO/ISO markets . . . may enter into bilateral financial transactions to hedge the purchase of that energy'')).

[373] *Id.* P 72.

[374] *Id.* P 73.

[375] *Id.* P 74 (citing EIA, Today in Energy, *North Carolina has More PURPA-Qualifying Solar Facilities than any other State,* figure titled *PURPA qualifying facilities (1980–2015) percent of total renewable capacity* (Aug. 23, 2016), https://eia.gov/todayinenergy/detail.php?id=27632).

[376] Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

[377] NOPR, 168 FERC ¶ 61,184 at P 74.

approximately 44% of all energy produced by natural gas-fired generation in the United States was generated by independently-owned capacity.[378] The total amount of energy produced in 2018 by independently-owned natural gas-fired generation was 651 TWh, an increase of 13.7% from 2017.[379] Again, the percentage of independently-owned natural gas generation outside of RTOs/ISOs was lower than in RTOs/ISOs, but still was significant. In the Mountain State region, 21.4% of the energy produced by natural gas-fired generation in 2018 was produced by independently-owned capacity, and in Oregon and Washington 45.4% of natural gas-fired energy was produced by independently-owned capacity.[380] From this, the Commission concluded that independent owners of non-QF generation have been, and continue to be, able to obtain financing for their facilities.[381]

242. The Commission did not suggest that this evidence supports the conclusion that substantial non-QF capacity is being financed and constructed without any form of fixed revenue to support financing. Rather, the Commission concluded that the evidence demonstrated that the existing PURPA avoided cost rate provisions are not necessary for some independent power generators to put in place contractual arrangements, including fixed revenue streams, that are sufficient to obtain financing. The Commission reasoned that QFs, which have the ability to take advantage of PURPA's mandatory purchase requirements, should be better positioned than non-QFs to negotiate the necessary contractual arrangements for financing. Moreover, the Commission noted that QFs are equally as well positioned as non-QF independent generators to take advantage of federal and state incentives designed to encourage the construction of renewable resources. [382]

243. Further, the Commission pointed to evidence that the desire to limit the effect of fixed QF contract rates had directly led to PURPA implementation issues that affected QF financing in other respects, particularly with respect to the length of QF contracts.[383] For example, a commissioner of the Idaho Commission testified at the Technical Conference that the Idaho Commission's decision to limit QF contracts to a two-year term was based on the Idaho Commission's concern that longer contract terms at fixed rates would lead to payments above avoided costs.[384] Similarly, Southern Company testified that the fixed rate requirement is ''resulting in . . . typically shorter contract term lengths.'' [385] Golden Spread Electric Cooperative recommended that, if the fixed rate requirement is not eliminated, the Commission permit shorter contract terms, ''as short as one-year or three years at most.'' [386]

244. Finally, the Commission addressed one particular standard form of QF contract rate currently employed by a number of utilities, which is a one-part rate, applicable to each MWh of energy delivered by the QF. This one-part rate is calculated to reflect both avoided capacity costs and avoided energy costs. Contracts employing such rates also typically impose a must purchase obligation on the purchasing utility. The Commission stated that its proposed rule was not intended to prevent states from implementing such an approach to setting QF contract rates in the future. The Commission proposed that, to the extent a state determines to establish a one-part QF contract rate that recovers both avoided capacity and avoided energy costs, the rate must continue to be subject to the QF's option to select a fixed rate for the term of the contract, as provided in 18 CFR 304(d)(2)(ii). Any requirement to impose a variable energy QF contract rate would need to be accomplished through a multi-part rate that includes separate avoided capacity cost rates and avoided energy cost rates.[387]

c. General Comments on the NOPR Proposal

i. Comments in Support of NOPR Proposal

245. Several commenters support the NOPR proposal to allow energy rates to vary in QF contracts and other LEOs, arguing it will reduce overpayments and protect customers.[388] In that regard, Duke Energy asserts that the primary factor behind overpayment has been the requirement to offer fixed avoided cost energy rates during a period of rapidly declining energy prices.[389] Several other commenters similarly cite to the general decline of energy prices coupled with the fact that QFs have been able to lock in rates over the life of a contract or other LEO as reasons for their support of the NOPR proposal.[390]

246. Several commenters also support the NOPR's variable rate proposal because it will allow states greater flexibility to determine avoided cost rates accurately and to meet PURPA's consumer protection goals.[391] LG&E/KU states that such flexibility is appropriate and necessary to meet the statutory requirement that ratepayers not pay a rate that exceeds the electric utility's incremental cost of alternative energy.[392] NorthWestern argues that providing such flexibility will assist in guaranteeing that customers are held harmless by purchases of QF power.[393]

247. Supporters of the NOPR variable rate proposal also commented on specific aspects of the proposal. These comments are discussed in more detail in the following sections.

ii. Comments in Opposition to NOPR Proposal

248. Several commenters oppose the NOPR variable energy rate proposal.[394]

[378] NOPR, 168 FERC ¶ 61,184 at P 75 (citing EIA, *Electric Power Monthly with Data for December 2018,* at tbl. 1.7.B, *https://www.eia.gov/electricity/monthly/current_month/epm.pdf.*).

[379] *Id.*

[380] *Id.*

[381] *Id.*

[382] *Id.* P 76.

[383] *Id.* P 65 (citing Natural Resources Defense Council Comments, Docket No. AD16–16–000, at 4 (filed June 30, 2016)).

[384] *Id.* P 65 (citing Technical Conference Tr. at 142–43 (Idaho Commission) (''No matter the starting point, allowing QFs to fix their avoided cost rates for long terms results in rates which will eventually exceed and overestimate avoided cost rates into the future. The longer the term, the greater the disparity. . . . [The Idaho Commission] recently reduced PURPA contract lengths to two years in order to correct the disparity. We didn't reduce contract lengths to kill PURPA. We did it to allow periodic adjustment of avoided cost rates.'')).

[385] *Id.* P 65 (citing Technical Conference Tr. at 202 (Southern Company)).

[386] *Id.* P 65 (citing Golden Spread Electric Cooperative Comments, Docket No. AD16–16–000, at 10 (filed June 30, 2016)).

[387] *Id.* P 81.

[388] Conservative Action Comments at 1; Consumer Energy Alliance Comments at 2; EEI Comments at 30–31; Idaho Power Comments at 7–8; Idaho Commission Comments at 4; LG&E/KU Comments at 3; NextEra Comments at 5; *see also* Alaska Power Comments at 1; Arizona Public Service Comments at 3–4; Basin Comments at 6–8; Chamber of Commerce Comments at 4; Freedom Center Comments at 1–2; R Street Comments at 5; Tax Reform Comments at 1–2.

[389] Duke Energy Comments at 5–7.

[390] Consumer Energy Alliance Comments at 2; Idaho Power Comments at 7–8; Idaho Commission Comments at 4; LG&E/KU Comments at 3; Ohio Commission Energy Advocate Comments at 4.

[391] Alliant Energy Comments at 9; Duke Energy Comments at 8–9; LG&E/KU Comments at 4; MA DPU Comments at 1, 7; NorthWestern Comments at 6–7.

[392] LG&E/KU Comments at 4.

[393] NorthWestern Comments at 6–7.

[394] Allco Comments at 9–11; AllEarth Comments at 2; Biogas Comments at 2; BluEarth Comments at 2; CARE Comments at 3–5; Biological Diversity Comments at 8; ELCON Comments at 18, 21–23; EPSA Comments at 6–13; Massachusetts AG Comments at 8–9; North Carolina DOJ Comments at 2–6; North Carolina Commission Staff Comments at 2–4; New England Hydro Comments at 8; NIPPC, CREA, REC, and OSEIA Comments at 29–48; North American-Central Comments at 4–6; Public Interest Organizations Comments at 6–7, 27–51; Resources for the Future Comments at 4–7; Solar Energy Industries Comments at 28–38; SC Solar Alliance

Continued

In addition to objections as to specific aspects of that proposal, which are discussed in the following sections, some commenters raise threshold issues regarding this proposal.

249. NIPPC, CREA, REC, and OSEIA cite to the PURPA Conference Report as expressing Congress's intent that QFs be entitled to long-term fixed energy rates. Specifically, they cite to the statement in the Conference Report that ''the Commission and States should look to the reliability of that power to the utility and the cost savings to the utility which may result at some later date by reason of supply to the utility at that time of power from the cogenerator or small power producer.'' [395] According to NIPPC, CREA, REC, and OSEIA, this statement shows that ''Congress also recognized that attempts to set the rates based on the avoided costs at the time of delivery would likely be insufficient to encourage such facilities.'' [396]

250. Harvard Electricity Law asserts that the Commission may not authorize state regulators to change rates in existing contracts.[397] Harvard Electricity Law then asserts that the Commission: (1) Attempts to portray its agenda as consistent with Congressional intent by providing a skewed summary of the legislative history; (2) presents an unsupported statement that its rules will ''continue to encourage'' QF development, which ignores the administrative record and fails to account for regulatory changes since PURPA's enactment; (3) misreads its own rules in claiming that repeal is necessary to protect consumers; and (4) relies on a finding that fixed price energy contracts are not necessary to encourage QFs that is based on irrelevant data and questionable assumptions that are not grounded in reasoned decision making.

251. Harvard Electricity Law also asserts that allowing long-term contracts to include variable rates is contrary to PURPA.[398] In support of this assertion, Harvard Electricity Law cites to two decisions which it claims stand for the proposition that the Commission's proposed rule would impose forbidden utility-type regulation on QFs.[399]

252. NIPPC, CREA, REC, and OSEIA and Public Interest Organizations assert that it is unclear whether independent power producers that have obtained financing did so with short-term variable rate conditions.[400] North American-Central argues that, if a variable rate will preclude a QF from receiving financing in the first place, it is irrelevant that a state might be more willing to offer a longer-term contract.[401]

iii. Commission Determination

253. In this final rule, we adopt without modification the NOPR variable rate proposal. We find that setting QF energy avoided cost contract and other LEO rates at the level of the purchasing utility's avoided energy costs at the time the energy is delivered is consistent with PURPA, which limits QF rates to the purchasing utility's avoided costs. Indeed, a variable energy avoided cost approach is a more accurate way to ensure that payments to QFs equal, but do not exceed, avoided costs.[402] It is inevitable that, in contrast, over the life of a QF contract or other LEO a fixed energy avoided cost rate, such as that used in past years, will deviate from actual avoided costs.

254. As described in more detail in the following sections, the record overwhelmingly supports our conclusions that long-term forecasts of avoided energy costs are inherently less accurate, and that states should be given the flexibility to rely on a more accurate variable avoided cost energy rate approach. Further, there are numerous instances where overestimates and underestimates have not balanced out.[403] When that has occurred, consumers have borne the brunt of the overpayments, which subsidized QFs, in contravention of Congressional intent and the Commission's expectations.

255. Given that PURPA section 210(b) prohibits the Commission from requiring QF rates in excess of avoided costs,[404] this record evidence supports our decision to give the states the flexibility to require variable avoided cost energy rates in QF contracts and other LEOs to prevent QF rates from exceeding avoided costs. We discuss specific aspects of the variable energy rate provisions below, but at the outset address certain threshold issues raised in the comments.

256. We reiterate the points made in detail above in Section II. The variable energy avoided cost rate provision is not based on any determination that the Commission's rules no longer should encourage QF development. The question of whether QFs should continue to be encouraged is a question for Congress. Rather, we are revising the PURPA Regulations by giving states the flexibility to require variable avoided cost energy rates in QF contracts and other LEOs in order to better comply

Comments at 4–10; Southeast Public Interest Organizations Comments at 9–18; sPower Comments at 10–13; State Entities Comments at 2–3; Mr. Mattson Comments at 26–27; Two Dot Wind Comments at 11–13; Western Resource Councils Comments at 2.

[395] NIPPC, CREA, REC, and OSEIA Comments at 27 (quoting Conf. Rep. at 98–99).

[396] *Id.*

[397] Harvard Electricity Law Comments at 23 (citing *API,* 461 U.S. at 414).

[398] *Id.* at 28.

[399] *Id.* at 29 (citing *Freehold Cogeneration Assoc.* v. *Bd. of Regulatory Comm'rs. of N.J.,* 44 F.3d 1178, 1193 (3d Cir. 1995) (*Freehold Cogeneration*); *Smith Cogeneration Mgt.* v. *Corp. Comm'n.,* 863 P.2d 1227 (Okla. 1993) (*Smith Cogeneration*)).

[400] NIPPC, CREA, REC, and OSEIA Comments at 46.

[401] North American-Central Comments at 5–6.

[402] 16 U.S.C. 824a–3(b)(1).

[403] *See* Duke Comments at 6 (Duke's QF contracts cost $4.66 billion but its ''actual current avoided costs'' are $2.4 billion); Idaho Power Comments at 10–11 (''The cost of PURPA generation contained in Idaho Power's base rates, on a dollars per MWh basis, is not just greater than Mid-C market prices, it is greater than all the net power supply cost components currently recovered in base rates. Idaho Power's average cost of PURPA generation included in base rates is $62.49/MWh. At $62.49/MWh, the average cost of PURPA purchases is greater than the average cost of FERC Account 501, Coal at $22.79/MWh; greater than FERC Account 547, Natural Gas at $33.57/MWh; greater than FERC Account 555, Non-PURPA Purchases at $50.64/MWh; and significantly greater than what is being sold back to the market as FERC Account 447, Surplus Sales at $22.41/MWh.''); Portland General Comments at 5 (''for a typical 3 MW Solar QF project that incurred a LEO in 2016 and reaches commercial operations three years later, [Portland General's] customers would pay 67% more for the project's energy than if the 2019 avoided cost rate had been used. As a result of this lag, [Portland General's] customers would pay an additional $1.6 million more for the energy from the QF facility over the 15-year contract term.''); *see also* NOPR, 168 FERC 61,184 at P 64 n.101 (citing Alliant Energy, Comments, Docket No. AD16–16–000, at 5 (filed Nov. 7, 2016) (''Current market-based wind prices in the Iowa region of MISO are approximately 25% lower than the PURPA contract obligation prices [Interstate Power and Light Company] is forced to pay for the same wind power for long-term contracts entered into as of June 2016. As a result, PURPA-mandated wind power purchases associated with *just one project* could cost Alliant Energy's Iowa customers an incremental $17.54 million above market wind prices over the next 10 years.'') (emphasis in original); EEI Supplemental, Comments, attach. A at 3–4 (''On August 1, 2014, a 10-year fixed price contract at the Mid-Columbia wholesale power market trading hub was priced at $45.87/MWh. On June 30, 2016, the same contract was priced as $30.22/MWh, a decline of 34% in less than two years. However, over the next 10 years, PacifiCorp has a legal obligation to purchase 51.9 million MWhs under its PURPA contract obligations at an average price of $59.87/MWh. The average forward price curve for the Mid-Columbia trading hub during the same period is $30.22/MWh, or 50% below the average PURPA contract price that PacifiCorp will pay. The additional price required under long-term fixed contracts will cost PacifiCorp's customers $1.5 billion above current forward market prices over the next 10 years.''); Comm'r Kristine Raper, Idaho Commission Comments, Docket No. AD16–16–000, at 3–4 (filed June 30, 2016) (''Idaho Power demonstrated that the average cost for PURPA power since 2001 has exceed the Mid-Columbia (Mid-C) Index Price and is projected to continue to exceed the Mid-C price through 2032. Likewise, PacifiCorp's levelized avoided cost rates for 15-year contract terms in Wyoming shows a decrease of approximately 50% from 2011 through 2015 (from approximately $60 per megawatt-hour to less than $30 per megawatt-hour).'').

[404] This prohibition is described in Section IV.A.

with Congress's clear instruction in PURPA that the Commission may not require QF rates in excess of a purchasing utility's avoided costs.

257. By its very nature, the question of fixed versus variable energy rates is a question of how risk from increases in avoided energy costs over the life of a QF contract or other LEO should be allocated. Answering this question requires the Commission to allocate this risk either to (i) customers of electric utilities, or (ii) QFs and their investors and lenders. But the Commission does not have unlimited discretion in how it resolves the question. Congress in PURPA section 210(b) provided guidance to the Commission in how it should perform that allocation—by mandating that the Commission cannot adopt a rule that provides for a rate that exceeds the incremental cost of alternative electric energy.[405]

258. Opponents of variable avoided cost energy rates urge the Commission to continue placing this risk on the customers of electric utilities, as it did in the past, by retaining the option for QFs to fix their avoided cost energy rates in their contracts or LEOs notwithstanding record evidence, discussed elsewhere in this final rule, that fixed energy rates compared to actual avoided costs have not balanced out over time. But, after consideration of the record, the Commission has decided instead to allow states to reduce the risk to customers by giving states the flexibility to require variable avoided cost energy rates in QF contracts and LEOs. The Commission's determination ensures that the PURPA Regulations continue to be consistent with the statutory avoided cost rate cap in PURPA section 210(b), coupled with the directive in the Conference Report that customers of utilities not be required to subsidize QFs.[406]

259. Third, there is no merit to the contention that the PURPA Conference Report expresses Congressional intent that QFs are entitled to long-term fixed energy rates. The statement in the Conference Report cited by NIPPC, CREA, REC, and OSEIA does not support this contention.[407] The example provided in the PURPA Conference Report was of a utility owning a hydroelectric generating facility. Congress hypothesized that this utility might be able to avoid drawing down its reservoir as a result of a purchase from a QF, and thereby be able to generate electricity from the hydroelectric facility at a later date rather than running a more expensive fossil fuel unit at that later date. Congress stated that the avoided cost in its example should be based on the cost of the more expensive fossil unit whose operation was avoided at a later date rather than the avoided cost at the time the QF delivered its energy.[408]

260. While Congress recognized that the better measure of avoided cost in that scenario might be the cost of the alternative fossil fuel unit that would not be run at that later date,[409] nothing in the quoted section of the PURPA Conference Report suggests that Congress intended the Commission to require that all avoided cost energy rates be fixed at the outset for the life of a QF contract or other LEO. And nothing in the revision being implemented in this final rule would prohibit a state from calculating a QF's avoided cost energy rate for a QF contract or LEO in the manner suggested in the PURPA Conference Report or, indeed, in the manner the Commission has long allowed, if a state determined that such an approach best reflects the purchasing electric utility's avoided costs.

261. Fourth, the variable avoided cost energy rate provision adopted herein does not run afoul of the *Freehold Cogeneration* and *Smith Cogeneration* cases cited by Harvard Electricity Law.[410] Those decisions, which overturned state avoided cost determinations allowing for changes in QF rates, were based on the provision in the original PURPA Regulations giving QFs the option to select contracts with long-term fixed avoided cost rates.[411] Indeed, the *Smith Cogeneration* decision quotes at length from the explanation in Order No. 69 of the Commission's justification for its requiring in its regulations fixed avoided cost rates in QF contracts and LEOs.[412] Neither decision suggests that PURPA would prevent the Commission from revising its regulations to allow states the flexibility to require variable avoided cost energy rates, as the Commission is doing here.

262. Harvard Electricity Law also relies on *Freehold Cogeneration* and *Smith Cogeneration* to assert that the Commission is imposing ''utility-type'' regulation in violation of Congressional intent as expressed in the PURPA Conference Report.[413] However, those holdings do not address the changes the Commission is implementing here. By adopting a provision that allows states the option to require variable avoided cost energy rates, we are not mandating ''utility-type'' regulation. The PURPA Conference Report states that: ''It is not the intention of the conferees that [QFs] become subject . . . to the type of examination that is traditionally given to electric utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power.''[414] Our action today is consistent with that statement; we are not subjecting QFs to the same type of examination that is traditionally given to electric utility rate applications (*e.g.,* cost-of-service rate regulation).

263. Indeed, the regulation adopted today does not subject QF rates to any examination whatsoever of the costs incurred by QFs in producing and selling power. Rather, the variable avoided cost energy rate provision applicable to QF contracts and other LEOs that is adopted in this final rule sets QF rates based on the avoided costs

[405] 16 U.S.C. 824a–3(b); *see also* 16 U.S.C. 824a–3(d); 18 CFR 292.101(b)(6), 292.304(b)(2).

[406] Conf. Rep. at 98 (''The provisions of this section *are not intended to require the rate payers of a utility to subsidize* cogenerators or small power produc[er]s.'') (emphasis added).

[407] *See* NIPPC, CREA, REC, and OSEIA Comments at 27 (quoting Conf. Rep. at 98–99).

[408] *Id.* at 98–99 (''In interpreting the term 'incremental cost of alternative energy,' the conferees expect that the Commission and the states may look beyond the cost of alternative sources which are instantaneously available to the utility. Rather, the Commission and states should look to the reliability of that power to the utility and the cost savings to the utility which may result at some later date by reason of supply to the utility at that time of power from the cogenerator or small power producer; for example an electric utility which owns a source of hydroelectric power and which is offered the sale of electric energy from a cogenerator or small power producer might, if measured over the short term, have a low incremental cost of alternative power because of its access to hydropower; however, it may be the case that by purchasing from the cogenerator or small power producer and saving hydropower for later use, the utility can avoided the use of expensive electric energy generated by fossil fired units during later months of its seasonal generation cycle. Thus, viewed over the longer period of time, the incremental cost of alternative electric energy might be substantially higher than that measured by the instantaneously available hydropower.'').

[409] Under the approach adopted in this final rule, with the flexibility granted to states to adopt—but not a mandate directing states to adopt—variable avoided cost energy rates for QF contracts and other LEOs, states can adopt a pricing approach that best fits their circumstances, including adopting the pricing approach described by the Conference Report to address the circumstances described by the Conference Report.

[410] Harvard Electricity Law Comments at 29 (citing *Freehold Cogeneration,* 44 F.3d at 1193; *Smith Cogeneration,* 863 P.2d at 1227).

[411] *See Smith Cogeneration,* 863 P.2d at 1241 (holding that allowing reconsideration of established avoided costs ''makes it impossible to comply with PURPA *and FERC regulations requiring established rate certainty for the duration of long term contracts* for qualifying facilities that have incurred an obligation to deliver power'') (emphasis added); *Freehold Cogeneration,* 44 F.3d at 1193 (relying on *Smith Cogeneration* analysis that ''that PURPA *and FERC regulations* preempted the State Commission rule'') (emphasis added).

[412] *Smith Cogeneration,* 863 P.2d at 1240.

[413] Harvard Electricity Law Comments at 30.

[414] Conf. Rep. at 97.

of the purchasing utility. In no sense can this variable avoided cost energy rate provision be characterized as imposing utility-style regulation on the QFs themselves.

264. Finally, we agree with Harvard Electricity Law that state regulators may not change rates in existing QF contracts or other existing LEOs.[415] By its terms, the variable energy avoided cost provision adopted in this final rule applies only prospectively to new contracts and new LEOs entered into after the effective date of this final rule. Nothing in the final rule, including in this preamble, should be read as sanctioning the modification of existing fixed-rate QF contracts and LEOs.

d. Whether the Current Approach Has Resulted in Payments to QFs in Excess of Avoided Costs

i. Comments in Support of NOPR Proposal

265. Duke Energy states that its experience shows the Commission's original assumption that overestimations and underestimations will balance out over time was incorrect. From 2012 to 2017, Duke Energy states that it experienced explosive growth in solar QF contracts, and entered into at a time of rapidly declining natural gas prices—which drove down Duke Energy's avoided costs. Duke Energy states that, as of July 1, 2019, it has almost 4,000 MW of QF power under contract and in commercial operation. Duke Energy claims the total estimated financial obligation on Duke Energy's retail and wholesale customers to pay for this QF power is approximately $4.66 billion over the next approximately 15 years. If the contracts had been permitted to contain rates that mirrored the utilities' declining incremental costs either to generate that electric energy itself or to purchase alternative electric energy, *i.e.,* Duke Energy's ''actual current avoided costs,'' Duke Energy asserts that the contracts would be valued at $2.4 billion. Duke Energy claims that, among the factors contributing to this overpayment of $2.26 billion for the remainder of these QF contracts, the primary factor has been the requirement to offer fixed avoided cost energy rates during a period of rapidly declining energy prices.[416]

266. EEI argues that relying on certain avoided cost methods, such as the costs of a proxy unit at a fixed point in time, may result, and has resulted, in the over estimation of future energy prices, leaving customers saddled with uneconomic PURPA contracts. According to EEI, the Commission's variable rate proposal will help ensure that the variable energy rate more accurately reflects the electric utility's actual avoided cost of energy so that rates for customers are just and reasonable. EEI describes this change as important for states, especially those in RTO/ISO markets, that elect to have the avoided cost rate set at LMP.

267. EEI also submitted with its comments a study performed by Concentric Energy Advisors showing that the avoided cost rates in the sample of solar and wind QF contracts they reviewed generally exceeded rates that are realized in competitive markets for solar and wind energy. According to that report, the total overpayment ranged between $2.7 billion and $3.9 billion. Several other commenters also cited the Concentric Energy Advisors report for the proposition that consumers nationwide have overpaid for QF contracts between 2009–2018.[417] Berkshire Hathaway represents that PURPA contracts held by PacifiCorp will cost customers more than $1.2 billion above projected market costs over the next 10 years.[418]

268. Massachusetts DPU argues that a 10-year, fixed energy rate based on current New England wholesale energy market prices is highly likely to diverge from actual energy market prices over the ten-year contract term and could significantly harm ratepayers.[419] Mr. Transeth represents that Consumers Energy's QF contracts are priced between 30 to 50% higher than their current market value.[420]

269. APPA supports the variable energy rate proposal because the discrepancy between administratively set, locked-in, long-run avoided costs and actual market prices for the purchase of equivalent energy can be enormous, as demonstrated by the evidence submitted in the Technical Conference. According to APPA, were continued development of the IPP and renewable industries in jeopardy, the Commission might have grounds to conclude that enabling QFs to lock in energy payments over the course of their agreement is needed in order to bolster these resources, but the growth in the IPP and renewables industries in RTOs/ISOs indicate otherwise.[421]

270. Commissioner O'Donnell asserts that the Montana Public Service Commission has addressed concerns about overpayments by shortening QF contract length from 25 years to 15, which has resulted in litigation currently pending before the Montana Supreme Court. Commissioner O'Donnell asserts that, because the energy component of an avoided cost rate reflects the price at which the purchasing electric utility could purchase power on the open market, there is no need to fix that fluid energy component for as long as 25 years.[422]

271. Competitive Enterprise asserts that long-term fixed price rates ''serve only to reward certain financial investors at the expense of consumers, who are forced to pay inflated rates for electricity'' and insists that utilities should only be required to purchase from resources that are needed and competitively priced.[423]

ii. Comments in Opposition to NOPR Proposal

272. Harvard Electricity Law observes that the Commission's examples of contract rates that exceed avoided costs calculated years prior illustrate the general proposition that ''energy forecasts have a manifest record of failure.'' [424] Harvard Electricity Law notes, however, that in issuing Order No. 69, the Commission recognized that industry changes are difficult to forecast, but the Commission nonetheless concluded in Order No. 69 that the possibility that consumers would be harmed by high rates was outweighed by the Commission's duty to encourage QFs.[425] Harvard Electricity Law further claims that the repeal of the fixed-price rule is not necessary to protect consumers from rates in future contracts.[426] Harvard Electricity Law argues that the Commission's rules do not require an annual matching between avoided costs and rates, nor prevent states from setting declining avoided costs (which Order No. 69 explicitly condones).[427]

273. Several commenters argue that the NOPR's assertion of artificially high avoided cost rates is unsupported or

[415] Harvard Electricity Law Comments at 23 (citing *API,* 461 U.S. at 414).

[416] Duke Energy Comments at 6.

[417] Alliant Energy Comments at 7–8; Conservative Action Comments at 1; Duke Energy Comments at 5–7; Mr. Moore Comments at 2; Mr. Transeth Comments at 2.

[418] Berkshire Hathaway Comments at 5.

[419] Massachusetts DPU Comments at 7 (citing NOPR, 168 FERC ¶ 61,184 at 40).

[420] Mr. Transeth Comments at 2.

[421] APPA Comments at 16.

[422] Commissioner O'Donnell Comments at 2.

[423] Competitive Enterprise Comments at 2.

[424] Harvard Electricity Law Comments at 24 (citing Vaclav Smil, *Energy at the Crossroads: Global Perspectives and Uncertainties,* Mass. Inst. Tech., 2003, at 121, 145–149).

[425] Harvard Electricity Law Comments at 24.

[426] *Id.* at 23.

[427] *Id.* at 23–24 (citing Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,881).

relies on flawed data and analysis.[428] For example, NIPPC, CREA, REC, and OSEIA argue that the Commission relied on flawed data and analysis by using actual market prices that resulted after substantial QF penetration (which they assert has reduced power prices).[429]

274. Public Interest Organizations claim that the NOPR's evidence of overestimations is based on a selective choice of years reflecting general wholesale price declines, in which QF contracts were executed just before unforeseen natural gas price declines.[430] Public Interest Organizations argue that these recent electricity price overestimations are not unique to QFs and can be explained by general declines in natural gas prices since the adoption of hydraulic fracturing and the 2007–2009 recession.[431]

275. Public Interest Organizations dispute Alliant's asserted overestimation by claiming that Alliant likely would have procured non-QF energy at the same price and further point out that Alliant does not disclose the data upon which it relies.[432] Public Interest Organizations assert that the Commission similarly erred in relying on EEI's description of overestimations of avoided costs in PacifiCorp's QF contracts because PacifiCorp only compares those prices to the Mid-C hub and does ''not contain an analysis of the long-term balancing of its forecasted avoided energy rates with actual avoided energy costs.'' [433] Public Interest Organizations contend that this comparison implies that PacifiCorp would have relied entirely on the Mid-C hub for all of its needs but for the QF contracts.[434]

276. SC Solar Alliance contests Duke Energy's estimate of $2.26 billion in overpayments for QF power. According to SC Solar Alliance, ''an expert witness for South Carolina's Office of Regulatory Staff, which represents the interests of the using and consuming public in proceedings before the South Carolina Commission, recently testified that Duke's estimation of 'overpayments' to QFs was not reliable and that he 'wouldn't put a whole lot of weight in [Duke's estimate].' '' [435]

277. GridLab attacks the conclusions of the Concentric Report, raising two principal arguments. First, according to GridLab, QF contracts are executed in non-competitive markets where utilities do not perform competitive solicitations. If QF avoided cost pricing is higher than prices set through competitive bidding, GridLab asserts that is because the utility's production costs are higher than competitive prices.[436] Second, GridLab asserts that Concentric has compared two datasets that are different in several ways, most notably project size—with larger projects enjoying economies of scale that result in lower costs. According to GridLab, the difference in project size and its impact on cost is a significant factor that could account for the whole of the reported increase on price.[437]

278. NIPPC, CREA, REC, and OSEIA argue that it was unreasonable for the Commission in the NOPR to assume that electricity price declines are permanent, given recent integrated resource plans (IRP) in the Northwest predicting significantly increased electricity demand and market prices at the Mid-C and Palo Verde hubs.[438] NIPPC, CREA, REC, and OSEIA represent that electricity prices will climb significantly in the Northwest. NIPPC, CREA, REC, and OSEIA also assert that 100% renewable or non-emitting generation mandates and increased electrification of transportation could substantially increase electricity demand. NIPPC, CREA, REC, and OSEIA contend that fixed-price QF contracts protect consumers from the potential for future rising prices, market volatility, market risk, and project risk.[439]

279. Resources for the Future reasons that ''while fixed prices determined [five to ten] years ago would likely exceed current average market prices, that may not be true for fixed prices determined either more recently or in the future.'' [440] Resources for the Future states that, contrary to the NOPR, there is no consensus that wind and solar generation costs will continue to decline because any capital cost declines will be relatively modest and will be offset by declining federal tax credits.[441] Furthermore, Resources for the Future attributes these cost declines to the recent U.S. natural gas boom and points out that this decline is therefore not likely to continue.[442] sPower similarly argues that recent energy price declines will not necessarily continue, especially given expiring tax credits and additional tariffs.[443]

280. Several commenters assert that the risk of overpayments to QFs should be compared to the alternative generation sources used by the utility.[444] For example, ELCON claims that critics who assert that QFs are ''locking-in'' consumers to artificially high rates must acknowledge that utility procurement does exactly the same via the pre-approval process, sometimes for even longer durations. ELCON argues that QFs can only benefit consumers by competing on a level playing field with comparable terms and conditions.[445] North Carolina Commission Staff similarly asserts that the risk of overpayment to QFs should be considered in the context of a utility's long-term commitment to build plants where ''generation decisions are based upon uncertain forecasts that could result in ratepayers bearing the same type of forecast risk from utility plants as they do from QFs.'' [446]

281. According to Solar Energy Industries, the risk from utility generation construction is allocated to ratepayers for the life of these assets regardless of ongoing changes in energy prices, while PURPA was designed to shift this risk away from ratepayers. Solar Energy Industries state that there is no evidence that ratepayers are harmed by long-term QF contracts any more than other long-term contracts or utility recovery of generation assets in their rate base. Solar Energy Industries state that, even though solar prices have declined over time, solar QFs should not be penalized for utility failures to update their avoided cost calculations to keep pace with such declines.[447]

282. The DC Commission states that, with respect to the fact that long-term contracts (*e.g.,* 20 years) using fixed avoided energy costs could create stranded costs potentially due to

[428] NIPPC, CREA, REC, and OSEIA Comments at 30; Public Interest Organizations Comments at 39–40; Public Interest Organizations Comments at 43; Solar Energy Industries Comments at 34–36.

[429] NIPPC, CREA, REC, and OSEIA Comments at 30–31.

[430] Public Interest Organizations Comments at 39–40.

[431] *Id.* at 47–50.

[432] *Id.* at 40–41.

[433] *Id.* at 41 (citing NOPR, 168 FERC ¶ 61,184 at P 64 n.101 (citing EEI Supplemental Comments, Docket No. AD16–16–000, attach. A at 3–4 (June 25, 2018))).

[434] *Id.*

[435] SC Solar Alliance Comments at 7 (quoting Public Service Commission of South Carolina, Docket No. 2019–185 & 186–E, Hearing Transcript Vol. 2 at 596, lines 6–21 (Horii Test.)) (attached as Appendix 1 to SC Solar Alliance Comments).

[436] GridLab Comments at 1–2.

[437] *Id.* at 4.

[438] NIPPC, CREA, REC, and OSEIA Comments at 33–34.

[439] *Id.* at 34–36.

[440] Resources for the Future Comments at 4.

[441] *Id.* at 5.

[442] *Id.* at 4.

[443] sPower Comments at 10–11.

[444] ELCON Comments at 22; North Carolina Commission Staff Comments at 2–3; NIPPC, CREA, REC, and OSEIA Comments at 31; Public Interest Organizations Comments at 40, 43; Solar Energy Industries Comments at 36–38.

[445] ELCON Comments at 22.

[446] North Carolina Commission Staff Comments at 2–3.

[447] Solar Energy Industries Comments at 36–38.

inaccurate projections, the chance of creating stranded costs is substantially reduced when the most up-to-date data regarding avoided energy costs is used. The DC Commission states that, if the contract length is permitted to be flexible, the possibility of stranded costs would be significantly reduced for shorter term contracts.[448] The DC Commission states that, without the worry of stranded costs, there is no need to eliminate the fixed price contract option for QFs.[449]

iii. Commission Determination

283. As explained above, the NOPR proposal to give states the flexibility to require variable energy pricing in QF contracts and other LEOs, instead of providing QFs the right to elect fixed energy prices, was based on the Commission's concern that, at least in some circumstances, long-term fixed avoided cost energy rates have been well above the purchasing utility's avoided costs for energy—a result prohibited by PURPA section 210(b). And the record evidence demonstrates just that, *i.e.,* that QF contract and LEO prices for energy can exceed and have exceeded avoided costs for energy without any subsequent balancing out. In addition to the examples presented in the record of the Technical Conference that were cited in the NOPR, commenters have provided additional examples of such overpayments, as described above.[450] Such evidence has persuaded us that it is necessary to give states the flexibility to address QF contract and LEO rates for energy that exceed avoided costs for energy, while at the same time still allowing states the flexibility to continue requiring long-term fixed avoided cost energy rates in QF contracts and other LEOs when such treatment is appropriate.

284. As Harvard Electricity Law concedes, the examples of QF contract rates that exceed avoided costs that are in the record illustrate the general proposition that ''energy forecasts have a manifest record of failure.'' [451] It is this ''manifest record of failure'' including evidence in the record that the failure has been at the expense of consumers, that drives us to make the change adopted in the final rule.[452]

285. While some commenters challenge the idea that avoided cost energy rates in QF contracts and other LEOs have exceeded actual avoided costs, their arguments largely either concede that overestimations have occurred while arguing that such overestimations impacted purchasing electric utilities just as much as QFs, or attempt to argue that such overestimations were temporary or unusual. For these reasons, they assert that the Commission should not conclude that historical overestimations of avoided cost require a change to the current PURPA Regulations requiring states to allow QFs to fix their avoided costs energy rates for the term of their contracts. These arguments do not cause us to reconsider our determination, for the reasons explained below.

286. First, Harvard Electricity Law's citation to the Commission's original determination in Order No. 69 that it was not necessary to provide for variable avoided cost energy rates carries little weight.[453] The purpose of the NOPR was to reconsider the Commission's determinations made in Order No. 69 in light of changes in circumstances and additional evidence that was not available to the Commission when it issued Order No. 69 in 1980. The record evidence cited above demonstrates that, contrary to the Commission's finding in 1980, overestimations and underestimations of future avoided costs may not even out.[454] Consequently, the Commission's determination in 1980 does not preclude the Commission from changing the rule adopted at that time.

287. We agree with Public Interest Organizations that the recent electricity price overestimations were not unique to QFs and can be explained by general declines in natural gas prices since the adoption of hydraulic fracturing and the 2007–2009 recession.[455] But that is precisely why the estimates of avoided costs reflected in the QF contracts and LEOs were incorrect and why the resulting fixed avoided cost energy rates reflected in such QF contracts and other LEOs resulted in QF rates well above utility avoided costs in violation of PURPA section 210(b); the precipitous decline in natural gas prices caused a corresponding reduction in utilities' energy costs, and thus in their energy avoided costs but this decline was not reflected in the QFs' fixed contract rates that remained at their previous levels.

288. Similarly, arguments from commenters that electric utilities also based resource acquisitions on incorrect forecasts of natural gas prices [456] ignore a key distinction between utility rates and fixed QF rates. Electric utilities may have relied on incorrect natural gas price forecasts to justify the timing and type of their resource acquisitions, as commenters assert. But once an electric utility resource decision was made, their cost-based rate regimes typically obligated the electric utility eventually to pass through to customers any energy cost savings realized as a result of declining natural gas and other fuel prices, as well as any energy cost savings due to lower purchased power rates resulting from the decline in natural gas prices. By contrast, once QF avoided cost energy rates were fixed based on now-incorrect (and now-high) natural gas price forecasts, those energy rates remained fixed for the term of the QFs' contracts and LEOs. Therefore, unlike fixed avoided cost energy rates in QF contracts and LEOs, cost-based electric utility energy rates declined as the cost of natural gas and other fuels and purchased power declined.

289. We also disagree with Public Interest Organizations' assertions that it was improper to have used competitive market hub prices to determine whether fixed QF contract and LEO prices resulted in overpayments as compared to electric utilities' actual avoided costs.[457] We recognize that the competitive market hub prices used in the comparisons may not have precisely reflected the avoided energy costs of all electric utilities located in the same region as the competitive market hub. However, as explained above in the discussion of the use of Market Hub Prices to determine avoided energy costs, competitive market prices in general should reflect the marginal avoided energy costs of utilities with access to such markets. Certainly, those markets generally reflect the marginal cost of energy in the region.[458] The

[448] DC Commission Comments at 8.

[449] *Id.*

[450] *See* Duke Comments at 6; Idaho Power Comments at 10–11; Portland General Comments at 5; NOPR, 168 FERC ¶ 61,184 at P 64 n.101.

[451] Harvard Electricity Law Comments at 24 (citing Vaclav Smil, *Energy at the Crossroads: Global Perspectives and Uncertainties,* Mass. Inst. Tech., 2003, at 121, 145–149).

[452] *See, e.g., supra* P 254 & note 403.

[453] *Id.* at 23–24 (citing Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,881).

[454] *See* Duke Comments at 6; Idaho Power Comments at 10–11; Portland General Comments at 5; NOPR, 168 FERC ¶ 61,184 at 64 n.101.

[455] Public Interest Organizations Comments at 47–50.

[456] ELCON Comments at 22; North Carolina Commission Staff Comments at 2–3; NIPPC, CREA, REC, and OSEIA Comments at 31; Public Interest Organizations Comments at 40, 43; Solar Energy Industries Comments at 36–38.

[457] Public Interest Organizations Comments at 40–41.

[458] A review of recent Mid-C Hub daily spot prices (from Intercontinental Exchange (ICE) *https://www.eia.gov/electricity/wholesale/,* indicates that they reflect the marginal cost of energy in that area since they are usually the result of a significant number of trades (averaging 54 per day), counterparties (averaging 16 per day), and trading volume (averaging 26,714 MWh/day), which usually exceed those of the NP–15 trading hub, an active Western trading hub in Northern California

magnitude of the differences between the market hub prices and the QF contract and LEO prices provides solid evidence that the QF contract and LEO prices used in the comparison were well above actual avoided energy costs at the time the energy was delivered by the QFs, even if the exact magnitude is unclear.

290. We acknowledge that energy prices may increase in the future, as several commenters point out.[459] However, as noted by Harvard Electricity Law, ''energy forecasts have a manifest record of failure.'' [460] Moreover, the fact that energy prices may increase in the future does not eliminate the risk that fixed avoided cost energy rates could still be above actual avoided costs. That is, if the actual increase in energy prices is still lower than the forecasted increase that would form the basis of the fixed avoided cost energy rate, then the fixed avoided cost energy rate will be above actual avoided energy costs. Giving states the flexibility to require variable avoided cost energy rates in QF contracts and in other LEOs will allow states to better ensure that avoided cost energy payments made to QFs will more accurately reflect the purchasing utility's avoided costs regardless of whether energy prices are increasing or declining. We also note that, if energy prices do in fact increase, variable avoided cost energy pricing would protect and even benefit the QF itself, as it would not be locked into a fixed energy rate contract or LEO that would be below the purchasing electric utility's avoided energy cost.

291. Although many commenters agreed that fixed QF energy rates were higher than actual avoided energy costs in at least some instances, challenges were raised against both Duke Energy's estimate that its fixed QF contract rates were $2.6 billion above market costs, and the Concentric Report's comparison of QF fixed rates for wind and solar facilities with the cost of wind and solar projects with competitive, non-PURPA contracts.

292. However, the expert testimony cited by the SC Solar Alliance, that the witness ''wouldn't put a whole lot of weight in [Duke's estimate],'' [461] does not address Duke's calculation of past overpayments. Rather, the witness was answering a question regarding the potential for overpayments ''[f]or going forward solar,'' *i.e.,* future overpayments as a result of the new fixed avoided cost rates being considered by the South Carolina Commission that were the subject of the expert witness' testimony.[462] The same witness acknowledged the past overpayments made by Duke Energy, which he attributed to ''drops in natural gas prices that no one could've foreseen.'' [463] It is these overpayments due to unforeseen declines in natural gas prices that form an important basis for the Commission's determination in this final rule to now give states the flexibility to require variable avoided cost energy rates in QF contracts and LEOs.

293. With respect to the criticisms of the Concentric Report, we emphasize that we have not relied on that report to support the variable energy avoided cost provision adopted in the final rule. It is not clear that the lower cost of the competitively priced renewable resources identified in the report represents the avoided costs of the purchasing utilities that entered into the QF contracts at fixed rates for renewable resources under PURPA. Therefore, it is not clear that the difference in costs identified by Concentric can be ascribed to the fixed rates in the QF contracts or rather to the fact that the avoided cost rates in the QF contracts were based on more expensive non-renewable capacity that was avoided by the purchasing utilities.

e. Whether the Proposed Change Would Violate the Statutory Requirement that the PURPA Regulations Encourage QFs

i. Comments

294. Several commenters argue that the NOPR's variable rate proposal is inconsistent with PURPA's mandate that the PURPA Regulations ''encourage'' the development of QFs.[464] Southeast Public Interest Organizations state that removing QFs' right to a fixed energy rate would flout Congressional intent that PURPA encourage QF development because fixed rates are necessary to attract QF financing.[465] Harvard Electricity Law states that Congress's mandate to encourage QFs is not contingent on industry conditions and does not expire.[466]

ii. Commission Determination

295. As explained above in Section IV.A.1, the statutory requirement that the Commission's PURPA Regulations encourage QFs remains, but it is bounded by the statutory provision in PURPA section 210(b) that QF rates may not exceed a purchasing utility's avoided costs. Further, as explained above, we have determined, based on the record evidence, that it is not necessarily the case that overestimations and underestimations of avoided energy costs will balance out. Consequently, a fixed energy rate in a QF contract or LEO potentially could violate the statutory avoided cost cap on QF rates.

296. The Commission's PURPA Regulations continue to encourage the development of QFs by, among other things, allowing a state to vary the rate paid to the QF over time but in a way that satisfies the rate cap established in PURPA section 210(b). In this way, the QF can obtain a higher rate when the utility's avoided costs increase, and ratepayers are not paying more than the utility's avoided costs when prices decrease. Furthermore, as discussed above, allowing the use of variable energy rates may promote longer contract terms, which would help encourage and support QFs.[467] It therefore is consistent with PURPA section 210(b), as well as the obligation imposed by PURPA section 210(a) to revise the Commission's PURPA Regulations ''from time to time,'' to provide the states the flexibility to require that QF contracts and other LEOs implement variable avoided cost energy rates in order to prevent payments to QFs in excess of the purchasing electric utility's avoided energy costs. PURPA section 210(b) prohibits the Commission from requiring QF rates above avoided costs even if, according to some commenters, a fixed avoided cost energy rate would provide greater encouragement to QFs than a variable avoided cost energy rate.

in the CAISO footprint (averaging 6 trades per day, 4 counterparties per day, and 2,756/MWh per day). The prices for Mid-C ranged between an average of approximately $16/MWh high price and $13/MWh low price during the recent spring (Mar 19–Jun 20, 2020). During this period the index was reported for 65 trading days for Mid-C and 9 trading days for NP–15.

[459] NIPPC, CREA, REC, and OSEIA Comments at 33–36; Resources for the Future Comments at 4; sPower comments at 10–11.

[460] Harvard Electricity Law Comments at 24 (citing Vaclav Smil, *Energy at the Crossroads: Global Perspectives and Uncertainties,* Mass. Inst. Tech., 2003, at 121, 145–149).

[461] SC Solar Alliance Comments at 7 (quoting, Public Service Commission of South Carolina, Docket No. 2019–185 & 186–E, Hearing Transcript Vol. 2, Tr. at 596: 6–21 (Horii Test)) (attached as Appendix 1 to SC Solar Alliance Comments).

[462] Public Service Commission of South Carolina, Docket No. 2019–185 & 186–E, Hearing Transcript Vol. 2, Tr. 596: 3–4 (Horii Test)) (attached as Appendix 1 to SC Solar Alliance Comments).

[463] *Id.* at 593:21–22.

[464] Allco Comments at 9; Con Edison at 3, 4; Harvard Electricity Law Comments at 1; North American-Central Comments at 4–6; Southeast Public Interest Organizations at 9–11.

[465] Southeast Public Interest Organizations Comments at 9–10.

[466] Harvard Electricity Law Comments at 1.

[467] *See infra* P 349.

f. Discrimination

i. Comments in Support of NOPR Proposal

297. Alliant Energy observes that utility-owned generation and traditional power purchase agreements (PPAs) are subject to a demonstration of need and that traditional PPAs are subject to re-evaluation during their term to determine whether they continue to be cost-competitive and in the best interests of customers. Alliant Energy asserts that, by contrast, QFs are not required to demonstrate that their projects are needed and that, once a contract is executed, it is not subject to re-evaluation.[468]

ii. Comments in Opposition to NOPR Proposal

298. Several commenters assert that the NOPR's variable avoided cost energy rate proposal is discriminatory.[469] For example, EPSA argues that PURPA requires the Commission to implement regulations that, for rates for electric utility purchases from QFs, ''shall not discriminate against qualifying cogenerators or qualifying small power producers.'' EPSA describes this standard as more restrictive than the FPA's prohibition against ''unduly discriminatory'' rates. According to EPSA, the fact that long-term QF contracts are substantially above prevailing market prices due to declining wholesale prices over the long-term does not justify the variable rate proposal because electric utility-owned generation is similarly based on imperfect long-term forecasts of energy prices that oftentimes prove to be too high. EPSA therefore argues that the NOPR variable rate proposal should not be adopted unless utility-owned assets are also subject to a similar cost recovery regime.[470]

299. sPower describes the NOPR proposal to allow variable rates as providing a significant advantage to electric utilities over QFs, given that electric utilities themselves, according to sPower, have not had to lower rates to consumers as energy prices have declined.[471] ELCON asserts that pushing more market risk to QFs while utility assets remain insulated from markets creates an investment risk asymmetry. ELCON claims this puts QFs at a competitive disadvantage and shifts the consumer burden to more utility builds, which have generally been higher cost than merchant builds.[472]

300. SC Solar Alliance states that utilities often rely on fuel price forecasts over time to justify rate base approval for generation assets that might run beyond price forecasts. SC Solar Alliance argues that allowing utilities this right, but not QFs, holds QFs to a much higher standard than utilities and therefore is discriminatory.[473]

301. Commissioner Slaughter argues that, by removing the fixed, long-term contract option for independent power producers, the NOPR threatens to hamper the competitiveness of renewable-based energy firms challenging vertically integrated utilities in many localities across the country.[474]

iii. Commission Determination

302. The discrimination claims are based on the incorrect assumption that electric utilities have not been required to lower their energy rates as prices have declined. To the contrary, as explained above, utilities typically charge their customers cost-based rates, and as their fuel and purchased power costs have declined, they typically have been required to provide corresponding reductions in the energy portion of their rates to their customers.[475] Requiring QF avoided cost energy rates to likewise change as purchasing electric utilities' avoided energy costs change does not create a discriminatory difference, but rather puts QF rates on par with utility rates.

303. Further, we are not changing the requirement that QF avoided cost energy rates be set at the purchasing utility's full avoided energy costs. As the Supreme Court held in *API,* ''the full-avoided-cost rule plainly satisfies the nondiscrimination requirement.'' [476] Rather, we are allowing the states the option to now choose to require QF avoided cost energy rates that vary with the purchasing utility's avoided costs of energy, rather than QF avoided cost rates that are fixed for the life of the QF's contract or LEO, to ensure the rates comply with PURPA.

g. Effect of Variable Energy Rates on Financing

i. Comments in Support of the NOPR Proposal

304. Several commenters state that fixed energy payments are not necessary for QFs to obtain financing.[477] Alliant states that it is on track to be the third largest utility owner-operator of wind facilities in the United States, with 1.9 GW on its system and in addition is increasing the pace of solar resource development in its Wisconsin territory. Alliant states it therefore does not believe that the proposed change will slow renewable deployment and adoption.[478]

305. Several commenters assert that PURPA's must-purchase requirement itself should necessarily afford QF developers a degree of certainty and enables developers to attract capital at advantageous terms.[479] The Idaho Commission states that, even if modified as proposed, QF contract terms would remain superior to competitively bid renewable projects where the energy is not ''must take'' and curtailment and other reliability parameters are imposed.[480]

306. Finadvice and APPA argue that maintaining a fixed capacity rate, as proposed by the Commission, will help attract capital and ameliorate any negative effect that the variable energy rate proposal may impose.[481] Ohio Commission Energy Advocate argues, as evidence that QFs can still flourish under a variable energy rate, that the PJM market has successfully attracted new supplies and ensured resource adequacy through fixed capacity and variable energy rates.[482]

307. The Idaho Commission states that variable energy prices protect the ratepayer while allowing the QF to ensure a stream of revenue through a longer-term contract. The Idaho Commission affirms that the rapid growth of non-QF renewable projects and their ability to obtain financing should quell any concerns about a QF's ability to obtain financing as long as PURPA's ''must take'' provision remains.[483] Commissioner O'Donnell asserts that QFs should bear some market risk as energy prices rise and fall in a way that balances risks to all parties.[484]

308. EEI argues that PURPA does not require the Commission or the states to implement regulations that guarantee a

[468] Alliant Energy Comments at 6–7.

[469] ELCON Comments at 21–22; SC Solar Alliance Comments at 5–10; sPower Comments at 13; *see also* ELCON Comments at 22; North Carolina Commission Staff Comments at 2–3; NIPPC, CREA, REC, and OSEIA Comments at 31; Public Interest Organizations Comments at 40, 43; Solar Energy Industries Comments at 36–38.

[470] EPSA Comments at 8–9.

[471] sPower Comments at 13.

[472] ELCON Comments at 21–22.

[473] SC Solar Alliance Comments at 5–10.

[474] Commissioner Slaughter Comments at 4.

[475] *See supra* PP 40, 122, 288.

[476] *API,* 461 U.S. at 413.

[477] APPA Comments at 16–17; Indiana Commission Comments at 6.

[478] Alliant Energy Comments at 6.

[479] APPA Comments at 16–17; Finadvice Comments at 2; Idaho Commission Comments at 4; Commissioner O'Donnell Comments at 3.

[480] Idaho Commission Comments at 4.

[481] APPA Comments at 16–17; Finadvice Comments at 2.

[482] Ohio Commission Energy Advocate Comments at 3–4.

[483] Idaho Commission Comments at 4.

[484] Commissioner O'Donnell Comments at 3.

QF's financeability. EEI represents that Congress intended QFs to be treated similarly to merchant generation and simply required QFs to have non-discriminatory access. According to EEI, because QFs are not subjected to the oversight or regulatory responsibilities applicable to electric utilities, it was not expected or intended that QFs be treated the same as electric utilities.[485] Similarly, Duke argues that the central design criteria for PURPA rates and terms should be customer indifference, just and reasonableness, and non-discrimination. Duke Energy states that a design that requires QF financeability as a criterion will inevitably lead to a QF boom and customer harm.[486] Duke Energy further asserts that several factors affect financeability and that, therefore, claims by QFs that they require fixed energy payments for financing purposes should be rejected.[487]

309. EEI claims QFs that require third-party financing will still be able to obtain financing if the Commission adopts the proposals in the NOPR, because they are additional options, in addition to those currently being used by states, that will be available to determine avoided costs. EEI maintains that a QF developer will be able to obtain financing under any of the options, provided it can build a cost-efficient plant that can profit at an avoided cost rate.[488] EEI claims that independent power producers lacking the certainty of the mandatory purchase obligation are building most renewable generation today because merchant power plants may be developed and financed using a variety of hedging and risk management tools, such as commodity hedges, that lock in cash flows and facilitate construction at the outset.[489]

310. APPA states that much of the renewable development that has occurred over the past 20 years has taken place within RTO/ISO footprints and therefore is largely unaided by PURPA obligations.[490]

311. Duke Energy states that concern about the potential for fixed avoided cost contract rates exceeding actual avoided costs at the time of delivery have led both North Carolina and South Carolina to enact laws placing limits on the length of QF contracts.[491] The Idaho Commission states that there is no evidence that variable energy prices would be fatal to QF development.[492] The Idaho Commission states that it reduced contract length on large projects to two years because it did not interpret the Commission's current rules to allow for a variable energy rate inside a long-term contract. The Idaho Commission states that, because its experience dictated that the longer the contract term, the more inflated the avoided cost rate, the Idaho Commission set parameters to balance QF interests against utility ratepayer interests. The Idaho Commission states that an energy rate established at the time of contract formation that provides for ''revisions to the energy rate at regular intervals, consistent with, for example, a purchasing electric utility's [integrated resource planning (IRP)] to reflect updated avoided cost calculations'' would allow states to consider longer term contracts without putting ratepayers at risk.[493] NorthWestern represents that the Montana Commission has lowered the length of QF contracts from 25 to 15 years in response to the current requirement that QFs are entitled to fixed avoided cost rates for energy in their contracts and a concern that rates calculated at the time a contract is signed are likely to change over the life of that contract.[494]

ii. Comments in Opposition to the NOPR Proposal

312. Many commenters assert that the NOPR's variable energy rate proposal will result in QFs being unable to obtain financing.[495] Several commenters also assert that it is discriminatory that utilities and non-QF generators can rate-base long-term investments and recover actual operating costs, while the NOPR's proposed rules would deprive QFs of a reasonable ability to forecast their cost recovery with no guarantees.[496]

313. Several commenters assert that the NOPR lacks evidence on the record to conclude that the variable rate proposal would not affect the ability of QFs to obtain financing.[497] NIPPC, CREA, REC, and OSEIA argue that the NOPR contained no record evidence demonstrating how this proposal would continue to encourage QFs in a non-discriminatory manner,[498] and lacks evidence on how QF generation can be financed without a fixed energy rate.[499] Similarly, Harvard Electricity Law asserts that repealing the fixed-price PPA requirement is premised on irrelevant data and ignores the record, and disagrees with the Commission's demonstration of information on non-QF capacity to show that QF development no longer relies on contracts with fixed energy rates.[500]

314. Public Interest Organizations assert that testimony from Southern Company, American Forest and Paper Association, and Solar Energy Industries, upon which the NOPR relies, states that non-QF renewable PPAs generally entail fixed energy rates rather than variable energy rates.[501] In particular, Public Interest Organizations state that testimony from Solar Energy Industries, refers to reliance on fixed rates for energy and/or capacity without describing them as alternatives but rather ''an acknowledgement that a [power purchase agreement] may provide fixed capacity in addition to fixed energy revenue, not a suggestion that a QF can be developed without a predictable energy revenue stream.'' [502]

315. Allco describes programs in California, Massachusetts, Connecticut, and Vermont that offer standard QF contract programs with variable energy rates, none of which, according to Allco, have led to the construction of solar projects.[503] Allco claims that these programs prove that, without the ability to obtain a fixed long-term forecasted rate, QF solar energy development will

[485] EEI Comments at 35.

[486] Duke Energy Comments at 17–18.

[487] *Id.* at 13.

[488] EEI Comments at 35–36.

[489] *Id.* at 36.

[490] APPA Comments at 16–17.

[491] Duke Energy Comments at 9; LG&E/KU Comments at 4.

[492] Idaho Commission Comments at 4.

[493] *Id.* (citing NOPR, 168 FERC ¶ 61,184 at P 5 n.5).

[494] NorthWestern Comments at 6–7.

[495] Allco Comments at 9; AllEarth Comments at 2; Biogas Comments at 2; BluEarth Comments at 2; Biological Diversity Comments at 8; Commissioner Slaughter Comments at 4; Con Edison Comments at 3, 4; Covanta Comments at 7–8; DC Commission Comments at 6–8; Distributed Sun Comments at 1; EPSA Comments at 2; Energy Recovery at 4; Harvard Electricity Law Comments at 5; Massachusetts AG Comments at 8–9; New England Hydro Comments at 8; NIPPC, CREA, REC, and OSEIA Comments at 37–38; North Carolina DOJ Comments at 3, 6; North American-Central Comments at 4–6; Public Interest Organizations Comments at 6–7; Resources for the Future Comments at 6–7. SC Solar Alliance Comments at 5–7; Southeast Public Interest Organizations Comments at 9–11; State Entities Comments at 2–3; Two Dot Wind Comments at 11–13.

[496] Allco Comments at 9; Commissioner Slaughter at 4; Harvard Electricity Law Comments at 5; NIPPC, CREA, REC, and OSEIA Comments at 36–37; Public Interest Organizations Comments at 6–7; Solar Energy Industries at 29–30.

[497] NIPPC, CREA, REC, and OSEIA Comments at 29, 46; Harvard Electricity Law Comments at 22, 25–27; Public Interest Organizations Comments at 6–7, 33–35.

[498] NIPPC, CREA, REC, and OSEIA Comments at 29.

[499] *Id.* at 46–48.

[500] Harvard Electricity Law Comments at 22, 25 (citing NOPR, 168 FERC ¶ 61,184 at PP 69–70, 76).

[501] Public Interest Organizations Comments at 33–35 (citing NOPR, 168 FERC ¶ 61,184, at P 70 n.114 (citing Tech. Conference, Docket No. AD16–16–000, Tr. at 153, 200 (filed June 30, 2016))).

[502] *Id.* at 35 (citing NOPR, 168 FERC ¶ 61,184, at P 70 n.115 (citing Solar Energy Industries Comments, Docket No. AD16–16–000, at 3 (filed June 30, 2016))).

[503] Allco Comments at 10.

not exist.[504] Southeast Public Interest Organizations assert that Southeastern states with fixed QF energy rates have seen vigorous QF development, while Southeastern states with variable energy rates have seen virtually no QF development, undermining the Commission's assertion that QFs can be financed without fixed energy rates.[505]

316. Covanta and Energy Recovery state that the NOPR's variable rate proposal would have an especially negative effect on Waste to Energy facilities.[506] Covanta states that, because Waste to Energy depends on finite local tax resources, a loss in energy revenue due to price variability cannot be easily replaced.[507] Covanta states that, without adequate QF pricing and multi-year contracts (and consistent, predictable pricing throughout the life of the contract), local governments may be forced to close their Waste to Energy facilities prematurely, to minimize loss and stranding that investment.[508] Energy Recovery states that the inability to secure suitable rates through a long-term contract has closed seventeen Waste to Energy facilities in the last fifteen years.[509]

317. NIPPC, CREA, REC, and OSEIA state that the NOPR's anecdotal reliance on tax incentives to encourage QF development is irrelevant because these incentives are declining or disappearing, thereby requiring QFs to rely even more on energy rates.[510] NIPPC, CREA, REC, and OSEIA predict that the NOPR's proposed rules would make QF development riskier and would thereby slow the development of new technologies such as energy storage, hydrogen fuels, and other advanced renewable energy technologies.[511]

318. Solar Energy Industries states that financing for QFs differs from financing for fossil fuel generators because ''much of the cost of installation is incurred up-front, but once installed, the generation has little, if any, variable cost.'' [512] Likewise, Harvard Electricity Law observes that wind and solar QFs, for example, have higher capital costs, lower operating costs, and provide energy intermittently, and therefore have characteristics that may present different financing challenges as compared to non-QF natural gas fired capacity.[513] Similarly, Public Interest Organizations argue that, unlike independent power producer natural gas generators with fixed capacity payments and variable energy costs, renewable QFs rely on fixed energy payments to cover their capital costs given their own nominal variable energy costs.[514]

319. NIPPC, CREA, REC, and OSEIA state that the financeability of generation with fixed capacity prices and variable energy prices inside RTOs/ISOs is irrelevant to regions that lie outside of RTOs/ISOs.[515] NIPPC, CREA, REC, and OSEIA criticize the NOPR's reliance on an independent power producer natural gas turbine's financeability outside the RTO/ISO context as irrelevant to QFs because these natural gas turbines receive fixed capacity payments and variable energy payments to account for the fluctuating price of fuel; whereas a QF would need a sufficient fixed capacity payment to support financing and an energy rate that removes market risk.[516]

320. NIPPC, CREA, REC, and OSEIA state that the NOPR's reference to hedging instruments to reduce risks from fluctuating prices is irrelevant.[517] NIPPC, CREA, REC, and OSEIA state that hedging makes projects less financeable because it increases transaction and compliance costs for small power producer QFs that cannot afford large legal divisions and trading floors to employ such hedges.[518]

321. Resources for the Future states that wind projects have used bank hedges, synthetic PPAs, and proxy revenue swaps.[519] Resources for the Future claims, however, that these products would be inaccessible to most wind QFs if fixed energy payments are eliminated. Resources for the Future argues that solar QFs would have even less access to such hedging given their smaller size and high transaction costs. Resources for the Future states that QFs under 5 MW in RTO/ISOs and QFs outside of RTO/ISOs thus would be unable to obtain financing.[520]

322. Solar Energy Industries states that QFs in RTO/ISO markets without a fixed energy rate would require a hedging instrument to finance their projects. Solar Energy Industries further states that QFs outside RTO/ISO markets without a fixed energy rate would be unable to finance their projects because they would have no access to such hedging mechanisms.[521] Solar Energy Industries states that the NOPR failed to consider which markets offer financial products, whether these financial products are available to QFs outside RTOs/ISOs, and whether these products will be sufficient to provide financing to QFs.[522]

323. Solar Energy Industries states that financing for QFs differs from financing for fossil fuel generators because much of the cost of installation is incurred up-front, with virtually no variable costs. Solar Energy Industries states that, because of this difference, financiers ''examine the QF's projected revenue stream to ensure that the revenue stream is sufficient to recover the installed costs plus a competitive return.'' [523] Solar Energy Industries reasons that QFs must therefore know in advance their facility's energy and capacity values and obtain a legally enforceable contract that fits into common underwriting models.[524]

324. North Carolina DOJ asserts that allowing avoided cost energy prices to fluctuate could eliminate fixed-price power sales contracts, thereby making compensation to QFs more volatile and discouraging renewable energy financing.[525]

325. Distributed Sun agrees with Commissioner Glick's dissent on the NOPR that revoking the fixed energy price requirement would halt the construction of most distributed energy resources.[526] Solar Energy Industries states that it is not aware of a meaningful number of QFs that have been constructed using capacity rates alone or capacity rates with variable energy rates.[527]

326. Mr. Mattson argues that a variable rate or a rate based on a projected stream of revenues during the contract are not long-term contracts. Mr. Mattson argues that this violates legislative intent and precedent and is not viable, suggesting that PURPA requires avoided cost data to be kept by a utility for public inspection.[528]

327. Western Resource Councils represents that PURPA, in the rural

[504] *Id.* at 9–11.

[505] Southeast Public Interest Organizations Comments at 9–11, 15–16.

[506] Covanta Comments at 7–8; Energy Recovery Comments at 1, 4.

[507] Covanta Comments at 7–8.

[508] *Id.* at 8.

[509] Energy Recovery Comments at 3.

[510] NIPPC, CREA, REC, and OSEIA Comments at 40–41.

[511] *Id.* at 41–42.

[512] Solar Energy Industries Comments at 30.

[513] Harvard Electricity Law Comments at 26.

[514] Public Interest Organizations Comments at 33–34.

[515] NIPPC, CREA, REC, and OSEIA Comments at 42–43.

[516] *Id.*

[517] *Id.* at 44–45 (citing NOPR, 168 FERC ¶ 61,184 at P 72 & n.117).

[518] *Id.* at 45–46.

[519] Resources for the Future Comments at 6.

[520] *Id.* at 6–7.

[521] Solar Energy Industries Comments at 30.

[522] *Id.* at 31.

[523] *Id.*

[524] *Id.*

[525] North Carolina DOJ Comments at 3.

[526] Distributed Sun Comments at 3.

[527] Solar Energy Industries Comments at 28.

[528] Mr. Mattson Comments at 26.

Northern Plains and Rocky Mountain West, is the only vehicle for small businesses to obtain project financing and that variable rates undermine the certainty of QFs obtaining financing.[529]

328. Public Interest Organizations assert that the NOPR has no basis to speculate that the Idaho Commission shortened contract lengths to two years because of the fixed rate requirement or that it would provide longer contracts if it could require variable energy rates.[530] According to Public Interest Organizations, the fact that no solar and wind QFs have been developed since the Idaho Commission set a two year contract length, even while they are currently entitled to fixed rates, shows that allowing variable rates will further discourage wind and solar QF development.[531]

329. sPower argues that, even with long-term contracts, QFs will not be viable without fixed energy rates and explains that, if the Commission seeks to encourage states to offer longer contract terms, it should just require longer terms.[532]

330. The DC Commission states that, in the jurisdictions where the contract length has been adjusted to ''short-term,'' such as Idaho's two-year contract,[533] further elimination of the QF fixed price contract option would discourage or eliminate new small renewable energy facilities entering the markets, which is not consistent with PURPA's objective of encouraging the construction of renewable generation.[534]

331. NIPPC, CREA, REC, OSEIA, and Public Interest Organizations argue that the fact that states have shortened the length of QF contracts in response to fixed energy prices means that the Commission should require a minimum contract length.[535] Green Power supports the creation of longer-term standard contract lengths for both cogeneration and small power production facilities.[536] Green Power recommends that cogeneration developers are offered 5, 8, or 10-year contracts and that small power producers developers are offered 10, 15, or 20-year contracts.[537] Mr. Mattson proposes that long-term contracts, defined as 20 years or longer, be available to QFs at their discretion.[538]

332. CARE notes that a purchasing utility's fixed capacity value may be zero if the state determines that the electric utility has no need for additional capacity resources. In that circumstance, there would be no fixed element in an avoided cost contract, which CARE believes would be inconsistent with the Commission's rationale justifying variable energy rate contracts.[539] EPSA similarly argues that, as noted in the NOPR, an electric utility is not required to pay for QF capacity that the state has determined is not needed. EPSA claims that the variable rate proposal therefore would create substantial uncertainty for QF developers and investors in non-ISO/RTO regions.[540]

333. American Biogas argues that LMP prices are not sufficient to sustain existing biogas projects or to increase their number.[541] Several commenters state that LMP cannot sustain QFs in general.[542]

334. NIPPC, CREA, REC, and OSEIA argue that the NOPR proposal to base QF pricing on LMP or Western EIM will limit competition, because QFs will be stuck with no long-term assurance of investment recovery, and thus with no means to finance their projects, while regulated incumbent utilities will be able to rate-base their generation assets, thus guaranteeing long-term recovery of their investments.[543] NIPPC, CREA, REC, and OSEIA maintain that prices for long-term QF contracts should be set by reference to long-term price indices or other indicators that, unlike highly-variable LMP and Western EIM prices, genuinely reflect the long-term costs of generation avoided by the purchasing utility.[544]

iii. Commission Determination

335. As an initial matter, the Commission agrees with commenters that PURPA does not guarantee QFs a rate that guarantees financing. PURPA only requires the Commission to adopt rules that encourage the development of QFs; it does not provide a guarantee that any particular QF will be developed or profitable. This is evident from the structure of PURPA, which caps QF rates at the purchasing utility's avoided costs rather than providing for rates that guarantee the recovery of a QF's costs. The legislative history confirms that Congress did not intend to guarantee QF financing. As stated in the PURPA Conference Report, ''the Conferees recognize that [QFs] are different from electric utilities, *not being guaranteed a rate of return* on their activities generally or on the activities vis-a-vis the sale of power to the utility *and whose risk in proceeding forward in the [QF] enterprise is not guaranteed to be recoverable*.'' [545]

336. Notwithstanding that PURPA does not guarantee QF financeability, the Commission believes that the variable avoided cost energy rate option implemented by this final rule will still allow QFs to obtain financing.

337. Before addressing specific comments on this issue, however, we reiterate that we are not eliminating fixed rate pricing for QFs. Under this final rule, QFs will continue to be able to require fixed avoided cost capacity rates in their contracts and LEOs. Capacity costs, as relevant here, include the cost of constructing the capacity being avoided by purchasing utilities as a consequence of their purchases from QFs. As will be discussed below, a combination of fixed avoided cost capacity rates and variable energy rates can provide important revenue streams that can support the financing of QFs.

338. Furthermore, merely because QFs have had access to fixed avoided cost energy rates does not mean that QFs must have access to such rates to obtain future financing. Up to now, QFs have had the right under the PURPA Regulations to both fixed capacity and fixed energy rates, and we understand that most QFs executing long-term contracts have exercised this right. Commenters insisting that the Commission cannot allow states the option to impose variable avoided cost energy rates without evidence that QFs have obtained financing under such contract structures [546] are attempting to impose a standard that could never be satisfied.

339. In any event, there is ample evidence outside of the PURPA context demonstrating that generation projects with fixed capacity rate-variable energy contracts are financeable. As the Commission explained in detail in the NOPR, since the time of the passage of PURPA a large new independent power production industry has developed in

[529] Western Resource Councils Comments at 2.

[530] Public Interest Organizations Comments at 36.

[531] *Id.* at 35–38.

[532] sPower Comments at 11.

[533] DC Commission Comments at 8 (citing NOPR, 168 FERC ¶ 61,184 at P 77).

[534] *Id.*

[535] NIPPC, CREA, REC, and OSEIA Comments at 47–48; Public Interest Organizations Comments at 6–7.

[536] Green Power Comments at 2, 10.

[537] *Id.* at 10.

[538] Mr. Mattson Comments at 7–9.

[539] CARE Comments at 4 n.7.

[540] EPSA Comments at 12.

[541] Biogas Comments at 2.

[542] BluEarth Renewables Comments at 2; Biological Diversity at 8; Covanta Comments at 9; Public Interest Organization Comments at 43–44.

[543] NIPPC, CREA, REC, and OSEIA Comments at 55–56.

[544] *Id.* at 53.

[545] Conf. Rep. at 97–98 (emphasis added).

[546] *See* Solar Energy Industries Comments at 28; NIPPC, CREA, REC, and OSEIA Comments at 29, 46; Harvard Electricity Law Comments at 22, 25–27; Public Interest Organizations Comments at 6–7, 33–35.

the United States. Like QFs, independent power producers sell power at wholesale, and have no ability to rate-base their facilities or to otherwise recover their costs through regulated rates to retail customers, unlike traditional utilities with franchised service territories and retail customers. Unlike QFs, however, independent power producers have had no right to require utilities to purchase their power or to impose fixed energy cost pricing in their power sales contracts.[547]

340. The record shows that, even without the right to require long-term fixed energy rates, non-QF independent power producers nevertheless have been able to obtain financing for large amounts of generation capacity, including from renewables. EIA data shows that, in 2019, approximately 44% of all energy produced by natural gas-fired generation in the United States was generated by independently owned capacity.[548] Furthermore, EIA data demonstrates that net generation of energy by non-utility owned renewable resources in the United States grew by almost 700% between 2005 and 2018, which speaks to the reality that renewable resources are able to acquire financing even without the right to require long-term fixed energy rates.[549] Based on this data, we find that the right to require counterparties to pay fixed energy rates is not essential for the financing of independent power generation capacity.

341. We acknowledge that a number of different financing mechanisms were used for this independent power generation capacity, not all of which will be available to QFs. Nevertheless, we understand that a standard rate structure employed in the electric industry is a fixed capacity rate-variable energy rate structure, and that many independent power production facilities have been financed based on this structure.[550] Accordingly, record evidence and historical data regarding the financing and construction of significant amounts of independent power production facilities supports the Commission's conclusion that a fixed capacity rate-variable energy rate structure—which will apply in those states choosing the variable avoided cost energy rate option—also will support financing of QFs.

342. For the reasons described below, we do not find compelling the concerns expressed by some commenters that a fixed capacity rate-variable energy rate construct may not work for solar and wind resources, which have high fixed capacity costs and minimal variable energy costs.[551] Similarly, we are not persuaded by comments that point out that energy rates in typical independent power production contracts are designed to recover the cost of a facility's fuel, whereas variable energy rates would provide no such guarantee.[552]

343. As an initial matter, as we have noted, the record demonstrates that the amount of renewable resources being developed outside of PURPA greatly exceeds the amount of renewable resources developed as QFs.[553] Renewable resources developed outside of PURPA may not have a legal right to long-term contracts with fixed energy rates, yet nevertheless have been able to obtain financing.

344. The Commission also disagrees with those commenters who assert that, as a consequence of the above factors, the Commission should ''require[] the variable energy component to be structured in a way that removes market risk from the QF.'' [554] This argument runs directly counter to one of the fundamental premises of PURPA, which is that QFs must accept the market risk associated with their projects by being paid no more than the purchasing utility's avoided cost, thereby preventing utility retail customers from subsidizing QFs.[555] PURPA does not allow the Commission to require QFs to be paid rates above avoided costs in order to make certain types of QF technologies financeable. If a state determines that it is necessary to require variable avoided cost energy rates in order to avoid paying QFs an above-avoided cost rate, which is a bedrock requirement of PURPA, then the impact this may have on facilities not financeable with a fixed capacity rate-variable energy rate contract structure is a direct result of the requirements of PURPA itself.[556] Concerns regarding the alleged mismatch between avoided costs and the costs of renewable technologies therefore are collateral attacks on the requirements of PURPA itself, not our proposed implementation of it.

345. In the NOPR, the Commission noted the availability of various hedging devices that would allow QFs to fix or limit the variability of a variable avoided cost energy rate.[557] We acknowledge those comments explaining that hedging tools increase project expense and may not be available to all QFs.[558] However, the Commission never intended to suggest that hedging is cost-free or that it would be appropriate for all QFs. The commenters all agree that hedging is available for at least some QFs.[559] For such QFs, hedging can help provide energy rate certainty if such certainty is required for financing. To the extent that certainty is required, then the cost of hedging is a part of the cost of financing the project that PURPA requires QFs to bear.

346. Public Interest Organizations cite testimony from the Technical Conference stating that Southern Company has negotiated non-QF renewable contracts with fixed energy rates rather than variable energy rates.[560] However, that testimony does not support the contention that the Commission must provide for fixed avoided cost energy rates for QF contracts and other LEOs. As the cited testimony notes, Southern agreed to contracts with longer terms and with fixed energy rates only because the

[547] *See* NOPR, 168 FERC ¶ 61,184 at P 76.

[548] EIA, *Electric Power Monthly with Data for December 2018,* at tbl. 1.7.B (February 2020), *https://www.eia.gov/electricity/monthly/archive/february2020.pdf*).

[549] *Id.* P 74 (explaining that net generation of energy by non-utility owned renewable resources in the United States escalated from 51.7 TWh in 2005 when EPAct 2005 was passed, to 340 TWh in 2018) (citing EIA, Electricity Data Browser, *www.eia.gov/electricity/data/browser*).

[550] American Public Power Association, *How New Generation is Funded* (Aug. 29, 2018), *https://www.publicpower.org/blog/how-new-generation-funded* (''Beginning in 2015, merchant generation [in RTOs/ISOs markets] began to increase dramatically from prior years, amounting to 19.3 percent of new capacity in 2015, 7.2 percent in 2016, and 29.1 percent in 2017.''). In RTOs and ISOs with capacity markets, merchant generators are compensated through variable energy rates and fixed capacity rates, along with whatever ancillary service revenues they can earn.

[551] *See* Harvard Electricity Law Comments at 26; Public Interest Organizations Comments at 33–34; Solar Energy Industries Comments at 30.

[552] NIPPC, CREA, REC, and OSEIA Comments at 42–43.

[553] *See supra* P 240.

[554] NIPPC, CREA, REC, and OSEIA Comments at 43.

[555] *See* Conf. Rep. at 97–98 (stating that the ''risk in proceeding forward in the [QF] enterprise is not guaranteed to be recoverable''); *accord API,* 461 U.S. at 416 (holding that QFs ''would retain an incentive to produce energy under the full-avoided-cost rule so long as their marginal costs did not exceed the full avoided cost of the purchasing utility'').

[556] *See* Connecticut Authority Comments at 14 (''[C]ontracted QF rates that take into account New England market conditions would not deter lenders and investors. Many QFs have no fuel costs and low variable costs of production; therefore, it is reasonable to find that these QFs would earn substantial inframarginal rents on energy sales. Further, QFs may be able to sell RECs and/or participate in other Connecticut programs.'').

[557] NOPR, 168 FERC ¶ 61,184 at P 72.

[558] NIPPC, CREA, REC, and OSEIA Comments at 45–46; Resources for the Future Comments at 6–7; Solar Energy Industries Comments at 30.

[559] *Id.*

[560] Public Interest Organizations Comments at 33–34 (citing NOPR, 168 FERC ¶ 61,184 at P 70 n.114 (citing Tech. Conference, Docket No. AD16–16–000, Tr. 200 (filed June 30))).

renewable energy developers agreed to a rate that was 50 to 60 percent of the projected long-term avoided cost.[561]

347. Certain commenters expressed concern that, when a purchasing electric utility is not avoiding the construction or purchase of capacity as a consequence of entering into a contract with a QF, under the NOPR's proposed rules a state could limit the QF's contract rate to variable energy payments.[562] However, in that event, the only costs being avoided by the purchasing electric utility would be the incremental costs of purchasing or producing energy at the time the energy is delivered.[563] Nothing in PURPA or the legislative history of PURPA suggests that the Commission should set QF rates so as to facilitate the financing of new QF capacity in locations where no new capacity is needed.

348. In the NOPR, the Commission also observed that the variable avoided cost energy rate proposal might cause states to make other changes to their administration of PURPA in ways that would improve the financeability of QF projects. Most notably, states that had limited the length of contract terms because of concerns about overpayments for energy might be willing to allow longer term contracts if the contracts have variable avoided cost energy rates. Longer term contracts with fixed avoided cost capacity rates, in turn, would provide greater revenue assurance to QFs.[564] The comments submitted in response to the NOPR support our analysis.

349. Further, there is some evidence that variable avoided cost energy rates in contracts and LEOs could result in longer-term contracts.[565] To be clear, we are not finding that the variable avoided cost energy rate provision in this final rule will necessarily lead to longer term contracts and LEOs in every state, nor does our decision to adopt this provision rely on such a finding.[566] However, the record supports the conclusion that the variable avoided cost energy rate provision could lead to longer term contracts in at least some states, and that likelihood provides support for the conclusion that QFs will be able to obtain financing for their projects under this provision if their costs are indeed below the purchasing utility's avoided costs.

h. Other Claimed Benefits of Fixed Avoided Cost Energy Rates

i. Comments

350. Public Interest Organizations assert that maintaining the requirement to pay QFs fixed rates serves as a hedge for consumers because QFs, unlike utilities, bear their own risks and have provided ''billions of dollars'' in benefits to consumers. Public Interest Organizations assert that eliminating QFs' rights to fixed rate contracts ignores these benefits to consumers and puts them at risk.[567] Likewise, Solar Energy Industries portrays a fixed energy rate as providing a hedge to a utility that the purchasing electric utility may use as a revenue stream in connected markets. Solar Energy Industries nevertheless argues that, in order to encourage QF development, the Commission must ensure that QFs know the energy price at the time of contracting and that utilities publish rates stating the energy, capacity, and environmental attributes of the QF rate.[568]

ii. Commission Determination

351. Fixed and variable energy rates each can provide benefits to electric utility customers. These benefits are the converse of each other: Variable avoided cost energy rates provide protection to customers when energy costs decline, and fixed avoided cost energy rates provide protection to customers when energy costs increase. By giving the states the flexibility to choose either variable or fixed avoided cost energy rates in QF contracts and LEOs, the Commission is giving each state the ability to choose the protection that is best suited for electric customers in their state, based on each state's view of what the future may hold and the likelihood that variable energy avoided costs will exceed fixed energy avoided costs during the life of a QF contract or LEO.

352. We acknowledge that fixed avoided energy cost rates can serve as a hedge against future fuel price increases in a way that protects ratepayers, assuming such price increases actually occur. Given that PURPA both places an avoided cost cap on QF rates, and requires that such rates must be just and reasonable to the electric consumers of the electric utility, we find it is appropriate to provide flexibility to states to decide how to apportion such risks to their ratepayers in a way that ensures QF avoided energy cost rates are consistent with PURPA's requirements (*i.e.,* by using either fixed or variable avoided cost energy rates to best meet those requirements).

353. We caution, though, that having made that choice, a state is not free to toggle a QF's contractual rate structure back and forth unilaterally from one to the other as circumstances change; QFs are entitled to the certainty that once a state has made its choice with respect to a particular QF's contract or LEO, that QF's contract or LEO is not subject to change during the term of that contract or LEO except by mutual consent.

i. Potential Modifications to NOPR Proposal

i. Comments

354. The California Commission, Connecticut Authority, and Massachusetts DPU support the variable energy rate proposal and suggest that, in addition, states be given the discretion

[561] Tech. Conference, Docket No. AD16–16–000, Tr. at 200 (filed June 30). The Commission notes that the PURPA Regulations specifically permit QFs and utilities to agree to rates that differ from what the PURPA Regulations require. 18 CFR 292.301(b). As the testimony cited by the Public Interest Organizations suggests, QFs that believe fixed energy avoided cost rates are required to obtain financing are free to offer rate and/or other contractual concessions in exchange for a fixed rate.

[562] CARE Comments at 4 n.7; EPSA Comments at 12.

[563] *See, e.g., City of Ketchikan,* 94 FERC ¶ 61,293, at 62,061 (2001) (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'').

[564] NOPR, 168 FERC ¶ 61,184 at P 65. Contrary to assertions by some commenters, the Commission's conclusion in the NOPR about the possible positive effects of the variable avoided cost energy rate proposal was not based on speculation. *See* Public Interest Organizations Comments at 36. Rather, the Commission relied on testimony presented at the Technical Conference. *See* Technical Conference Tr. at 142–43 (Idaho Commission) (''No matter the starting point, allowing QFs to fix their avoided cost rates for long terms results in rates which will eventually exceed and overestimate avoided cost rates into the future. The longer the term, the greater the disparity. . . . [The Idaho Commission] recently reduced PURPA contract lengths to two years in order to correct the disparity. We didn't reduce contract lengths to kill PURPA. We did it to allow periodic adjustment of avoided cost rates.'').

[565] Idaho Commission Comments at 4 (allowing states to set variable QF energy avoided costs ''would allow states to consider longer term contracts without putting ratepayers at risk'') (citing NOPR, 168 FERC ¶ 61,184 at 5 n.5).

[566] We are not finding that variable avoided cost energy rates would be appropriate only if they cause states to require longer term contracts, and we are not adopting the suggestion made by certain commenters that the Commission order states to require longer contract terms. *See* NIPPC, CREA, REC, and OSEIA Comments at 47–48; Public Interest Organizations Comments at 6–7; sPower Comments at 11.

[567] Public Interest Organizations Comments at 45–46 (citing S. Rep. No. 95–442, at 9, 22–23, 33 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 7903, 7906, 7919–21, 7930; Public Interest Organizations, Comments, Docket No. AD16–16–000, at 5, 19–21 (Oct. 17, 2018)). In earlier comments in Docket No. AD16–16–000, cited by Public Interest Organizations in response to the NOPR, Public Interest Organizations asserted that long-term fixed QF contracts often act as a hedge that lowers QF financing expenses, which benefits ratepayers, and insulates ratepayers from fuel price fluctuations. Public Interest Organizations, Comments, Docket No. AD16–16–000, at 20–21 (Oct. 17, 2018).

[568] Solar Energy Industries Comments at 31–32.

to require the avoided capacity rate to vary.[569]

355. In contrast, NIPPC, CREA, REC, and OSEIA urge the Commission, if it allows variable energy rates, to adopt strict parameters for setting capacity rates in order to provide some predictability to QFs to allow them to obtain financing. NIPPC, CREA, REC, and OSEIA recommend that the Commission require forecasted capacity rates be ''offered in a long-term contract of at least 20 years after commencement of sales under the agreement'' for ''[a]ll years during the term of the QF's long-term contract after which the utility forecasted to be capacity deficit in its load and resource balance, as forecasted in its resource plan in effect at the time of the legally enforceable obligation'' and ''[a]ny time the utility is planning or undertaking actions to acquire a major generation resource or a major capital investment at an aging facility at the time of creation of the legally enforceable obligation.''[570]

356. Commissioner O'Donnell urges the Commission to provide additional guidance to states on the minimum required contract duration that would enable a QF to obtain financing from investors while providing sufficient ratepayer protections.[571]

ii. Commission Determination

357. We decline to adopt the California Commission's, Connecticut Authority's, and Massachusetts DPU's requests to permit a state to require variable avoided cost capacity rates in addition to variable avoided cost energy rates. There is a fundamental difference between avoided energy costs and avoided capacity costs. Unlike avoided energy costs, which fluctuate with changes in the variable cost of the purchasing utility's marginal energy resource, a purchasing utility's avoided capacity cost is determined at the time the utility incurs the obligation to purchase capacity from a QF rather than self-build a capacity resource or enter into a power purchase agreement with a third party. Although a purchasing utility's avoided capacity cost may later change as additional capacity acquisitions are avoided, the cost of the capacity avoided by the purchasing utility as a consequence of purchasing capacity from a particular QF at a particular moment in time does not change.

358. As a simple illustrative example, if a utility is able to avoid constructing a new generation facility with a capacity cost of $10/MW-month as a result of purchasing power from a QF, its avoided capacity cost is the $10/MW-month capacity cost that it would have been incurred to construct the new facility. Once the utility commences its purchases from the QF, it may not need additional capacity, and its avoided capacity cost for the next QF would drop to $0/MW-month. It would not be appropriate to then reduce the original QF's avoided capacity charge to $0/MW-month, however, because the only reason that the utility does not need additional capacity is because it already purchased capacity from the original QF in order to avoid the $10/MW-month capacity cost. That is, without the purchase from the original QF, the utility would have incurred a capacity cost of $10/MW-month, and that is the utility's avoided capacity cost for the term of its contract with the original QF. It would be inappropriate, in other words, for avoided cost capacity rates to change after they are first set at the time a LEO (such as a contract) is established.

359. We also decline to adopt the suggestion of NIPPC, CREA, REC, and OSEIA to adopt additional criteria for establishing avoided capacity costs, including minimum contract lengths. We believe that the existing rate-setting provisions adequately set out the criteria that should be considered by a state in determining avoided capacity costs.[572] To the extent that any party believes a state has not appropriately applied these criteria, that party has recourse to the enforcement provisions of PURPA sections 210(g) and (h).[573]

360. We decline to specify a minimum required contract length given that it is up to states to decide appropriate contract lengths in a way that accurately calculates avoided costs so as to meet all statutory requirements.

8. Consideration of Competitive Solicitations To Determine Avoided Costs

a. NOPR Proposal

361. The Commission in the NOPR proposed to revise the PURPA Regulations in 18 CFR 292.304 to add subsection (b)(8). In combination with new subsection (e)(1), this subsection would permit a state the flexibility to set avoided cost energy and/or capacity rates using competitive solicitations (*i.e.,* requests for proposals or RFPs), conducted pursuant to appropriate procedures.

362. The Commission recognized that one way to enable the industry to move toward more competitive QF pricing is to allow states to establish QF avoided cost rates through a competitive solicitation process. The Commission previously has explored this issue. In 1988, the Commission issued a notice of proposed rulemaking proposing to adopt regulations that would allow bidding procedures to be used in establishing rates for purchases from QFs.[574] That rulemaking proceeding, along with several related proceedings, ultimately was withdrawn as overtaken by events in the industry.[575]

363. Since then, the Commission held in a 2014 order addressing the specific facts of the particular competitive solicitation at issue that an electric utility's obligation to purchase power from a QF under a LEO could not be curtailed based on a failure of the QF to win an only occasionally-held competitive solicitation.[576] In a separate proceeding involving a different competitive solicitation, the Commission declined to initiate an enforcement action where the state competitive solicitation was an alternative to a PURPA program.[577]

364. Given this precedent, the Commission proposed to amend its regulations to clarify that a state could establish QF avoided cost rates through an appropriate competitive solicitation process. Consistent with its general approach of giving states flexibility in the manner in which they determine

[569] California Commission Comments at 27–28; Connecticut Authority Comments at 14–15; Massachusetts DPU Comments at 8–10.

[570] NIPPC, CREA, REC, and OSEIA Comments at 51.

[571] Commissioner O'Donnell Comments at 3.

[572] *See* 18 CFR 292.304(e).

[573] *See also Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304.

[574] *Regulations Governing Bidding Programs,* FERC Stats. & Regs. ¶ 32,455 (1988) (cross-referenced at 42 FERC ¶ 61,323) (*Bidding NOPR*); *see also Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities,* FERC Stats. & Regs. ¶ 32,457 (1988) (cross-referenced at 42 FERC ¶ 61,324) (*ADFAC NOPR*).

[575] *See Regulations Governing Bidding Programs,* 64 FERC ¶ 61,364 at 63,491–92 (1993) (terminating *Bidding NOPR* proceeding); *see also Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities,* 84 FERC ¶ 61,265 (1998) (terminating *ADFAC NOPR* proceeding).

[576] *See, e.g., Hydrodynamics, Inc.,* 146 FERC ¶ 61,193, at PP 31–35 (2014) (*Hydrodynamics*).

Competitive solicitation processes have been used more recently in a number of states, including Georgia, North Carolina, and Colorado. Georgia's competitive solicitation process is described at Ga. Comp. R. & Regs. 515–3–4.04(3) (2018). North Carolina's competitive solicitation process is described at 4 N.C. Admin. Code 11.R8–71 (2018). Colorado's competitive solicitation process is described at *sPower Development Co., LLC* v. *Colorado Pub. Utils. Comm'n,* 2018 WL 1014142 (D. Colo. Feb. 22, 2018).

[577] *Winding Creek Solar LLC,* 151 FERC ¶ 61,103, *reconsideration denied,* 153 FERC ¶ 61,027 (2015). *But see Winding Creek Solar LLC* v. *Peterman,* 932 F.3d 861 (9th Cir. 2019).

avoided costs, the Commission did not propose in the NOPR to prescribe detailed criteria governing the use of competitive solicitations as tools to determine rates to be paid to QFs, as well as to determine other contract terms. The Commission stated that states arguably may be in the best position to consider their particular local circumstances, including questions of need, resulting economic impacts, amounts to be purchased through auctions, and related issues.

365. Nevertheless, in considering what constitutes proper design and administration of a competitive solicitation, the Commission found it was appropriate to establish certain minimum criteria governing the process by which competitive solicitations are to be conducted in order for a competitive solicitation to be used to set QF rates. In that regard, the Commission noted that it has addressed competitive solicitations in prior orders in a number of contexts that provide potential guidance to states and others. For example, the Commission's policy for the establishment of negotiated rates for merchant transmission projects,[578] the Bidding NOPR, and the *Hydrodynamics* case [579] all suggest factors that could be considered in establishing an appropriate competitive solicitation that is conducted in a transparent and non-discriminatory manner.

366. These factors, as proposed in the NOPR, include, among others: (a) An open and transparent process; (b) solicitations should be open to all sources to satisfy the purchasing electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity; [580] (c) solicitations conducted at regular intervals; (d) oversight by an independent administrator; and (e) certification as fulfilling the above criteria by the state regulatory authority or nonregulated electric utility. The Commission proposed that a state may use a competitive solicitation to set avoided cost energy and capacity rates, provided that such competitive solicitation process is conducted pursuant to procedures ensuring the solicitation is transparent and non-discriminatory. The Commission proposed that such a competitive solicitation must be conducted in a process that includes, but is not limited to, the factors identified above which would be set forth in proposed subsection (b)(8).

367. In addition, the Commission sought comment on whether it should provide further guidance on whether, and under what circumstances, a competitive solicitation can be used as a utility's exclusive vehicle for acquiring QF capacity.[581]

b. Comments

i. Comments in Opposition

368. Several commenters oppose the NOPR proposal to allow states the ability to set avoided cost energy and capacity rates through a competitive solicitation such as an RFP.[582]

369. Allco states that allowing a state commission to use a competitive solicitation price is simply giving another tool to a state commission to eliminate QF projects.[583] Allco also contends that this proposal creates an apples and oranges scenario where a competitive solicitation could be won by solar projects of 80 MWs at a low, steeply discounted price that may never get built, resulting in a state commission publishing that as an avoided cost for a 1 MW solar project connected to the distribution system.[584] Allco points to California's Renewable Marketing Adjustment Tariff program as an example of a competitive solicitation price failure.[585]

370. CA Cogeneration states that relying on a competitive solicitation violates PURPA's mandatory purchase obligation, and the regulations must always preserve the right of a QF to negotiate a contract for the purchase of its output at an avoided cost rate.[586] CA Cogeneration states that reliance on a competitive solicitation also fails to provide the necessary financial and operational encouragement for combined heat and power.[587]

371. Covanta asserts that the Commission's proposed competitive solicitation process would disadvantage technologies like Waste to Energy that are not growing, or are closing facilities.[588]

372. Southeast Public Interest Organizations argue that, in the states that currently require some form of competitive solicitation, many utilities do not regularly hold competitive solicitations, do not make competitive solicitations open to all QFs, or do not provide QFs the ability to sell to the utility outside of a competitive solicitation process.[589] Southeast Public Interest Organizations maintain that the competitive solicitation process can be overly burdensome and costly for smaller facilities. Southeast Public Interest Organizations assert that no state requires, and no utility conducts, a competitive solicitation to determine how best to meet the ongoing energy needs that it currently meets through the operation of its existing generation fleet and market purchases.[590] In particular, Southeast Public Interest Organizations represent that: (1) Florida does not require an independent evaluator as part of its competitive solicitation process; (2) Colorado and Oklahoma allow utilities to apply for waivers of the competitive solicitation requirement; and (3) North Carolina allows the incumbent utility to participate in the competitive bidding process and to receive preferential treatment in the form of waiving post bid security required for any independently owned projects.[591] Southeast Public Interest Organizations conclude that, while a well-designed and well-implemented competitive solicitation process could be an appropriate procurement and rate-setting tool in some cases, competitive solicitations should never be the only way to set rates or for QFs to sell their output, and close consideration should be given to determinations of utility capacity needs that could be manipulated to limit renewable energy procurements.[592]

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[578] *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects,* 142 FERC ¶ 61,038 (2013).

[579] *See Hydrodynamics,* 146 FERC ¶ 61,193 at P 32 n.70 (citing *Bidding NOPR,* FERC Stats. & Regs. ¶ 32,455 at 32,030–42). The Commission notes that, while QFs not awarded a contract pursuant to an competitive solicitation would retain their existing PURPA right to sell energy as available to the electric utility, if the state has concluded that such QF capacity puts tendered after an competitive solicitation was held are ''not needed,'' the capacity rate may be zero because an electric utility is not required to pay a capacity rate for such puts if they are not needed. *See Hydrodynamics,* 146 FERC ¶ 61,193 at P 35 (referencing *City of Ketchikan,* 94 FERC ¶ 61,293 at 62,061 (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'')).

[580] *See* 18 CFR 292.304(e); *Windham Solar,* 157 FERC ¶ 61,134 at PP 5–6.

[581] The Commission proposed that, even if a competitive solicitation were used as an exclusive vehicle for an electric utility to obtain QF capacity, QFs that do not receive an award in the competitive solicitation would be entitled to sell energy to the electric utility at an as-available avoided cost energy rate.

[582] Allco Comments at 12; Blue Earth Comments at 1–2; Boulder Comments at 6; CA Cogeneration Comments at 10–11; Green Power Comments at 1–3; Industrial Energy Consumers Comments at 13.

[583] Allco Comments at 12.

[584] *Id.*

[585] *Id.*

[586] CA Cogeneration Comments at 10.

[587] *Id.* at 11.

[588] Covanta Comments at 9.

[589] Southeast Public Interest Organizations Comments at 26.

[590] *Id.* at 26–27.

[591] *Id.* at 27.

[592] *Id.* at 25–26.

373. Mr. Mattson states that precedent and legislative intent remove competitive solicitations from being a PPA option.[593] Both Mr. Mattson and Two Dot Wind point to the Commission's ruling in *Hydrodynamics* that ''requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obstacle to obtaining a legally enforceable obligation.'' [594] Two Dot Wind also states that competitive solicitations have not worked in Montana, and that the NOPR's suggestion that competitive bidding can replace PURPA is not supported by the factual record in Montana.[595]

374. Industrial Energy Consumers expresses concern that the parameters for competitive solicitations are not sufficiently developed to ensure a well-structured, fairly administered, transparent, and non-discriminatory process for procurement, and therefore opposes allowing a competitive solicitation process to determine avoided costs at this time.[596]

ii. Comments in Support

375. Several commenters support the NOPR proposal to allow states the ability to set energy and capacity rates through a competitive solicitation such as an RFP.[597]

376. Multiple commenters, including EEI, NRECA, and the Oregon Commission, support the notion that the states are in the best position to tailor the competitive solicitation process to their needs, and that the Commission should not provide detailed criteria governing the use of competitive solicitations.[598] EEI states that the fact that competitive solicitations may be used to set avoided costs is an idea nearly as old as PURPA.[599] EEI also supports the Commission's proposal for a state to allow a competitive solicitation to be used as the exclusive vehicle for acquiring QF capacity.[600] NRECA notes that numerous NRECA members have already had success using competitive solicitations to establish both energy and capacity rates in states where competitive solicitations are permitted.[601]

377. Growth and Opportunity Center states that competitive solicitation processes, in place of avoided cost calculations, provide better signals to investors of where their electricity is most valuable because competitive solicitations reflect more informed estimates of the real-time needs of electricity consumers. Growth and Opportunity Center contends that the proposed rule changes, by giving states more latitude to use competitive solicitations in complying with PURPA, should result in prices for consumers that more accurately reflect market costs for electricity.[602] Growth and Opportunity Center also asserts that in states using competitive solicitation processes, nondiscrimination rules should be enforced to ensure that solicitations are competitive and that no providers receive preferential treatment.[603]

378. The Michigan Commission states that it recently approved using competitive solicitations to determine avoided capacity costs for a large electric utility in Michigan.[604] The Michigan Commission states that it believes that that recently approved structure aligns with the Commission's proposal in the NOPR.[605]

379. Portland General asserts that, because the output of an competitive solicitation represents a resource's true market costs, a competitive solicitation is the correct method to determine avoided cost.[606] Portland General states that, given the competitive nature of competitive solicitations, bidders are highly motivated, which results in the procurement of resources with high benefit-to-cost ratios. Portland General cites as an example its recent competitive solicitation, which resulted in a $40.70-levelized price and reflects a combination of technologies (wind, solar, and battery), whereas QFs, which Portland General asserts provide lower capacity, are currently offered at a $45.19 levelized price for solar energy.[607]

380. Xcel urges the Commission's to give the states the option of procuring all needed capacity through competitive bidding processes.[608] Xcel strongly believes that states must have the ability to control capacity additions to ensure that customer needs and state policy goals are met.[609] Xcel explains that in many states, including some in which the Xcel operating companies operate, resource procurement is accomplished largely through state-administered IRP processes, which are utilized to ensure a resource mix that meets the overall public interest in affordable and clean energy. Xcel states that these carefully calibrated processes can be upset when QFs bring capacity on to a utility's system that does not align with the state's vision of its optimal resource mix and when those QFs also attempt to collect above-market payments from utilities and therefore customers. Xcel states that Colorado's procurement efforts have been so successful that in 2016 more than 400 bids for 238 distinct projects were submitted for Public Service Company of Colorado alone, and that this process resulted in some of the lowest prices for renewables seen as of that date, with a median wind price of $19.30/MWh and a median solar price of $30.96/MWh. Xcel argues that unsolicited puts by QFs, in contrast, can impede the ability of states to meet their resource planning goals and can undermine the competitive markets that states like Colorado have already created or are striving to create.[610]

381. North Carolina Commission Staff states that North Carolina has implemented a competitive solicitation process for solar energy that complements the PURPA reforms adopted by the state, with the first solicitation concluding in April 2019.[611] North Carolina Commission Staff states that an independent administrator estimated the initial nominal savings for the competitive solicitation with a 20-year contract versus traditional avoided cost pricing to exceed $370 million for the utilities involved.[612]

382. Duke Energy shares its state-specific experience with North Carolina's competitive solicitation for renewable energy as a positive example.[613] Duke Energy states that Duke Energy Carolinas, LLC and Duke Energy Progress, LLC recently completed their Tranche 1 Competitive Procurement of Renewable Energy RFP and procured approximately 550 MW of new solar capacity for 20-year fixed price contract terms at a projected savings of approximately $261 million relative to administratively determined

[593] Mr. Mattson Comments at 23.

[594] *Id.;* Two Dot Wind Comments at 10 (citing *Hydrodynamics,* 146 FERC ¶ 61,193).

[595] Two Dot Wind Comments at 9–10.

[596] Industrial Energy Consumers Comments at 13.

[597] Alaska Power Comments at 1; Distributed Sun Comments at 2; EEI Comments at 32–33; El Paso Electric Comments at 4; NARUC Comments at 3; NRECA Comments at 11; South Dakota Commission Comments at 2–3.

[598] EEI Comments at 32–33; NRECA Comments at 11; Oregon Commission Comments at 3–4.

[599] EEI Comments at 32.

[600] *Id.* at 33.

[601] NRECA Comments at 11.

[602] Growth and Opportunity Center Comments at 9.

[603] *Id.* at 10.

[604] Michigan Commission Comments at 4.

[605] *Id.* at 5.

[606] Portland General Comments at 11.

[607] *Id.*

[608] Xcel Comments at 10.

[609] *Id.* at 8.

[610] *Id.* at 9.

[611] North Carolina Commission Staff Comments at 3–4.

[612] *Id.* at 4.

[613] Duke Energy Comments at 10–12.

forecasts of avoided costs over this same period.[614]

iii. Comments Requesting Modifications/Clarifications

(a) Requests for Clarification and/or Separate Proceedings

383. NIPPC, CREA, REC, and OSEIA argue that the NOPR fails to explain (1) whether the Commission is proposing to merely clarify that a state could use the lowest offer prices submitted in a competitive solicitation to set the avoided costs of energy and capacity on a prospective basis for any QF seeking a contract until the next competitive solicitation, or (2) whether the Commission is proposing a radical change in its precedent by revising its rules to provide that a QF may only sell under a long-term contract if that QF wins a competitive solicitation, which NIPPC, CREA, REC, and OSEIA assert would be contrary to the *Hydrodynamics*[615] and *Winding Creek*[616] cases.[617]

384. NIPPC, CREA, REC, and OSEIA request that any requirement to win a competitive solicitation to obtain a long-term PURPA contract should exempt small facilities.[618] NIPPC, CREA, REC, and OSEIA further state that the Commission should: (1) Require that the competitive solicitation include no utility-ownership options; or (2) if utility-owned generation may result, the competitive solicitation must be: (i) Administered and scored (not just overseen) by a qualified independent party, not the utility; (ii) any utility or utility-affiliate ownership bid must be capped at its bid price and not allowed traditional cost-plus ratemaking treatment; and (iii) the product sought, minimum bidding criteria, and detailed scoring criteria must be made known to all parties at the same time.[619] Additionally, NIPPC, CREA, REC, and OSEIA contend that an option for long-term contracts should remain available for both small QFs and existing QFs outside of a competitive solicitation.[620]

385. The Michigan Commission states that it would welcome guidance on whether, and under what circumstances, a competitive solicitation can be used as a utility's exclusive vehicle for acquiring QF capacity.[621] Similarly, the Montana Commission recommends that the Commission provide as much guidance to states as possible regarding the requirements for transparency and non-discrimination.[622]

386. The California Commission states that the NOPR does not provide states any more flexibility than they already have, and the Commission's final order adopting revised regulations should clearly state this.[623]

387. Several commenters suggest that the Commission should conduct focused additional processes on this topic.[624] Advanced Energy Economy suggests that the Commission conduct one or more workshops or technical conferences, to explore in detail the specific factors that would make a utility competitive solicitation process a truly competitive process of a ''comparative quality'' to competitive wholesale energy and capacity markets.[625] Advanced Energy Economy contends that such workshops or technical conferences could ultimately be the basis for developing proposed regulations better guiding the states and electric utilities in implementing open and competitive solicitation processes to obtain relief from the mandatory purchase obligation under PURPA section 210(m)(1)(C).[626] Industrial Energy Consumers argues that, if the Commission seeks to allow states to rely on competitive solicitation processes, the Commission should undertake a separate inquiry, with necessary technical conferences, to develop specific parameters to govern such processes.[627] If the Commission relies directly on competitive solicitation processes in the final rule, Industrial Energy Consumers states that if, after undertaking the competitive solicitation, the utility rejects all offers and decides to self-build, then the all-inclusive price of the self-build option should at least establish the avoided cost rate for QFs seeking to develop in that area.[628] EPSA argues that the Commission should require further proceedings, including another technical conference, to discuss the protections that would be necessary in order to have a genuinely level playing field for competitive solicitations.[629]

388. Commissioner Slaughter states that PURPA sits at the intersection of competition and regulatory policy in an area of vital and urgent interest, and that the Commission should establish fair, non-discriminatory guidelines for competitive solicitations that would help states and other stakeholders maximize the benefits of competition from low-cost energy sources, particularly utility-scale renewable energy facilities.[630] Commissioner Slaughter states that such guidelines could form the basis for transitioning many local markets from administratively determined prices to environments of dynamic price discovery in which the rapidly decreasing cost of utility-scale renewable energy can put maximum pressure on both new and pre-existing fossil fuel-based sources of electricity.[631]

389. EPSA states that the Commission should ensure that competitive solicitations are properly designed to ensure that QFs have meaningful opportunities to compete against resources owned by incumbent utilities on a level playing field.[632] EPSA states that the Commission should use this opportunity to do a full assessment of how competitive solicitations are working and could be enhanced, while providing continued protections to prevent discrimination against QFs.[633] EPSA also emphasizes that, regardless of whatever competitive solicitation rules the Commission ultimately adopts, the Commission must continue to exercise its ''backstop'' oversight and enforcement authority to ensure that any requirements are implemented in a consistent and appropriate manner by individual states.[634]

(b) Requests Regarding Proposed Criteria

390. Several commenters requested that the Commission clarify the criteria that solicitations be conducted at regular intervals.[635] Several commenters request that the Commission reconsider or remove that criteria.[636] sPower argues that the Commission should require that such competitive solicitations be conducted at a minimum every two years.[637] Colorado Independent Energy

[614] *Id.* at 12.

[615] *Hydrodynamics,* 146 FERC ¶ 61,193.

[616] *Winding Creek Solar LLC* v. *Peterman,* 932 F.3d 861.

[617] NIPPC, CREA, REC, and OSEIA Comments at 62–63.

[618] *Id.* at 67.

[619] *Id.*

[620] *Id.* at 67–68.

[621] Michigan Commission Comments at 5.

[622] Montana Commission Comments at 3.

[623] California Commission Comments at 23.

[624] Advanced Energy Economy Comments at 13; EPSA Comments at 15–16; Industrial Energy Consumers Comments at 13–14.

[625] Advanced Energy Economy Comments at 13.

[626] *Id.*

[627] Industrial Energy Consumers Comments at 13–14.

[628] *Id.* at 14.

[629] EPSA Comments at 16.

[630] Commissioner Slaughter Comments at 1–2.

[631] *Id.* at 3.

[632] EPSA Comments at 3.

[633] *Id.* at 14.

[634] *Id.* at 16–17.

[635] APPA Comments at 17–18; Basin Comments at 9; Montana Commission Comments at 3; sPower Comments at 9–10.

[636] NorthWestern Comments at 7–8.

[637] sPower Comments at 9–10.

asserts that competitive solicitations should be held at regular intervals to test the market, and that the Commission should consider the entire market, not just projects 80 MW and under, in evaluating whether there are full and competitive opportunities.[638]

391. Several commenters oppose the requirement for an independent administrator.[639] APPA argues that the entire PURPA administrative construct is designed to entrust to state regulatory authorities the responsibility to carry out the duties they are assigned under the Commission's regulations.[640] NRECA believes that states are in the best position to determine the need for ''oversight by an independent administrator'' and recommends this criterion be deleted.[641] NRECA requests that, if the Commission retains the requirement that competitive solicitation processes include some type of oversight, instead of requiring oversight by an independent administrator, the Commission should allow states the flexibility to allow electric utilities to retain a third-party consultant for this purpose.[642] NRECA contends that many cooperatives have long-standing relationships with third-party consultants that assist the cooperatives in evaluating power supply options, and requiring those cooperatives to now use some other entity (*i.e.,* the independent administrator) would be disruptive and costly.[643] Colorado Independent Energy notes that, while independent evaluators are helpful, they are often employed by utilities and thus sometimes reluctant to offer third party criticism of the bid evaluation process.[644]

392. The Montana Commission requests clarification of the term ''independent administrator'' and ''certified'' as those terms are used in the proposed revisions to § 292.304(b).[645]

393. sPower disagrees that a competitive solicitation should ''take into account the required operating characteristics of the needed capacity'' in order to produce accurate avoided cost rates and recommends that a final rule remove that language from condition (ii) in the Commission's list of conditions that a competitive solicitation must meet.[646]

394. Colorado Independent Energy states that, in addition to the guidelines provided in the NOPR, the Commission should include additional guidelines, including that fairness of an ''all-source'' competitive solicitation must also be determined based on bid evaluation and not just on a competitive solicitation. Colorado Independent Energy asserts that competitive solicitation *submissions* can be technology-specific, but not the evaluation or the analysis of the need to be met by a competitive solicitation. Colorado Independent Energy asserts that a true all-source selection process must allow resource planning models to optimize among all bids received without bias toward QF-eligible technologies such as renewable generation or cogeneration.[647]

395. Several commenters stated that competitive solicitations must be assessed using the criteria set forth in *Allegheny*.[648] EPSA further states that, while the *Allegheny* principles provide a good starting point, additional protections will be required to level the playing field between independent generators and utilities.[649] R Street asserts that, if an auction can meet the *Allegheny* standard, then generators in that state would not be eligible for QF designations. R Street suggests that QFs should not be able to force their power on utilities if they lose such fairly administered auctions.[650]

396. Solar Energy Industries asserts that the Commission should require a purchasing electric utility to provide the state commission, and make available for public inspection, a post-solicitation report that: (1) Identifies the winning bidders; (2) includes a copy of any reports issued by the independent evaluator; and (3) demonstrates that the solicitation program was implemented without undue preference for the interests of the purchasing utility or its affiliates. Solar Energy Industries further assert that the solicitation program should include clear details regarding the manner in which the bids will be scored and clearly specify price and non-price criteria under which bids are evaluated including: (1) Acceptable delivery points and any scoring deductions for delivery to other points; (2) credit evaluation criteria and development securing requirements; and (3) performance requirements.[651]

397. Public Interest Organizations argue that the Commission's proposal does not require that state competitive solicitation procedures meet the statutory floor established through PURPA that rates both (1) encourage small power producers and (2) not discriminate relative to the utility's own generation and other non-QF generators.[652] To ensure competitive solicitations actually meet the statutory criteria, the Commission must ensure that competitive solicitations meet four minimum standards.[653] First, Public Interest Organizations state that solicitations must account for utility-owned and non-QF generation and cannot be a limited competition between QFs without the ability to displace non-QF generation.[654] As an example of an incorrectly-conducted, and unlawfully-discriminatory, bidding process, Public Interest Organizations cite the Nevada competitive solicitation process that is limited to QFs to meet a small, segregated portion of the utility's energy and unmet capacity requirements.[655] Second, to ensure that QFs receive the same price that other generation receives, Public Interest Organizations state that all sources of supply must compete in the competitive solicitation— including the utility's own generation.[656] Third, Public Interest Organizations state that the solicitation process cannot be used in any way to curtail or delay a utility's obligation to purchase from QFs.[657] Fourth, the ''required operating characteristics of the needed capacity'' factor suggested in the NOPR cannot be used as a surrogate to define characteristics of only non-QF generation or to allow a utility to pick among favored generators.[658]

398. Biogas states that, if QFs are to enter into competitive solicitations as a vehicle for PURPA, then there must be some correcting for the inequitable tax and regulatory provisions afforded to incumbent utilities and select renewable

[638] Colorado Independent Energy Comments at 9–12.

[639] APPA Comments at 18; NRECA Comments at 11.

[640] APPA Comments at 18 (citing 16 U.S.C. 824a–3(f) (expressly calling for state regulatory authorities and nonregulated electric utilities to implement Commission-issued PURPA regulations)).

[641] NRECA Comments at 11.

[642] *Id.* at 12.

[643] *Id.*

[644] Colorado Independent Energy Comments at 8.

[645] Montana Commission Comments at 3.

[646] sPower Comments at 8.

[647] Colorado Independent Energy at 2.

[648] EPSA Comments at 14–15 (citing *Allegheny,* 108 FERC ¶ 61,082); R Street Comments at 3–4; Solar Energy Industries Supplemental Comments, Docket No. AD16–16–000, at 32–37 (filed Aug. 28, 2019).

[649] EPSA Comments at 15.

[650] R Street Comments at 3–4.

[651] Solar Energy Industries Supplemental Comments, Docket No. AD16–16–000, at 21 (filed August 28, 2019).

[652] Public Interest Organizations Comments at 69–70.

[653] *Id.* at 70.

[654] *Id.*

[655] *Id.* at 71–72.

[656] *Id.* at 72.

[657] *Id.* at 72–73.

[658] *Id.* at 73.

technologies, in order to ensure a fair market opportunity.[659]

399. American Dams requests that QFs competing against a utility that can rate base the cost of new generation should be entitled to similar valuation provided that QF costs are at or less than those of the utility.[660]

(c) Other Requests

400. In their comments to the NOPR, Solar Energy Industries reference their August 28, 2019 comments in Docket No. AD16–16–000,[661] in which they describe the ''SEIA Counterproposal.'' That document proposes that, where a utility seeks to meet identified capacity needs through an open, fairly designed, and independently administered competitive solicitation: (i) The purchasing electric utility would only have to pay QFs for capacity to the extent that the purchasing electric utility failed to meet identified need through the competitive solicitation; and (ii) the QF would be paid for its output (energy and capacity) at the market rate established through the competitive solicitation process.[662]

401. Solar Energy Industries request that the Commission supplement proposed 18 CFR 292.304(b)(5) to require that: (1) Participants are provided with complete and transparent information regarding transmission constraints, levels of congestion, and interconnections; and (2) the solicitation is linked with the purchasing utility's IRP and is conducted for the entirety of a utility's anticipated capacity needs.[663]

402. Solar Energy Industries request that the Commission expressly implement safeguards to prevent utility self-dealing and affiliate abuse, with regard to both price and non-price terms.[664] Solar Energy Industries reference their previous comments in this proceeding, which they state describe practices of PacifiCorp,[665] NorthWestern,[666] Duke,[667] and Xcel[668] purportedly showing that these utilities have attempted to reduce QFs' ability to sell while simultaneously seeking to build and rate base their own substantial renewable resources.[669]

403. ELCON states that it continues to see shortcomings in competitive procurement practices across regions.[670] A current example ELCON provides is Dominion Energy Virginia's 2019 RFP which, ELCON argues, limited competition in a manner that all but guarantees that a Dominion self-build option will prevail because it restricts participation to new resources only and does not permit an independent third party to evaluate bids.[671] Another example ELCON provides is a recent Entergy Louisiana solicitation through which a natural gas generating facility was approved despite opposition from Louisiana industrial consumers who argued that the competitive solicitation was improperly designed to limit resource options to new construction comparable to a self-build.[672]

404. ELCON asserts that, to be competitive, a competitive solicitation must be transparent, face independent oversight, have safeguards against affiliate abuse involving transactions between franchised utilities and their market-based affiliates, and have well-defined technical parameters.[673] ELCON states that experiences with competitive solicitations thus far expose the challenges of achieving a workably competitive process. ELCON urges the Commission to set a high bar, with enforcement to verify that a process is sufficiently competitive.[674]

405. NorthWestern states that it supports the Commission's proposal to use competitive solicitations or RFPs to establish avoided *capacity* costs, but not avoided *energy* costs, because NorthWestern believes that an energy-only competitive solicitation has no relation to the market whereas a capacity competitive solicitation does.[675] NorthWestern believes that use of a competitive solicitation should be the preferred vehicle for setting avoided capacity rates for QFs because this will ensure that the capacity is acquired at the least cost thereby benefiting customers.[676]

406. Institute for Energy Research states that it would go even further than the NOPR proposal and require that competitive solicitations be the default whenever possible, with states having to justify case-by-case why a non-competitive solicitation is needed, because solicitation is the best expression of the Congressional mandate to encourage competition.[677]

407. Harvard Electricity Law states that the NOPR's proposed 18 CFR 292.304(b)(8)(ii), requiring solicitations must be open to ''all sources''—could be read as inconsistent with the Commission's *CPUC* orders[678] and the 2019 *CARE* v. *CPUC* decision.[679] Harvard Electricity Law argues that, if the Commission amends its avoided cost rules to allow states to set avoided cost rates based on competitive solicitations, it should clarify that states may set tiered rates, as the Commission and the U.S. Court of Appeals for the Ninth Circuit has allowed in the above cases.[680]

408. The Oregon Commission recommends that the Commission emphasize the need for states to have adequate safeguards to protect bidders' confidential and commercially sensitive proprietary information when using competitive solicitations to determine or inform avoided cost rates.[681]

409. sPower states that the issue of using a competitive solicitation process to establish avoided cost rates has sometimes been conflated with using a competitive solicitation process to establish a LEO, and sPower encourages the Commission to continue to analyze these distinct issues separately.[682]

410. Resources for the Future stresses that competitive solicitations alone would minimize QF costs but would not establish avoided cost rates, which depend on much more than the cost of QF generation.[683] However, used in concert with forward curves, Resources for the Future states that competitive solicitations could provide an effective complementary method.[684]

c. Commission Determination

411. In this final rule, we affirm the NOPR proposal to revise the PURPA Regulations to explicitly permit a state the flexibility to set avoided energy and/or capacity rates using competitive solicitations (*i.e.,* RFPs), conducted

[659] Biogas Comments at 2.

[660] American Dams Comments at 3.

[661] Solar Energy Industries Supplemental Comments, Docket No. AD16–16–000, at 17–40 (filed Aug. 28, 2019).

[662] Solar Energy Industries Comments at 38.

[663] *Id.* at 39.

[664] *Id.*

[665] Solar Energy Industries Supplemental Comments, Docket No. AD16–16–000, at 25–28 (filed August 28, 2019).

[666] *Id.* at 28–29.

[667] *Id.* at 29–31.

[668] *Id.* at 21.

[669] Solar Energy Industries Comments at 40.

[670] ELCON Comments at 27.

[671] *Id.*

[672] *Id.* at 28.

[673] *Id.* at 28–29.

[674] *Id.*

[675] NorthWestern Comments at 7.

[676] *Id.*

[677] Institute for Energy Research Comments at 1.

[678] *Cal. Pub. Utils. Comm'n,* 133 FERC ¶ 61,059, *clarification and reh'g denied,* 133 FERC ¶ 61,059 (2010), *reh'g denied,* 134 FERC ¶ 61,044 (2011) (*CPUC*) .

[679] *Californians for Renewable Energy* v. *Cal. Pub. Utils. Comm'n,* 922 F.3d 929, 937 (9th Cir. 2019) (*CARE* v. *CPUC*) (holding that ''where a state has [a renewable portfolio standard (RPS)] and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS[,]'' which ''comports with PURPA's goal to put QFs on an equal footing with other energy providers'').

[680] Harvard Electricity Law Comments at 31.

[681] Oregon Commission Comments at 4.

[682] sPower Comments at 3.

[683] Resources for the Future Comments at 8–9.

[684] *Id.* at 9.

pursuant to appropriate procedures in a transparent and non-discriminatory manner. A primary feature of a transparent and non-discriminatory competitive solicitation is that a utility's capacity needs are open for bidding to all capacity providers, including QF and non-QF resources, on a level playing field. This level playing field ensures that any QF's capacity rates that result from the competitive solicitation are just and reasonable and non-discriminatory avoided cost rates.

412. Consistent with our general approach of giving states flexibility in the manner in which they determine avoided costs, we do not prescribe detailed criteria governing the use of competitive solicitations as tools to determine rates to be paid to QFs, as well as to determine other contract terms. States arguably are in the best position to consider their particular local circumstances, including questions of need, resulting economic impacts, amounts to be purchased through auctions, and related issues.

413. In considering what constitutes proper design and administration of a competitive solicitation, however, we find it appropriate to establish certain minimum criteria governing the process by which competitive solicitations are to be conducted in order for an competitive solicitation to be used to set QF rates. These factors, which we proposed in the NOPR and adopt here, include, among others: (a) An open and transparent process; (b) solicitations should be open to all sources to satisfy that purchasing electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity; (c) solicitations conducted at regular intervals; (d) oversight by an independent administrator; and (e) certification as fulfilling the above criteria by the state regulatory authority or nonregulated electric utility.

414. We affirm that such competitive solicitations must be conducted in a process that includes, but is not limited to, the factors identified above that will be set forth in 18 CFR 292.304(b)(8). This rule does not undo any competitive solicitations conducted prior to the effective date of this final rule that may not have met these criteria. This rule applies only to competitive solicitations conducted after the effective date of the final rule. We also provide modifications and clarifications to the NOPR proposal, as described below.

i. Requests for Clarification and/or Separate Proceedings

415. As an initial matter, in the NOPR, the Commission addressed competitive solicitations in two related but distinct contexts. The first, to be discussed in this section, relates to the proposal to explicitly permit a state the flexibility to set avoided cost energy and/or capacity rates using competitive solicitations (*i.e.,* RFPs), conducted pursuant to appropriate procedures. The second, to be discussed below, in section IV.G.2 of this final rule, concerns the NARUC proposal that urged the Commission to give meaning to PURPA section 210m(1)(C) by establishing a ''yardstick'' by which a vertically integrated utility outside of an RTO or ISO could apply to terminate the mandatory purchase obligation if it conducts sufficiently competitive RFPs for energy or capacity.

416. More generally, we support the use of competitive solicitations as a means to foster competition in the procurement of generation and to encourage the development of QFs in a way that most accurately reflects a purchasing utility's avoided costs. We believe that allowing QFs to compete to provide capacity and energy needs, through a properly administered competitive solicitation, may help ensure an accurate determination of the purchasing electric utility's avoided cost, and therefore result in prices meeting the PURPA's statutory requirements. We also believe that it is reasonable for states to choose to require QFs to be responsive to price signals as to where and when capacity is needed. We believe that a properly administered competitive solicitation can help provide such price signals.

417. Furthermore, we believe that competitive solicitations may be an especially appropriate tool for developing competition in the markets outside of RTOs and ISOs, where there are no organized competitive markets in place where QFs can make sales.

418. We emphasize, however, that neither the Commission's current regulations, nor those adopted in this final rule, *require* a state or a purchasing electric utility to use a competitive solicitation to determine avoided cost rates for QFs. Consistent with other changes in our regulations discussed above, we give states the flexibility to use a properly structured competitive solicitation for this purpose, but we do not mandate that they do so.

419. Furthermore, in light of the substantial experience the industry has with competitive solicitations within and outside of the PURPA context, and the voluminous comments the Commission has received regarding competitive solicitations, we find that there is not currently a need for a separate proceeding or additional procedures to address competitive solicitation issues, such as holding workshops or technical conferences. Should further procedures appear beneficial in light of actual competitive solicitation experience under PURPA and the regulations adopted today, such a proceeding may be appropriate in the future.

ii. Proposed Criteria

420. We continue to find that competitive solicitations as discussed in this final rule may accurately reflect a purchasing electric utility's avoided costs and ensure that the resulting rates for winners of such competitive solicitations are consistent with PURPA. A competitive solicitation may more accurately value QF capacity over time by subjecting it to competition with other sources. Such competitive solicitations may provide more certainty both to QFs regarding when and how often they will be eligible to compete and to purchasing utilities regarding how they may expect to fulfill their capacity needs.

421. The Commission clarifies that, if a utility acquires all of its capacity through properly conducted competitive solicitations (using the factors described above), and does not add capacity through self-building and purchasing power from other sources outside of such solicitations, the competitive solicitations could be the exclusive vehicle for the purchasing electric utility to pay avoided capacity costs from a QF. In this situation, using properly conducted competitive solicitations as the exclusive vehicle to determine the purchasing electric utility's avoided cost capacity rates would allow QFs a chance to compete to provide the utility's capacity needs on a level playing field with the utility. We clarify that it is up to the states to determine whether to require that a utility's total planned self-build and power purchase options must compete in the competitive solicitations, and we will not direct such a requirement here.

422. If a state decides to require utility self-build and power purchase options to participate in competitive solicitations, then a QF that does not obtain an award in a competitive solicitation would have no right to an avoided cost capacity rate more than zero because the utility's full capacity needs would have been met by the competitive solicitation.[685] However,

[685] This would be consistent with *City of Ketchikan,* 94 FERC at 62,061 (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'').

QFs would continue to have the right to put energy to the utility at the as-available avoided cost energy rate because the purchasing utility will still be able to avoid incurring the cost of generating energy even when it does not need new capacity.

423. If the state does not require utility self-build and purchase options to participate in competitive solicitations, then QFs that lose in a competitive solicitation still may have the right to avoided cost capacity rates more than zero if the state determines that the utility still has capacity needs after the competitive solicitation that otherwise could be met through the utility's self-build or purchase options.

424. The Commission has held and we reaffirm here that, when capacity is not needed, the avoided capacity cost rate can be zero.[686] Competitive solicitations conducted pursuant to the rules adopted in this final rule that are held whenever capacity is needed provide QFs a level playing field on which to compete to sell capacity. This approach further shields purchasing electric utilities from situations like those explained by Xcel, where QFs could simply sit out the competitive solicitation process (or participate but not have their bids accepted), but then seek to sell capacity to the purchasing electric utility and to receive a separate higher administratively-determined avoided cost rate including an avoided cost capacity rate, and even potentially displace non-QF competitive solicitation winners.[687] This approach benefits ratepayers because allowing QFs to compete in properly conducted, competitive solicitations that are held whenever capacity is needed allows the purchasing utility to obtain needed capacity efficiently. To be clear, the competitive solicitation is not to be a means to determine a QF's right to put as-available energy to the utility. But the competitive solicitation can be the means to determine what, if any, rate the QF will be paid for capacity.

425. Multiple commenters point out that using competitive solicitations could be a beneficial way to carry out the Congressional intent behind PURPA. However, many of these same commenters claim that the competitive solicitations carried out to date do not live up to this standard. In other words, commenters assert that the competitive solicitations conducted to date have often not been properly conducted and instead have been unfair. As described above, assertions about specific states' competitive solicitation processes include that:

—The competitive solicitations conducted in Florida are unfair because they do not require an Independent Evaluator as part of the competitive solicitation process;[688]

—the competitive solicitations conducted in Colorado and Oklahoma are unfair because purchasing electric utilities are allowed to apply for waivers of the competitive solicitation requirement;[689]

—The competitive solicitations conducted in North Carolina are unfair because the incumbent purchasing electric utility can receive preferential treatment in the form of waivers of the post bid security otherwise required for any independently owned projects;[690] and

—The competitive solicitations conducted in Nevada are unfair because the process is limited to QFs to meet a small, segregated portion of the utility's energy and unmet capacity requirements.[691]

426. Commenters also make assertions about unfair practices of purchasing electric utilities, including that the purchasing electric utilities have attempted to reduce QFs' ability to sell while the purchasing electric utilities are simultaneously seeking to build and rate base their own substantial renewable resources.

427. The criteria proposed in the NOPR were aimed at ensuring that competitive solicitations are conducted fairly. In this final rule, the Commission finds that, in order to use the results of a competitive solicitation to set avoided cost rates, the competitive solicitation must be conducted in a transparent and non-discriminatory manner. Such a competitive solicitation must be conducted in a process that includes, but is not limited to, the following factors: (i) The solicitation process is an open and transparent process that includes, but is not limited to, providing equally to all potential bidders substantial and meaningful information regarding transmission constraints, levels of congestion, and interconnections, subject to appropriate confidentiality safeguards; (ii) solicitations must be open to all sources, to satisfy that purchasing electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity; (iii) solicitations are conducted at regular intervals; (iv) solicitations are subject to oversight by an independent administrator; and (v) solicitations are certified as fulfilling the above criteria by the relevant state regulatory authority or nonregulated electric utility through a post-solicitation report.

428. Without judging the competitive solicitations conducted to date, we find that henceforth any competitive solicitation that does not comply with these factors will be viewed as not transparent and discriminatory, and not a basis for either setting the avoided cost capacity rate that a QF may charge the purchasing electric utility or limiting which generators can receive a capacity rate. Phrased differently, we will presume that any future competitive solicitation that does not comply with the factors adopted in this final rule does not comply with the Commission's regulations implementing PURPA.

429. In addition, to further promote fairness, the Commission makes several clarifications, as described below.

430. We clarify that competitive solicitations must also be conducted in accordance with the *Allegheny* principles under which the Commission evaluates a competitive solicitation: (1) Transparency, a requirement that the solicitation process be open and fair; (2) definition, a requirement that the product, or products, sought through the competitive solicitation be precisely defined; (3) evaluation, a requirement that the evaluation criteria be standardized and applied equally to all bids and bidders; and (4) oversight, a requirement that an independent third party design the solicitation, administer bidding, and evaluate bids prior to selection.[692] While the NOPR's proposed guidelines for competitive solicitations were generally inclusive of the *Allegheny* principles, in order to more precisely define what is and what is not a properly conducted competitive solicitation that can be used to determine what generators will be entitled to an avoided cost capacity rate, and what that rate will be, we specifically clarify here that the *Allegheny* principles apply as well.

431. We also revise the proposed language in 18 CFR 292.304(d)(8)(i) to clarify that participants must be provided with substantial and meaningful information regarding transmission constraints, levels of congestion, and interconnections, subject to appropriate confidentiality

[686] *Id.* at 62,061 ("[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.").

[687] *See* Xcel Comments at 2–3, 9–10.

[688] Southeast Public Interest Organizations Comments at 27.

[689] *Id.*

[690] *Id.*

[691] Public Interest Organizations Comments at 71–72.

[692] *Allegheny,* 108 FERC ¶ 61,082 at P 18.

safeguards. We believe that it is important that all participants in the competitive solicitation have access to these data as a necessary predicate for a nondiscriminatory competitive solicitation process, and we find that requiring that this information be provided will help ensure that a competitive solicitation is open and transparent. We acknowledge the risk that competitive solicitation participants could use this information to gain a competitive advantage that could be used outside of the competitive solicitation, but find that this risk can be minimized through the use of non-disclosure agreements and placing reasonable limits on those persons permitted to review the information, just as is done in other Commission proceedings where this issue arises.

432. We also clarify that the requirement that the competitive solicitation process be open and transparent includes that the electric utility provide the state commission, and make available for public inspection, a post-solicitation report that: (1) Identifies the winning bidders; (2) includes a copy of any reports issued by the independent evaluator; and (3) demonstrates that the solicitation program was implemented without undue preference for the interests of the purchasing utility or its affiliates. We find this consistent with the requirement that competitive solicitations be open and transparent, to not only ensure that utilities are not discriminating against QFs, but also to help all stakeholders and the public at large better understand the utility's competitive solicitation processes and thus to be confident in the fairness of the process and of the results.

433. Regarding the requirement that solicitations must be open to all sources to satisfy the purchasing electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity, we decline to remove the phrase ''taking into account the operating characteristics of the needed capacity.'' There may be times when a utility needs capacity with specific attributes, such as specific ramping capability, that cannot be filled by certain types of generators. However, we agree with Public Interest Organizations that this phrase may not be used to define characteristics of only non-QF generation or to allow a utility to select favored generators.[693]

434. We decline to be overly prescriptive as to what constitutes ''regular intervals.'' In general, utilities should be reviewing their capacity needs frequently, and the state or nonregulated electric utility is in the best position to determine the frequency of that review. However, there may be times when a utility's review of capacity needs reveals that no capacity is needed, and it would not make sense for a competitive solicitation to be mandated at such a time.

435. We similarly decline to be overly prescriptive as to what constitutes an ''independent administrator.'' Commenters argue on both sides whether the NOPR proposal goes too far or not far enough. On the one hand, NRECA argues that states are in the best position to determine the need for oversight by an independent administrator and recommends this criterion be deleted.[694] On the other hand, Colorado Independent Energy notes that independent administrators are often employed by utilities and thus sometimes reluctant to offer third party criticism of the bid evaluation process.[695] We clarify that the independent administrator, who is responsible for administering the competitive solicitation, must be an entity independent from the purchasing electric utility in order to help ensure fairness. Whether the entity is called an independent administrator or a third-party consultant, the substantive requirement of this factor is that the competitive solicitation not be administered by the purchasing electric utility itself or its affiliates, but rather by a separate, unbiased, and unaffiliated entity not subject to being influenced by the purchasing utility. We recognize, however, that such an independent administrator will need to be selected and paid. Though we are not directing a process, we note that the selection and payment could be done under the auspices of a state regulatory authority or by mutual agreement between the utility and the competitive solicitation participants.

436. In response to the Montana Commission's request for clarification as to what ''certified'' means within the guideline that requires certification of the competitive solicitation by the state regulatory authority or nonregulated electric utility as fulfilling the above criteria, we clarify that, after a thorough review of the competitive solicitation procedures used and the competitive solicitation results, certification of the competitive solicitation requires a written, formally-issued finding by the state that the competitive solicitation and its results comply with PURPA and this Commission's PURPA regulations—and must include the independent administrator's report to the same effect.

437. We decline at this time to add any additional requirements for competitive solicitations. We continue to believe that states may be in the best position to consider their particular local circumstances. We think that the guidelines adopted here, in conjunction with the *Allegheny* principles and other clarifications made here, provide an adequate framework for competitive solicitations to be conducted efficiently, transparently and in a nondiscriminatory manner.

438. We also clarify that, if a competitive solicitation is not conducted fairly and in accordance with the guidelines here, then an aggrieved entity may challenge the state's competitive solicitation in the appropriate forum, which could include any one or more of the following: (1) Initiating or participating in proceedings before the relevant state commission or governing body; (2) filing for judicial review of any state regulatory proceeding in state court (under PURPA section 210(g)); or, alternatively (3) filing a petition for enforcement against the state at the Commission and, if the Commission declines to act, later filing a petition against the state in U.S. district court (under PURPA section 210(h)(2)(B)).

iii. Other Requests

439. We decline to grant Solar Energy Industries request to require that solicitations be linked with the purchasing electric utility's IRP. Where a state has an IRP,[696] it may make sense to link the competitive solicitation processes with the IRP so that the competitive solicitation is conducted for the entirety of a utility's anticipated capacity needs. On the other hand, IRPs may come in a variety of forms. For example, an IRP may merely be a general projection of short- and long-term load growth and potential resources to meet such growth, and each generation project may be subject to specific approval based on actual specific need. In order to provide states flexibility in conducting these

[693] Public Interest Organizations Comments at 73.

[694] NRECA Comments at 11. In this final rule, we note, for ease of readability we have used the word ''state'' to refer to both state regulatory authorities and to nonregulated electric utilities. Thus, in the context of nonregulated electric utilities in particular, to say that the ''state'' can fairly administer the competitive solicitation is to say that the nonregulated electric utility can, essentially, be both the purchasing electric utility and potentially the independent administrator of its own competitive solicitation. That is a result we cannot countenance.

[695] Colorado Independent Energy Comments at 8.

[696] 16 U.S.C. 2621(a), (d)(7) (requiring states to consider whether to employ integrated resource planning).

processes, we will not require such links between competitive solicitations and IRPs, although such links certainly are permitted if a state deems it to be appropriate.

440. Regarding facilities not designed primarily to sell electricity to the purchasing electric utility, such as waste to power small power production facilities and cogeneration facilities, we find that an exemption from competitive solicitation processes is unnecessary. We do not exempt small power production facilities from the competitive solicitation process; we are not persuaded that such an exemption is appropriate given that exempting large classes of small power producers could frustrate the price discovery function of the competitive solicitation. A large number of exempted small facilities could disrupt the competitive solicitation process. We clarify, however, that QFs whose capacity is 100 kW or less already are entitled to standard rates regardless of whether they compete in a competitive solicitation and we do not change that regulation in this final rule.[697] Given that we view competitive solicitations as an important price discovery tool and that states already are required to establish standard rates for such entities, there is no need to determine prices for QFs at 100 kW or less through a competitive solicitation.

441. The Commission clarifies that any competitive solicitation conducted may not force alteration of existing QF contracts. A QF receiving a capacity payment is entitled to that payment for the duration of the term of its contract, and a competitive solicitation is necessarily forward looking based on the results of that auction.

C. Relief From Purchase Obligation in Competitive Retail Markets

1. NOPR Proposal

442. The Commission in the NOPR proposed to add regulatory text at the end of § 292.303(a) of the PURPA Regulations to provide that a utility's purchase obligation may be reduced to the extent the purchasing electric utility's supply obligation has been reduced by a state retail choice program. The Commission stated that it was reasonable for electric utilities' PURPA capacity purchase obligations to be reduced to the extent retail choice reduces their supply obligations. To the extent Provider of Last Resort (POLR) supplies are obtained through solicitations having a particular contract term such as one year, the Commission proposed that the length of the utility's PURPA purchase contract should match the term of the POLR supply solicitation contracts in order to more accurately reflect the utility's avoided costs.

443. The Commission proposed, through this change, to provide that state regulatory authorities and nonregulated electric utilities have flexibility to respond to the possibility that, over time, a utility's POLR supply obligation may decrease (or increase). The Commission intended that this proposal would apply prospectively from the effective date of a final rule and would not disturb contracts in effect at the time the utility's supply obligation is reduced.

2. Comments

444. APPA, DTE Electric, EEI, Institute for Energy Research, NorthWestern, NRECA, Pennsylvania Commission, Portland General, and We Stand for Energy filed comments in support of the Commission's proposal to provide that the purchase obligation may be reduced to the extent the purchasing electric utility's supply obligation has been reduced by a state retail choice program.[698]

445. New England Small Hydro, NIPPC, CREA, REC, and OSEIA, and Public Interest Organizations filed opposing comments arguing that the Commission lacks the statutory authority to implement this proposal because the Commission lacks discretion to reduce an electric utility's mandatory purchase obligation except through PURPA section 210(m).[699] New England Small Hydro claims that PURPA section 210(a) clearly states that electric utilities must purchase the electric energy from QFs, and that the Commission does not have the authority to deviate from the statute.[700] NIPPC, CREA, REC, and OSEIA argues that the Commission's existing regulations adequately address the concern at issue because any reduction in the long-term capacity needs of the utility due to retail access should be reflected in avoided capacity rates offered to QFs.[701] Public Interest Organizations claim that the Commission proposes to remove state authority by requiring QF contracts with a POLR to match the term of the POLR's other supply contracts.[702] Public Interest Organizations also state that even if the Commission had such authority, there is no evidence in the record to support matching QF contract lengths with a POLR's other supply contracts. Public Interest Organizations also assert that the Commission's proposal unlawfully discriminates against QFs to the extent that it fails to treat QF contracts in parity with any of a POLR's other supply contracts.[703]

446. Biogas and Covanta argue that the rationale for this proposal is unclear and that the NOPR fails to justify the reduction of a utility's obligation to purchase QF power based on the amount of any non-utility generator's supply into the utility's service territory.[704] Covanta states that the NOPR incorrectly concludes that all public power is renewable power.[705] Biogas and Covanta assert that the existence of a competitive retail market does not mean there is a competitive retail market for biogas or waste-to-energy QFs.[706] Biogas and Covanta also argue that the NOPR would reduce that already limited market by providing greater leverage to the purchasing electric utility, and urge the Commission to remove barriers to local government options for energy purchase rates.

447. Ohio Commission Energy Advocate states that under Ohio law, an electric distribution utility is required to provide consumers within its certified territory a standard service offer of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services.[707] Ohio Commission Energy Advocate claims that all PUCO-regulated electric distribution utilities satisfy this obligation through competitive solicitation for default service within the context of an electric security plan.[708] Ohio Commission Energy Advocate believes that the electric distribution utility should retain the full purchase obligation because the regulated utility maintains the obligation to serve as the POLR for all

[697] *See* 18 CFR 292.304(c).

[698] APPA Comments at 20; DTE Electric Comments at 4–5; EEI Comments at 41–42; Institute for Energy Research Comments at 1–2; NorthWestern Comments at 8; NRECA Comments at 13–14; Pennsylvania Commission Comments at 6–7; Portland General Comments at 12–13; and We Stand Comments at 1.

[699] New England Small Hydro Comments at 15–16; NIPPC, CREA, REC, and OSEIA Comments at 68–69; and Public Interest Organizations Comments at 74–75.

[700] New England Small Hydro at 16 (citing *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council,* 467 U.S. 837 (1984)).

[701] NIPPC, CREA, REC, and OSEIA Comments at 69.

[702] Public Interest Organizations Comments at 74.

[703] *Id.* at 75.

[704] Biogas Comments at 2; Covanta Comments at 9.

[705] Covanta Comments at 9.

[706] Biogas Comments at 2; Covanta Comments at 9–10.

[707] Ohio Commission Energy Advocate Comments at 5.

[708] *Id.* at 6.

''wires-connected'' customers.[709] Ohio Commission Energy Advocate also states that it is concerned by the lack of alternatives to the mandatory purchase obligation and would question any interpretation of PURPA that contemplates a scenario where no entity has a purchase obligation for a QF.[710]

448. ELCON, California Utilities, Chamber of Commerce, Connecticut Authority, and Michigan Commission request further clarification on how the Commission's proposal will be implemented. ELCON states that industrial customers conditionally support the reduction in obligation to purchase based on a state retail choice program, subject to the development of clear and enforceable criteria that exclude mandatory purchase obligation relief for default supply obligations that utilities meet with their own generation.[711]

Similarly, California Utilities state that because of the various ways states have developed restructured retail markets, the Commission should provide additional guidance as to the various ways that state commissions can address load reductions due to retail choice while protecting legacy utilities.[712] California Utilities explain that they need Commission guidance to ensure that cost recovery for past and future mandated QF purchases is equitable to the remaining retail customers in the legacy utilities' distribution service areas and that future PURPA mandates or costs are fairly allocated consistent with cost-causation principles.[713] Chamber of Commerce states that the Commission should clarify that the reduction in a utility's QF purchase obligation is measured against the amount of a utility's load that has elected an alternative supplier, as opposed to eligible load.[714] Chamber of Commerce claims that in certain states, only a portion of an electric utility's load is eligible to select an alternative electricity supplier and that such percentage would serve as the limit for any corresponding reduction in a utility's QF purchase obligation. Michigan Commission states that its retail choice program caps retail choice at 10 percent of an electric utility's retail customer demand, and seeks clarification on (1) whether the reduction in a utility's purchase obligation would equal the reduction in its supply obligation, be based on the percentage of its customer demand participating in the state's retail choice program, or some other metric; and (2) how fluctuations in the state's retail choice program and resulting purchase obligation should be addressed.[715]

449. Connecticut Authority supports the proposal to modify distribution utilities' must-purchase obligations.[716] Connecticut Authority states that since Connecticut's electric industry restructuring, distribution utilities' purchases of QF output have not been used to serve retail customers, rather the distribution utility acts as an intermediary selling output into the New England markets. Connecticut Authority asserts that the Commission should clarify that the state regulatory authority is responsible for determining the appropriate adjustment to the distribution utility's must-purchase obligation and providing notice of such determination to the Commission.[717]

450. Connecticut Authority claims that QF output is different from, and cannot be substituted in for, distribution utility-provided default standard or last resort services. Connecticut Authority explains that standard service is procured in six-month tranches, last resort service is procured in three-month tranches, and that distribution utilities do not self-manage their default service supply portfolios.[718]

451. Connecticut Authority states that while it agrees that matching the contract terms for default service supply and QF supply could potentially reduce the burden of over-estimated avoided costs and give states flexibility to respond quickly to changes to a distribution utility's default supply obligation, the Commission should not mandate any term length for the mandatory purchase obligation.[719] Instead, Connecticut Authority asserts that the Commission should allow the state to establish the term based on state-specific circumstances.

452. California Utilities request that the Commission reaffirm that all alternative retail suppliers, including Electric Service Providers (ESP) and Community Choice Aggregators (CCA), are electric utilities subject to the PURPA purchase obligation.[720] California Utilities explain that ESPs and CCAs are the two types of entities that California allows to sell power to retail customers in the distribution service territories of CPUC-regulated utilities, and argues that such entities meet the definition of electric utility used in PURPA.[721]

453. California Utilities state that the Commission should clarify that a state has no authority to exempt any traditional or alternative retail supplier from the PURPA mandatory purchase obligation in order to ensure QFs that there is a robust market to sell their energy and capacity to entities that actually serve load in the event a legacy utility is relieved of all or part of its PURPA obligations.[722] California Utilities also state that the Commission should clarify that alternative retail suppliers must make avoided cost information publicly available to allow QFs to locate and identify potential buyers that may have higher avoided costs than legacy utilities that have lost load and may no longer have capacity needs.

454. California Utilities argue that for states such as California that allow alternative retail suppliers to opt out of procuring capacity and require legacy utilities to provide capacity on their behalf, it would be unfair for legacy utilities to pay a QF any amount for energy greater than the LMP unless the price differential for which the legacy utility can sell the energy in the market is paid for by the alternative retail supplier that was short on capacity.[723] California Utilities explain that this would prevent cost shifts to customers who remain with the legacy utility such that all costs associated with the mandatory PURPA purchases made by the legacy utility on behalf of the alternative retail supplier would be borne by customers of the alternative retail supplier.[724] California Utilities also argue that the Commission should clarify that if legacy utilities are required to procure capacity from QFs on behalf of alternative retail suppliers, states must require alternative retail suppliers to pay for such QF purchases at the avoided cost rate set by the state for the legacy utility for capacity.

455. California Utilities urge the Commission to adopt a stranded cost regulation addressing PURPA obligations incurred by legacy utilities that lose load to retail competition consistent with the cost recovery guarantee in PURPA section 210(m)(7)(A).[725] California Utilities argue that such regulation should be clear that prudently incurred costs include any costs associated with a

[709] *Id.* at 6–7.

[710] *Id.*

[711] ELCON Comments at 19.

[712] California Utilities Comments at 5.

[713] *Id.* at 7.

[714] Chamber of Commerce Comments at 5.

[715] Michigan Commission Comments at 5–6.

[716] Connecticut Authority Comments at 16.

[717] *Id.* at 17.

[718] *Id.*

[719] *Id.* at 18.

[720] California Utilities at 9.

[721] *Id.* at 9–10.

[722] *Id.* at 11.

[723] *Id.* at 12.

[724] *Id.* at 13.

[725] *Id.* at 14.

purchase under a state-mandated contract. California Utilities propose new language to § 292.304(g) regarding implementation of the cost recovery mandate in section 210(m)(7)(A) of PURPA stating, in part, that ''[a] state commission may not find any costs associated with any legally enforceable obligation that it has imposed on an electric utility imprudent.'' [726]

3. Commission Determination

456. In this final rule, we decline to adopt the proposed regulation permitting states with retail competition to allow relief from the purchase obligation. We instead clarify that the Commission's existing PURPA Regulations already require that states, to the extent practicable, must account for reduced loads in setting QF rates.

457. Specifically, 18 CFR 292.304(e)(3) already does and will continue to allow states, when setting avoided cost rates, to take into account ''the ability of the electric utility to avoid costs, including the deferral of capacity additions.'' We regard this existing regulation as allowing a state to consider reductions in a purchasing electric utility's supply obligations given retail competition and the purchasing electric utility's POLR obligations under state law. We further clarify that this clarification is not intended to be reflected as a MW-for-MW reduction (or increase) based on yearly changes in load and therefore does not and may not serve to terminate a purchasing utility's mandatory purchase obligation under PURPA section 210(a).[727]

D. Evaluation of Whether QFs Are at Separate Sites

1. Rebuttable Presumption of Separate Sites

a. NOPR Proposal

458. The Commission proposed to allow entities challenging a QF certification to rebut the presumption that affiliated facilities located more than one mile apart are considered to be separate QFs. The Commission proposed that this change would be effective as of the date of the final rule, which means that such challenges could only be made to QF certifications and recertifications that are submitted after the effective date of the final rule in this proceeding.

459. The Commission proposed that an entity can seek to rebut the presumption only for those facilities that are located more than one mile apart and less than 10 miles apart. The Commission believed that, just as there are some facilities that may be so close that it is reasonable to irrebuttably treat them as a single facility (those a mile or less apart), so there are some facilities that are sufficiently far apart that it is reasonable to treat them as irrebuttably separate facilities.[728] That latter distance, the Commission believed, is 10 miles or more apart. Thus, if two affiliated facilities are one mile or less apart, they would continue to be irrebuttably presumed to be a single facility at a single site. If affiliated facilities are 10 miles or more apart, they would be irrebuttably presumed to be separate facilities at separate sites.

460. The Commission proposed that if affiliated facilities are more than one mile apart and less than 10 miles apart, there would still be a presumption, but it would be a *rebuttable* presumption, that they are separate facilities at separate sites. Purchasing electric utilities and others thus would be able to file a protest attempting to rebut the presumption for facilities more than one mile apart and less than 10 miles apart and argue that they should be treated as a single facility. The Commission could also act *sua sponte.* The Commission proposed that self-certifications will remain effective after a protest has been filed, until such time as the Commission issues an order revoking the certification.

461. The Commission proposed allowing an entity seeking QF status to provide further information in its certification (both self-certification and application for Commission certification), to preemptively defend against rebuttal by asserting factors that affirmatively show that the affiliated facilities are indeed separate facilities at separate sites.[729] Anyone challenging the QF certification would be allowed to assert factors to show that the facilities are actually part of the same, single facility.

462. The Commission proposed limiting protests challenging QF status by requiring any entity filing a protest to specify facts that make a prima facie demonstration that the facility described in the self-certification, self-recertification, or Commission certification does not satisfy the requirements for QF status. General allegations or unsupported assertions would not be a basis for denial of certification. The Commission further proposed limiting protests to QF status by requiring that once the Commission has affirmatively certified an applicant's QF status through either a Commission certification proceeding or in response to protests challenging QF status, any later protest to a QF's existing certification asserting that facilities further than one mile apart are part of a single QF must demonstrate changed circumstances that call into question the continued validity of the earlier certification.

463. The Commission proposed that physical and ownership factors may be asserted to rebut or defend against rebuttal. Noting that no single factor would be dispositive, the Commission proposed the following factors: (1) Physical characteristics including such common characteristics as: infrastructure, property ownership, interconnection agreements, control facilities, access and easements, interconnection facilities up to the point of interconnection to the distribution or transmission system, collector systems or facilities, points of interconnection, motive force or fuel source, off-take arrangements, property leases, and connections to the electrical grid; and (2) ownership/other characteristics, including such characteristics as whether the facilities in question are: Owned or controlled by the same person(s) or affiliated persons(s), operated and maintained by the same or affiliated entity(ies), selling to the same electric utility, using common debt or equity financing, constructed by the same entity within 12 months, managing a power sales agreement executed within 12 months of a similar and affiliated facility in the same location, placed into service within 12 months of an affiliated project's commercial operation date as specified in the power sales agreement, or sharing engineering or procurement contracts. The Commission solicited comments on whether the Commission should rely on some or any of these factors, or other factors, or whether the various factors should be considered together and weighed.

464. The Commission stated that it will continue to rely on its definition of ''affiliate'' provided in 18 CFR 35.36(a)(9), and noted that subsection (iii) provides that the Commission may determine, after appropriate notice and

[726] *Id.* at 15.

[727] 18 CFR 292.304(e)(3).

[728] NOPR, 168 FERC ¶ 61,184 at P 101. As discussed in detail in section IV.D.1.d below, this final rule will change the references to ''separate facilities'' or ''the same facility'' to ''at separate sites'' or ''at the same site.''

[729] While a QF with a net power production capacity of 1 MW or less is not required to formally certify its QF status (either through a self-certification or application for Commission certification), if the QF's status is later challenged (*i.e.,* by a petition for declaratory order), the QF would be able to respond by affirmatively demonstrating that its facilities are not located at the same site as other affiliated facilities and thus that the QF does not exceed the 80 MW size limitation.

opportunity for hearing, that a person stands in such relation to a specified company that there is likely to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate.[730] The Commission intended, when applying its rules on separate facilities, to consider this provision of its regulations, when entities otherwise would not be deemed affiliates under the other provisions of the definition, to determine whether a person nevertheless should be treated as an affiliate. In doing so, the Commission stated that it could take into consideration many of the same factors that would reasonably be considered in evaluating whether facilities located over one and less than 10 miles apart are a single facility or separate facilities.

465. The Commission believed that this change, together with the proposed definition of ''electrical generating equipment'' and revision to the FERC Form No. 556, would more closely align with Congress's requirement that QFs seeking to certify as small power production facilities are in fact below the 80 MW statutory limit for such facilities.[731]

b. Commission Determination

466. As further discussed and revised in the following sections, we adopt the NOPR proposal. Henceforth, if a small power production facility seeking QF status is located one mile or less from any affiliated small power production QFs that use the same energy resource, it will be irrebuttably presumed to be at the same site as those affiliated small power production QFs. If a small power production facility seeking QF status is located ten miles or more from any affiliated small power production QFs that use the same energy resource, it will be irrebuttably presumed to be at a separate site from those affiliated small power production QFs. If a small power production facility seeking QF status is located more than one mile but less than ten miles from any affiliated small power production QFs that use the same energy resource, it will be rebuttably presumed to be at a separate site from those affiliated small power production QFs.

467. We adopt the proposal to allow a small power production facility seeking QF status to provide further information in its certification (both self-certification and application for Commission certification) or recertification (both self-certification and application for Commission recertification), to preemptively defend against anticipated challenges by identifying factors that affirmatively show that its facility is indeed at a separate site from affiliated small power production QFs that use the same energy resource and that are more than one but less than 10 miles from its facility. We will correspondingly allow any interested person or entity to challenge a QF certification (both self-certification and application for Commission certification) or recertification (both self-recertification or application for Commission recertification) that makes substantive changes to the existing certification as further described below).[732]

468. As explained in section IV.D.1.f below, we adopt the NOPR's proposed factors, with certain additions.

469. We adopt the proposal to clarify that challenges to QF status require that the interested person or entity filing a protest must specify facts that make a prima facie demonstration that the facility described in the certification (both self-certification and application for Commission certification) or recertification (both self-recertification and application for Commission recertification) does not satisfy the requirements for QF status. Additionally, any protest must be adequately supported, with supporting documents, contracts, or affidavits, as appropriate. General allegations or unsupported assertions will not provide a basis for denial of certification or recertification. We additionally limit protests, as described more fully in section IV.E below, by clarifying that protests may be made to an initial certification (both self-certification and application for Commission certification) filed on or after the effective date of this final rule, but only to a recertification (both self-recertification and application for Commission recertification) filed on or after the effective date of this final rule that makes substantive changes to the existing certification. We adopt the proposal to limit protests by requiring that once the Commission has affirmatively certified an applicant's QF status in response to a protest opposing a self-certification or self-recertification, or in response to an application for Commission certification or recertification, any later protest to a recertification (self-recertification or application for Commission recertification) making substantive changes to a QF's existing certification must demonstrate changed circumstances from the facts on which the Commission acted on the certification filing that call into question the continued validity of the earlier certification.[733] Finally, the Commission retains the discretion to summarily reject protests where a protest reiterates arguments already made against the same QF that the Commission previously denied or otherwise rejected.

c. Need for Reform

i. Comments

470. Multiple parties have expressed concern that some QF developers of small power production facilities are circumventing the one-mile rule, and thereby circumventing PURPA, by strategically siting small power production facilities that use the same energy resource slightly more than one mile apart in order to qualify as separate small power production facilities.[734] Several commenters state that the NOPR-proposed changes will reduce the opportunity for gaming.[735]

471. Several commenters argue, to the contrary, that there is no evidence of

[730] 18 CFR 35.36(a)(9)(iii).

[731] *See* 16 U.S.C. 796(17)(A)(ii) (defining small power production facility as, *inter alia,* ''a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which—. . . has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts'').

[732] We note that a protester must separately file for intervention seeking to be made a party to the proceeding; the filing of a protest does not make that person or entity a party. 18 CFR 385.102(c), 385.211(a)(2).

[733] An interested person or entity can choose to file a petition for declaratory order, with fee, at any time (that is, not only within 30 days from the date of the filing of the Form No. 556). However, if the Commission has affirmatively certified an applicant's QF status in response to a protest opposing a self-certification or self-recertification, or in response to an application for Commission certification or recertification, any later petition for declaratory order protesting the QFs existing certification must demonstrate changed circumstances from the time the Commission acted on the certification that call into question the continued validity of the earlier certification.

[734] *See* APPA Comments at 21; Center for Growth and Opportunity Comments at 5–6; Consumers Energy Comments at 4; East River Comments at 1–2; EEI Comments at 43; ELCON Comments at 35; Governor of Idaho Comments at 1; Idaho Commission Comments at 5–7; Idaho Power Comments at 13; Missouri River Energy Comments at 5; Mr. Moore Comments at 2; Northern Laramie Range Alliance Comments at 2; NorthWestern Comments at 9; NRECA Comments at 14–15; Portland General Comments at 14.

[735] APPA Comments at 21; Center for Growth and Opportunity Comments at 5–6; Consumers Energy Comments at 4; East River Comments at 1–2; EEI Comments at 43; ELCON Comments at 35; Governor of Idaho Comments at 1; Idaho Commission Comments at 5–7; Idaho Power Comments at 13; Missouri River Energy Comments at 5; Mr. Moore Comments at 2; Northern Laramie Range Alliance Comments at 2; NorthWestern Comments at 12; NRECA Comments at 14–15; Portland General Comments at 14.

gaming of the current one-mile rule.[736] Con Edison argues that utilities are not overwhelmed with QFs using the one-mile rule and there is little to no evidence to the contrary.[737] sPower states that it is difficult to see how developers that comply with this clear bright-line rule could be said to be circumventing.[738] New England Small Hydro argues that the Commission is attempting to address perceived abuses of the 80 MW limitation by burdening projects that do not abuse the system.[739]

ii. Commission Determination

472. The record shows that, since the establishment of the one-mile rule in the PURPA Regulations in 1980, the development of large numbers of affiliated renewable resource facilities, requires a revision of the one mile-rule. We find that the final rule will reduce the opportunity for developers of small power production facilities to circumvent the current one-mile rule by strategically siting small power production facilities that use the same energy resource slightly more than one mile apart.[740] While such circumvention may not be an everyday occurrence, we agree with commenters that the record demonstrates it is still a sufficient possibility under the current regulations that the Commission is justified in addressing it in order to comply with the statute.[741] The final rule, as adopted, still retains the presumption that small power production QFs more than one mile apart are located at separate sites, but simply makes the presumption rebuttable for small power production QFs located more than one mile but less than 10 miles apart, allowing the Commission the ability to address those circumstances.

d. Site Definition

i. Comments

473. Solar Energy Industries state that, in *El Dorado County Water Agency,* the Commission found that ''the critical test under PURPA relates to whether the facilities are located at one site rather than whether they are integrated as a project.'' [742] Solar Energy Industries argue that the proposed rule, as drafted, abandons the focus on whether the facilities are located at one site and transforms it into an analysis as to whether affiliated QFs are part of the same project. Solar Energy Industries similarly contend that it is arbitrary to change from a ''same site'' to an ''integrated project'' standard.[743]

474. NIPPC, CREA, REC, and OSEIA state that the existing rule is a reasonable means of implementing the statutory phrase ''same site,'' particularly given the statutory directive to encourage QF development, and state that they prefer the current bright line rule.[744] Allco argues that the proposed rule is divorced from the statutory use of ''site.'' Allco asserts that the Commission lacks authority to define the term ''site'' in a manner other than one reasonably related to its ordinary meaning and argues that the Commission's definition of site arbitrarily limits QF development for no apparent reason.[745] The DC Commission would like the Commission to leave the resolution of certain disputes over whether QFs are separate to state commissions.[746] Idaho also requests that states be given as much discretion as possible.[747]

475. EEI states that the interpretation of ''same site'' is determined by the Commission, and that there is nothing in the statute that prevents the Commission from modifying its interpretation of the term ''same site.'' [748]

ii. Commission Determination

476. We modify the NOPR proposal to change terminology relating to the determination of whether small power production facilities are separate facilities to focus not on whether they are *separate facilities,* but rather to mirror the statutory language and thus focus on whether they are at ''*the same site.*'' In that regard, we change references to ''separate facilities'' or ''the same facility'' to ''at separate sites'' or ''at the same site.''

477. The NOPR refers to determining whether affiliated facilities are ''separate facilities'' or ''a single facility.'' However, both the statute and the existing regulations contemplate that the Commission will determine what is ''the same site,'' [749] and do not require the Commission to determine whether two facilities are a single facility. The statute defines a small power production facility as an eligible facility, which, together with other facilities located at the same site (as determined by the Commission), has a power production capacity no greater than 80 MW,[750] and the Commission's regulations have long approached the matter as defining how to determine ''the same site.'' [751] We find that the Commission's determination of whether or not a small power production facility is a QF (*i.e.,* exceeds a power production capacity of 80 MW) should continue to be focused on whether the small power production facility seeking QF status and other nearby affiliated small power production QFs are at the same site or at separate sites.

478. We also modify the NOPR proposal to change the irrebuttable and rebuttable presumptions regarding affiliated facilities to instead apply to affiliated *small power production* qualifying facilities. As noted, the NOPR refers to determining whether *affiliated facilities* are ''separate facilities'' or ''a single facility.'' We find that only *affiliated small power production QFs* are relevant to the determination of whether the small power production facility seeking QF status and other nearby facilities are at the same site or separate sites.[752] Correspondingly, as further detailed below, we will allow entities challenging a QF certification (both self-certification and application for Commission certification) or recertification (both self-recertification and application for Commission recertification) to rebut the presumption that a small power production facility seeking QF status is at a separate site from any affiliated small power production QFs that use the same energy resource and that are located

[736] Solar Energy Industries Comments at 51; Southeast Public Interest Organizations Comments at 31; SC Solar Alliance Comments at 19.

[737] Con Edison Comments at 5.

[738] sPower Comments at 5.

[739] New England Small Hydro Comments at 17.

[740] The regulation, in practice, is only of consequence if the facilities located ''at the same site'' would exceed a power production capacity of 80 MW, as that is the size limit for a small power production facility to qualify as a QF. 16 U.S.C. 796(17)(A)(ii).

[741] *See* APPA Comments at 21; Center for Growth and Opportunity Comments at 5–6; Consumers Energy Comments at 4; East River Comments at 1–2; EEI Comments at 43; ELCON Comments at 35; Governor of Idaho Comments at 1; Idaho Commission Comments at 5–7; Idaho Power Comments at 13; Missouri River Energy Comments at 5; Mr. Moore Comments at 2; Northern Laramie Range Alliance Comments at 2; NorthWestern Comments at 9; NRECA Comments at 14–15; Portland General Comments at 14.

[742] Solar Energy Industries Comments at 60 (quoting *El Dorado Cty. Water Agency,* 24 FERC ¶ 61,280, at 61,578 (1983)).

[743] *Id.* at 61–62.

[744] NIPPC, CREA, REC, and OSEIA Comments at 70.

[745] Allco Comments at 16.

[746] DC Commission Comments at 9.

[747] Idaho Comments at 1.

[748] EEI Comments at 42.

[749] 16 U.S.C. 796(17)(A)(i); 18 CFR 292.204(a).

[750] 16 U.S.C. 796(17)(A)(i).

[751] 18 CFR 292.204(a).

[752] We note, however, that, in the context of a PURPA section 210(m) proceeding, *all* affiliates are relevant in evaluating whether a QF has nondiscriminatory access to a competitive market.

more than one but less than 10 miles from it.[753]

479. We therefore modify the language proposed in the NOPR. In sum, we find that if a small power production facility seeking QF status is located one mile or less from any affiliated small power production QFs that use the same energy resource, it will be irrebuttably presumed to be ''at the same site'' as those affiliated small power production QFs (rather than a single facility at a single site, as proposed in the NOPR). The Commission finds that if a small power production facility seeking QF status is located ten miles or more from any affiliated small power production QFs that use the same energy resource, it will be irrebuttably presumed to be at a separate site from those affiliated small power production QFs (rather than separate facilities at separate sites, as proposed by the NOPR). We find that if a small power production facility seeking QF status is located more than one but less than ten miles from any affiliated small power production QFs that use the same energy resource, it will be rebuttably presumed to be at a separate site from those affiliated small power production QFs (rather than separate facilities at separate sites, as proposed in the NOPR).

480. Purchasing electric utilities and others will be able to file a protest and identify factors attempting to rebut the presumption for a small power production facility seeking QF status that has an affiliated small power production QF that uses the same energy resource more than one but less than 10 miles from it, and argue that the small power production facility seeking QFs status should be treated as ''at the same site'' as the affiliated small power production QF located more than one but less than 10 miles from it (rather than as a single facility, as proposed in the NOPR). We will allow a small power production facility seeking QF status to provide further information in its certification (both self-certification and application for Commission certification) or recertification (both self-recertification and application for Commission recertification) to preemptively defend against rebuttal by identifying factors that affirmatively show that its facility is indeed at a separate site from an affiliated small power production QF located more than one but less than 10 miles from it (rather than separate facilities at separate sites, as proposed in the NOPR).

481. Regarding the requests to allow states to decide whether affiliated small power production QFs are located at separate sites, we note that, in PURPA section 201, now codified in section 3 (17) of the FPA, Congress authorized the Commission to determine whether the applicant and other facilities are located at the same site. This Commission will therefore continue to make these determinations.

e. Distance Between Facilities

i. Comments

482. Several commenters contend that the proposal to institute a rebuttable presumption for facilities that are more than one mile but less than 10 miles apart is arbitrary and lacks sufficient supporting evidence.[754] ELCON notes that the choice of 10 miles as the threshold is not supported by any evidence.[755]

483. Regarding the proposed rebuttable presumption for QFs more than one but less than 10 miles apart, Terna Energy argues that the NOPR effectively increases the ''exclusion zone'' around a QF's electrical generating equipment from approximately three square miles (3.1415 square miles, the circle with one-mile radius around the QF's electrical generating equipment, assuming a point generating source) to over 300 square miles (*i.e.* a 10-mile radius circle), a 100-times increase to the ''exclusion area'' for a single QF.[756]

484. New England Small Hydro notes that hydroelectric generators are located where river conditions are ideal for generating and that, while they are not generally located within one mile, there may be some projects owned by affiliates that are within 10 miles of each other.[757]

485. Borrego Solar opposes applying the proposed changes to the one-mile rule to distributed generation and finds that it would restrict the ability of developers to follow market signals when locating projects and significantly increase the regulatory burden. Borrego Solar notes that there are several reasons that otherwise different projects from the same company would be within 10 miles of each other, including land zoning restrictions, available substation capacity, and optimal topology or insolation.[758] Borrego Solar notes that it is common for projects on the distribution system to be within two miles of a substation or three-phase lines to reduce interconnection costs. Borrego Solar states that it is also common for multiple unaffiliated developers to site their projects in a single area within just a few miles of each other, and later sell those projects to a single entity much later in the process, inadvertently violating the Commission's rules.[759] Borrego Solar would like the Commission to exclude projects directly interconnected to the distribution system or initially developed by different entities from any presumption of common development. Borrego Solar urges the Commission to, at a minimum, establish a streamlined, low-cost option for challenging any presumption of common development, to avoid casting a chill over project development and driving developers and long-term owners out of the market due to the risks of having the projects disqualified.[760]

486. North Carolina DOJ argues that the proposed rule, by discouraging facilities from being placed close to one another, also runs counter to a North Carolina policy based on efficient use of electric resources.[761] North Carolina DOJ and North Carolina Commission Staff state that the rules in North Carolina incentivize the installation of production facilities close to substations so projects naturally appear in clusters surrounding transmission and distribution infrastructure.[762] North Carolina DOJ says that the proposed rule fails to take into account the complex and regionally specific factors driving the siting, financing, operation, and maintenance of production facilities.[763]

487. Industrial Energy Consumers state that the NOPR does not distinguish between merchant small power production QFs built to sell electricity to third parties and self-supply QFs built primarily to support manufacturing or industrial processes. Industrial Energy Consumers state that there are many manufacturing company sites that are of a 10-mile length. Industrial Energy Consumers state that the Commission's proposed changes to the one-mile rule should be clarified to exclude ''self-supply'' QFs.[764]

488. Solar Energy Industries believes that for facilities less than one mile

[753] Though not at issue here, we also note that the facilities need to use the same energy resource. 18 CFR 292.204(a)(1).

[754] Allco Comments at 16; Ares Comments at 7; Borrego Solar Comments at 4; ELCON Comments at 19; Public Interest Organizations Comments at 93; SC Solar Alliance Comments at 17; Solar Energy Industries Comments at 60, 62.

[755] ELCON Comments at 35–36.

[756] Terna Energy Comments at 4.

[757] New England Small Hydro Comments at 17.

[758] Borrego Solar Comments at 3–4.

[759] *Id.* at 4.

[760] *Id.* at 5.

[761] North Carolina DOJ Comments at 8.

[762] *Id.;* North Carolina Commission Staff Comments at 6.

[763] North Carolina DOJ Comments at 6.

[764] Industrial Energy Consumers Comments at 16.

apart the Commission should continue to waive the rule where appropriate.[765]

489. Regarding the proposed irrebuttable presumption that facilities located more than 10 miles apart are separate facilities, NorthWestern urges the Commission to consider increasing the distance. NorthWestern explains that its operations in Montana are geographically very expansive and 10 miles in Montana is not a substantial distance, especially when compared to other states that are geographically much smaller. NorthWestern states that Montana's electric system has more than 24,450 miles of electric transmission and distribution lines to serve approximately 374,000 customers, and that its electric operations are very rural and cover more than 97,500 square miles.[766] NorthWestern therefore recommends that the Commission consider expanding this distance to accommodate utilities in the West that have very large service territories.[767]

ii. Commission Determination

490. We adopt the NOPR proposal that an entity can seek to rebut the presumption of separate sites only for an entity seeking small power production QF status with an affiliated small power production QF or QFs that are located more than one and less than 10 miles from it.

491. We recognize, as we have previously for the one-mile rule,[768] that it is debatable as to where exactly these thresholds are most appropriately set. PURPA requires that no small power production facility, together with other facilities located ''at the same site,'' exceed 80 MWs, and Congress has tasked the Commission with defining what constitutes facilities being at the same site for purposes of PURPA. We find that providing set geographic distances will limit unnecessary disputes over whether facilities are at the same site, and therefore must choose reasonable distances at which small power production facilities will be considered irrebuttably at the same site or irrebuttably at separate sites. There are some affiliated small power production facilities using the same energy resource that are so close together that it is reasonable to treat them as irrebuttably at the same site. The Commission finds that one mile or less is a reasonable distance to treat such facilities as irrebuttably at the same site. Likewise, there are some small power production facilities that are affiliated and may use the same energy resource but that are sufficiently far apart that it is reasonable to treat them as irrebuttably at separate sites. The Commission finds that 10 miles or more is a reasonable distance to treat such facilities as irrebuttably at separate sites. For affiliated small power production facilities using the same resource that are more than one mile but less than 10 miles apart, the Commission finds that the distinction between same site or separate site is not as clear, and therefore finds that it is reasonable to treat them as rebuttably at separate sites, and to allow interested parties to provide evidence to attempt to rebut that presumption. The Commission finds that establishing these reasonable distances, and particularly establishing the ability to rebut the presumption of separate sites for affiliated small power production facilities more than one mile but less than 10 miles apart, better allows the Commission to address the evolving shape and configuration of resources, such as modular solar or wind power plants, that are being developed as QFs, and provides for improved administration of PURPA. The Commission therefore finds that the one-mile and 10-mile limits are reasonable inflection points for differentiating between the same site and separate sites.

492. The Commission understands that there may be many reasons that guide developers' decisions on where to site facilities, and for siting them near to (or far from) each other. The Commission reiterates that for affiliated small power production QFs that are more than one and less than 10 miles apart, there is still a presumption that they are at separate sites, though the Commission today makes that presumption a rebuttable presumption.[769] We also adopt today the proposal to allow an entity seeking QF status to provide further information in its certification (both self-certification and application for Commission certification) or recertification (both self-recertification and application for Commission recertification) to preemptively defend against rebuttal by identifying factors that affirmatively show that its facility is indeed at a separate site from affiliated small power production QFs more than one but less than 10 miles from it. Additionally, we note that we are retaining waiver provision in 18 CFR 292.204(a)(3), allowing the Commission to waive the method of calculation of the size of the facility for good cause.[770]

493. Borrego Solar raises the concern that unaffiliated developers may site their projects within a few miles of each other, and later sell those projects to a single entity much later in the process, inadvertently violating the Commission's rules. The Commission finds that it is reasonable to expect the single purchasing entity in the example to be on notice about the size and locations of its QF acquisitions and the requirements of both PURPA and the Commission's regulations, just as it would need to consider other regulatory requirements associated with its acquisition. Moreover, ownership by a single entity of multiple small power production QFs in close proximity to each other that together exceed a power production capacity of 80 MW, and whether this improperly circumvents the Commission's regulations, is precisely what the new rebuttable presumption is seeking to address.

494. Regarding Industrial Energy Consumers' request that the Commission's changes be clarified to exclude ''self-supply'' QFs, the Commission declines to do so. PURPA limits the power production capacity of a small power production QF, together with any other facilities located at the same site (as determined by the Commission), to 80 MW.[771] The Commission finds that Industrial Energy Consumer's argument that ''self-supply'' QFs are built primarily to support manufacturing and industrial processes does not negate the fact that the ''self-supply'' QFs in question are small power production facilities limited to 80 MW. Similarly, its argument also does not justify different application of the same site determination. The Commission will therefore apply the same site determinations to all small power production QFs. The Commission notes that, as with other small power production QFs, an individual ''self-supply'' QF may assert relevant factors to show why it should not be considered to be at the same site as an affiliated small power production QF that is more than one but less than 10 miles away from it. For example, if a self-supply facility seeking QF status was within 10 miles of an affiliated

[765] Solar Energy Industries Comments at 60–61 (citing *Windfarms, Ltd.,* 13 FERC ¶ 61,017, at 61,032 (1980) (*Windfarms*)).

[766] NorthWestern Comments at 10.

[767] *Id.*

[768] *See Windfarms,* 13 FERC at 61,032.

[769] For hydroelectric generating facilities, the regulations currently provide that the same energy resources essentially means ''the same impoundment for power generation,'' *see* 18 CFR 292.204(a)(2)(i), and it is unlikely that hydroelectric generating facilities located more than a mile apart would rely on the same impoundment. Should that circumstance arise, though, the applicant facility could seek waiver, arguing that the facilities should not be considered to be at the same site. *See* 18 CFR 292.204(a)(3).

[770] *See* 18 CFR 292.204(a)(3).

[771] 16 U.S.C. 796(17)(A)(ii).

small power production QF, but the energy from each facility was used primarily to supply different end users, the self-supply facility seeking QF status could argue that this fact supports that it is at a separate site from the affiliated small power production QF, and the Commission would consider this fact in its evaluation.

495. Regarding Terna Energy's contention that the new rule causes a 100-times increase to the ''exclusion zone'' around a QF's electrical generating equipment, we believe that the rule providing for a rebuttable presumption for affiliated small power production QFs located more than one but less than 10 miles apart, as promulgated today, is necessary to address allegations of improper circumvention of the one-mile rule that both previously and in comments have been presented to the Commission.

496. We reject NorthWestern's request to increase the distance of the irrebuttable presumption of separate sites to more than 10 miles. Northwestern argues that 10 miles is not a significant distance compared to the geographic expansiveness of its system. We believe this is an irrelevant comparison; what matters is not how large or small the purchasing electric utility's service territory is or how rural it may be or how many miles of transmission lines it may have, but the question presented by the statute, *i.e.,* whether or not the affiliated small power production QFs are located at the same site. As described above, we have decided that 10 miles is a reasonable and appropriate distance at which to apply the irrebuttable presumption of separate sites, irrespective of how expansive, or diminutive, the purchasing electric utility's system may be.

f. Factors

i. Comments

497. Several commenters state that they support the factors for evaluating whether or not facilities are at the same site, which are described in the NOPR.[772] SC Solar Alliance and the Southeast Public Interest Organizations support considering a common point of interconnection or a single real estate parcel or owner as factors weighing towards a determination that multiple projects are a single facility.[773]

498. Several commenters offer additional factors for consideration.[774] North Carolina Commission Staff states that the Commission should also consider whether the QF is attempting to game the system by getting rates for which they would otherwise be ineligible, as well as where the facilities were constructed and when common ownership commenced.[775] Northern Laramie Range Alliance suggests that relevant factors could include, for example, direct or indirect ownership by the same party or parties, interconnection at a single substation, simultaneous site acquisition and/or state and local permitting.[776] Allco proposes that the criteria to determine if sites are separate should be whether they share infrastructure, private roads or interconnection agreements in common.[777] NRECA proposes that the types of evidence could include evidence of contemporaneous construction, shared interconnection, common communication and control, use of the same step-up transformer, and common permitting and land leasing.[778] The Idaho Commission proposes that relevant factors include whether they share an interconnection agreement, obtained local, state or federal permits under the same application or as the same entity, and if they have a revenue sharing agreement.[779]

Portland General suggests that the Commission include past ownership of projects as a factor.[780]

499. Regarding the relative weight of the factors, the Southeast Public Interest Organizations would like the Commission to identify which factors would be definitive in a QF being able to proactively demonstrate that their site is separate.[781] Both Basin and EEI would like the Commission to clarify that the list of factors to be considered is not exhaustive or weighted.[782] NorthWestern contends that the Commission should specify that a showing of any one factor is sufficient to rebut the presumption. NorthWestern argues that the Commission should have the flexibility to deal with this issue on a case-by-case basis and expand or modify the list of factors where appropriate.[783]

500. NorthWestern states that it has concerns about the Commission's reliance on 18 CFR 35.36(a)(9), because, according to NorthWestern, developers carefully structure the ownership of their companies to ensure that they are not, technically, legal affiliates when, in fact, considering the totality of the circumstances, they are affiliates. For these reasons, NorthWestern strongly urges the Commission to consider the physical characteristic factors identified for determining the distance between facilities in order to also determine if facilities are owned by affiliates.[784] NorthWestern states that, for example, if one facility only owns five percent voting interest in another facility, but the two facilities have one interconnection request and use the same collector system, the Commission should be able to find that there are sufficient facts so that they are treated as affiliates for purposes of the one-mile rule.[785]

501. Several commenters opposed the Commission's proposed factors.[786] SC Solar Alliance states that the range of factors included under the categories of ''ownership/other characteristics'' and ''physical characteristics'' is overly broad and could be subject to inconsistent or problematic interpretation. For example, SC Solar Alliance states that the term ''infrastructure'' is undefined and ambiguous, and ''control facilities,'' ''access and easements,'' ''collector systems or facilities,'' and ''property leases'' are all vague and imprecise.[787] SC Solar Alliance agrees with Solar Energy Industries' emphasis that under no scenario should common financing be relevant, as unquestionably distinct facilities are frequently financed as part of a bundled portfolio.[788]

502. NIPPC, CREA, REC, and OSEIA strongly oppose use of common interconnection facilities as a factor because separately owned facilities are likely to share interconnection facilities to reduce costs and build off of existing infrastructure. NIPPC, CREA, REC, and OSEIA state that, given that there are only a limited number of qualified

[772] APPA Comments at 21–22; Connecticut Authority Comments at 19–20; Idaho Commission Comments at 6–7; NARUC Comments at 5; Portland General Comments at 15.

[773] SC Solar Alliance Comments at 17; Southeast Public Interest Organization Comments at 34.

[774] Allco Comments at 16; Idaho Commission Comments at 6–7; North Carolina Commission Staff Comments at 6; Northern Laramie Range Alliance Comments at 3; NRECA Comments at 15–16.

[775] North Carolina Commission Staff Comments at 6.

[776] Northern Laramie Range Alliance Comments at 3.

[777] Allco Comments at 16.

[778] NRECA Comments at 15–16.

[779] Idaho Commission Comments at 6–7.

[780] Portland General Comments at 15.

[781] Southeast Public Interest Organization Comments at 34.

[782] Basin Comments at 12; EEI Comments at 45.

[783] NorthWestern Comments at 11.

[784] *Id.* at 12.

[785] *Id.*

[786] Ares Comments at 5–7; Borrego Solar Comments at 3–4; NIPPC, CREA, REC, and OSEIA Comments at 73; Solar Energy Industries Comments at 62; SC Solar Alliance Comments at 16–18; Southeast Public Interest Organizations Comments at 34.

[787] SC Solar Alliance Comments at 17.

[788] *Id.* at 16 (citing Solar Energy Industries Supplemental Comments, Docket No. AD16–16, at 55–56 (August 28, 2019)).

maintenance providers and other service contractors, the fact that two facilities use the same contractors should not be relevant to common ownership and control of two facilities. NIPPC, CREA, REC, and OSEIA state that the fact that two facilities are constructed within 12 months of each other could merely be evidence that the market conditions at the time favored construction of the facilities, not that the facilities are intended to be one facility.[789]

503. SC Solar Alliance states that the extensive list of ''ownership/other characteristics'' as written is highly problematic. Control and maintenance, particularly in North and South Carolina where there are a substantial number of distributed solar facilities, is often contracted for by a limited number of solar maintenance companies. Allowing the existence of a common maintenance company to in any way dictate QF status is entirely unreasonable and bears no relationship to the question at hand.[790] Similarly, other factors included in the NOPR, including the sale of electricity to a common utility, a common financing lender, the use of a mutual contractor for project construction, the timing of contract execution, and the timing of facilities being placed into service do not provide relevant evidence as to common ownership requiring facilities to be considered a single QF. Applying these factors would create an unnecessary and undue burden on QFs, particularly smaller distribution-connected QFs that have been constructed relatively nearby and which often rely on a limited number of local contractors and partners to complete this necessary work.[791]

504. The Southeast Public Interest Organizations are concerned that the use of common contractors, financing entity, maintenance companies, or sales to the same entity and such could be used against QFs that are built in the same area but are otherwise separate sites.[792]

505. SC Solar Alliance states that the Commission's statement that ''no single factor would be dispositive'' is troubling, and that it is inconceivable that QF ownership would not be dispositive in any such rebuttable presumption. SC Solar Alliance states that it would be wholly unjust and unreasonable to consider a solar facility owned by one solar developer to be considered part of a solar facility owned by a distinct and unaffiliated solar developer. SC Solar Alliance states that any rebuttable presumption should include ''separate ownership'' as a dispositive indication of separate facilities.[793]

506. North Carolina DOJ states that the element of common control is a challenging question because of the limited number of companies available to operate renewable energy facilities. North Carolina DOJ asserts that a handful of firms are responsible for the operation and maintenance work for close to half of the country's solar energy production facilities.[794]

507. NIPPC, CREA, REC, and OSEIA state that the Commission should include substantially more specific parameters about what evidence a project would need to submit to demonstrate single-project status and should make clear that this test has no applicability unless generators within one to 10 miles are owned by the same company or affiliates of the same company. NIPPC, CREA, REC, and OSEIA assert that ''the decisive factors are the 'stream of benefits' from the project and control of the venture,'' which the Commission defined ''to include entitlement to profits, losses, and surplus after return of initial capital contribution.'' [795] These criteria could be used to objectively evaluate whether two QFs within 10 miles are commonly owned or controlled, as opposed to also putting two separately owned and controlled facilities at risk of violating the rule based solely on physical characteristics.[796]

ii. Commission Determination

508. We adopt the physical and ownership factors proposed in the NOPR, including as noted above the ability of a QF to preemptively identify the factors in its filing in anticipation of protests to its filing. As explained above in section IV.D.1.d we are modifying the NOPR proposal to change terminology relating to the determination of whether facilities are separate facilities to focus not on whether they are *separate facilities,* but rather to mirror the statutory language and thus focus on whether they are at ''*the same site.*'' Accordingly, we adopt these factors as relevant indicia of whether affiliated small power production facilities are ''at the same site.'' In addition, we modify the NOPR proposal to identify the following additional physical factors as indicia that small power production facilities should be considered to be located at the same site: (1) Evidence of shared control systems; (2) common permitting and land leasing; and (3) shared step-up transformers.

509. Specifically, we adopt the factors listed below as examples of the factors the Commission may consider in deciding whether small power production facilities that are owned by the same person(s) or its affiliates are located ''at the same site'': (1) *Physical characteristics,* including such common characteristics as: Infrastructure, property ownership, property leases, control facilities, access and easements, interconnection agreements, interconnection facilities up to the point of interconnection to the distribution or transmission system, collector systems or facilities, points of interconnection, motive force or fuel source, off-take arrangements, connections to the electrical grid, evidence of shared control systems, common permitting and land leasing, and shared step-up transformers; and (2) *ownership/other characteristics,* including such characteristics as whether the facilities in question are: Owned or controlled by the same person(s) or affiliated persons(s),[797] operated and maintained by the same or affiliated entity(ies), selling to the same electric utility, using common debt or equity financing, constructed by the same entity within 12 months, managing a power sales agreement executed within 12 months of a similar and affiliated small power production qualifying facility in the same location, placed into service within 12 months of an affiliated small power production QF project's commercial operation date as specified in the power sales agreement, or sharing engineering or procurement contracts.

510. We adopt the NOPR proposal to allow a small power production facility seeking QF status to provide further information in its certification (both self-certification and application for Commission certification) or recertification (both self-recertification and application for Commission recertification) to preemptively defend against rebuttal, by identifying factors that affirmatively show that its facility is indeed at a separate site from

[789] NIPPC, CREA, REC, and OSEIA Comments at 73–74.

[790] SC Solar Alliance Comments at 17–18.

[791] *Id.*

[792] Southeast Public Interest Organizations Comments at 34.

[793] SC Solar Alliance Comments at 17.

[794] North Carolina DOJ Comments at 8.

[795] NIPPC, CREA, REC, and OSEIA Comments at 73 (citing *CMS Midland, Inc.,* 50 FERC ¶ 61,098, at 61,278–279 (1990), *aff'd Mich. Municipal Coop. Group* v. *FERC,* 990 F.2d 1377 (D.C. Cir. 1993)).

[796] *Id.*

[797] Definitionally, if the facilities are not owned by the same person(s) or its affiliates, then the issue of compliance with the one-mile rule, even as revised in this final rule, becomes irrelevant. *See* 18 CFR 292.204(a)(1). That is, two facilities owned by two different persons are definitionally not located at the same site.

affiliated small power production QFs more than one but less than 10 miles away from it. Any party challenging the QF certification (both self-certification and application for Commission certification) or recertification (both self-recertification and application for Commission recertification) that makes substantive changes to the existing certification would, in its protest, be allowed to correspondingly identify factors to show that the small power production facility seeking QF status and affiliated small power production QFs more than one but less than 10 from that facility are actually at the same site.

511. We reiterate that, as a general matter, no one factor is dispositive.[798] Rather, we will conduct a case-by-case analysis, weighing the evidence for and against, and the more compelling the showing that affiliated small power production QFs should be considered to be at the same site as the small power production facility seeking QF status in a specific case, the more likely the Commission will be to find that the facilities involved in that case are indeed located ''at the same site.''

g. Exemptions

i. Comments

512. Ares notes that small power producers have certain exemptions from utility regulation, including exemptions from FPA sections 203 and 204 if under 30 MW and exemptions from FPA sections 205 and 206 if under 20 MW (or 30 MW in special cases), as well as exemptions from some state utility laws and PUHCA if under 30 MW.[799] Ares is concerned that the rebuttable presumption and the factors will make many small power QFs ineligible for these exemptions.[800] Ares argues that the aggregation of small power QFs may result in many required applications for market-based rate authority for sales that are minor. Ares argues that the Commission has no basis for, did not consider, and has sought no comments on the removal of regulatory obligations when small power QFs are aggregated under the new ten-mile proposal.[801]

513. Solar Energy Industries note that many facilities could lose their FPA and PUHCA exemptions if there are multiple facilities within 10 miles, which is particularly harmful to QFs that are not selling to their host utility. Solar Energy Industries state that PURPA section 210(e)(1) instructs that the Commission shall exempt QFs from regulation if such exemption ''is necessary to encourage cogeneration and small power production.'' [802]

ii. Commission Determination

514. The Commission's current one-mile rule is a rule used to measure, ultimately, whether or not small power production facilities are within PURPA's limit on small power production QFs of 80 MW, and thus whether such facilities are QFs, and the Commission has consistently applied the one-mile rule generally to the regulations issued pursuant to PURPA.[803] There is no persuasive reason it should not be equally applied in the context of the regulations implementing section 210(e) of PURPA. That being said, we are not removing or amending the exemptions provided by the regulations implementing PURPA section 210(e). If a QF qualifies for exemptions pursuant to PURPA section 210(e) and the Commission's implementing regulations,[804] then that QF is entitled to those exemptions. But, if a small power production facility does not meet the 80 MW limit for whatever reason, including because an affiliated small power production QF is located at the same site, then it does not qualify for such exemption because it would not be a QF.[805] There is nothing inappropriate about this consequence; a facility that is not a QF is not entitled to the exemptions available to QFs. We further note that there will now be a rebuttable presumption that affiliated small power production QFs located more than one but less than 10 miles apart are indeed located at separate sites. That is no different than the one-mile rule as it has long existed. What is different is that, with this final rule, the presumption will be rebuttable while before it was irrebuttable; the presumption that the facilities are at separate sites, though, remains unchanged. Only if a party rebuts that presumption and shows that the small power production facility seeking QF status and affiliated small power production QFs should be viewed as located at the same site will the capacity of such facilities be counted together. In that event, if the small power production facility seeking QF status and affiliated small power production QFs located at the same site have a combined power production capacity that exceeds 80 MW, the entity seeking QF status would not qualify as a QF and would properly not be entitled to the exemptions that are available to QFs.

2. Electrical Generating Equipment

a. NOPR Proposal

515. The Commission proposed defining ''electrical generating equipment'' to refer to all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar panels and/or inverters, fuel cell equipment and/or other primary power generation equipment used in the facility, excluding equipment for gathering energy to be used in the facility. The Commission expected that each wind turbine on a wind farm and each solar panel in a solar facility would be considered ''electrical generating equipment'' because each wind turbine and each solar panel is independently capable of producing electric energy. The Commission sought comments on this approach, and on what equipment—if not individual wind turbines and solar panels—should be considered ''electrical generating equipment'' for wind and solar plants.

516. The Commission also proposed specifying how to measure the distance between facilities that have multiple, separate sets of ''electrical generating equipment'' such as wind farms and solar facilities. The Commission proposed measuring the distance between the nearest ''electrical generating equipment'' of any two facilities such that, for the facilities to be presumed irrebuttably separate, all such equipment of one QF must be at least 10 miles away from all such equipment of another QF. The Commission believed this is the appropriate way to measure the distance between affiliated sets of ''electrical generating equipment'' because this reflects the distance between the components directly tied to producing electric energy.

517. The Commission sought comment on this approach, and whether alternative approaches would be more appropriate. For example, some parties had suggested in QF certification proceedings that the Commission could use the geographic center of the plant footprint or a weighted average of the locations of the individual pieces of ''electrical generating equipment.'' [806] The Commission was concerned these approaches could be easily gamed, but sought comment on whether they may be constructed in a way that would prevent gaming, and whether such

[798] *But see supra* note 797.

[799] Ares Comments at 4–5.

[800] *Id.* at 5–6.

[801] *Id.* at 11–12.

[802] Solar Energy Industries Comments at 55.

[803] *SunE B9 Holdings LLC,* 157 FERC ¶ 61,044, at P 16 & n.24 (2016) (citing *Windfarms,* 13 FERC ¶ 61,017 at 61,031).

[804] 18 CFR 292.601, 292.602.

[805] *See* 16 U.S.C. 796(17)(A)(ii).

[806] *See Beaver Creek Wind II, LLC,* 160 FERC ¶ 61,052, at P 9 (2017).

formulations would be preferable to the proposed approach.

b. Comments

518. Many commenters support the definition of ''electrical generating equipment'' proposed in the NOPR.[807] However, ELCON objects to both the proposed definition of ''electric generating equipment'' and the approach to measuring distance.[808]

519. Many commenters support the method for measuring distance between sites proposed in the NOPR, which would require measuring the distance between the nearest ''electrical generating equipment'' of any two affiliated facilities.[809] Several commenters note their opposition to measuring the distance between sites using the geographic center of the plant or a weighted average of the locations of individual pieces of ''electrical generating equipment,'' both methods the Commission sought comment on in the NOPR.[810] The Southeast Public Interest Organizations request clarification of whether to measure from the edge of a solar panel or the center of a solar array.[811]

520. Several commenters request that the Commission discuss how energy storage (sometimes referred to as battery storage) would be considered in relation to the proposed definition of electrical generating equipment.[812] The California Commission requests that a battery storage facility be excluded from consideration as electrical generating equipment provided the storage is charged solely by the small power production facility, and that energy stored by the storage facility be considered to be of the same energy source of that energy before it was stored.[813] The California Commission also requests that the Commission affirm that storage does not permit a facility to exceed the maximum size criteria of a small power production facility.[814] EEI requests that the Form 556 collect data on storage resources as well as electrical generating equipment for purposes of measuring distance to an affiliated small power production QF.[815]

c. Commission Determination

521. We adopt the NOPR proposal that ''electrical generating equipment'' refers to all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar panels, inverters, fuel cell equipment and/or other primary power generation equipment used in the facility, excluding equipment for gathering energy to be used in the facility. Each wind turbine at a wind facility and each solar panel in a solar facility would be considered ''electrical generating equipment'' because each wind turbine and each solar panel is independently capable of producing electric energy.

522. We require the distance between the facility seeking small power production QF status and any affiliated small power production QFs using the same energy resource to be measured by the distance between the nearest ''electrical generating equipment'' of each such facility, such that, for the entity seeking QF status to be presumed irrebuttably at a separate site from any affiliated small power production QF, all such equipment of the affiliated small power production QF must be at least 10 miles away from all such equipment of the entity seeking small power production QF status. The Commission finds that this is the most appropriate way to measure the distance between affiliated sets of ''electrical generating equipment'' at small power production facilities because this reflects the distance between the components directly tied to producing electric energy.

523. The point used in the distance calculation will always be from the edge of the electrical generating equipment closest to the affiliated small power production QF's nearest electrical generating equipment. Thus, we clarify that for a solar facility, the measurement should be from the edge of the small power production facility seeking QF status' solar panel or inverter that is closest to the edge of the nearest ''electrical generating equipment'' of that affiliated small power production QF. For a wind facility, the measurement should similarly be from the edge of the small power production facility seeking QF status' wind turbine or inverter closest to the edge of the nearest ''electrical generating equipment'' of the affiliated small power production QF. For a wind facility, we clarify that the relevant point for measuring distance of an individual wind turbine is the tower (not the projection of the blade's wingspans onto the ground). We also clarify that only horizontal distances are taken into consideration for purposes of this rule (such that elevation changes have no effect on facility distance).

524. We find that the role of battery storage in QFs, including with regard to the distance between QFs, is beyond the scope in this proceeding.

E. QF Certification Process

1. NOPR Proposal

525. In the NOPR, the Commission proposed to revise 18 CFR 292.207(a) to allow interested persons to intervene in, and to file a protest of a self-certification or self-recertification of a facility without the necessity of filing a separate petition for declaratory order and without having to pay the filing fee required for a declaratory order. Because an applicant for self-certification or self-recertification is required to serve a copy of its submission on interested electric utilities (principally those with which it is interconnected and those to which it will be selling) as well as the relevant state regulatory authorities, the Commission proposed to allow interested persons 30 days from the date of filing at the Commission to intervene and/or to file a protest (without paying a filing fee).[816]

526. Any party submitting a protest would have the burden of specifying facts that make a prima facie demonstration that the facility described in the self-certification or self-recertification does not satisfy the requirements for QF status. General allegations that the facility is not a QF without reference to the specific regulatory provision that has not been satisfied (and without an explanation why the provision has not been satisfied), or unsupported assertions that the self-certification does not satisfy an aspect of the PURPA Regulations, would not satisfy this burden and would not be a basis for denial of certification. However, if this prima facie burden is met, then the burden would shift to the applicant submitting the self-certification or self-

[807] Alliant Energy Comments at 19; APPA Comments at 23; Basin Comments at 11; Connecticut Authority Comments at 19–20; EEI Comments at 49; Idaho Commission Comments at 6; Kentucky Commission Comments at 7; NRECA Comments at 17; Portland General Comments at 16–17; Southeast Public Interest Organizations Comments at 37–38.

[808] ELCON Comments at 36.

[809] Alliant Energy Comments at 19; APPA Comments at 23; Basin Comments at 11; Connecticut Authority Comments at 19–20; EEI Comments at 49; Kentucky Commission Comments at 7; NARUC Comments at 4–5; Portland General Comments at 16–17; Southeast Public Interest Organizations Comments at 37–38.

[810] Connecticut Authority Comments at 21; Kentucky Commission Comments at 7; NorthWestern Comments at 12–13; NRECA Comments at 18; Portland General Comments at 18.

[811] Southeast Public Interest Organizations Comments at 38.

[812] Alliant Energy Comments at 19; EEI Comments at 46–47; Energy Storage Comments at 3; NorthWestern Comments at 13.

[813] California Commission at 16–17.

[814] *Id.* at 15.

[815] EEI at 51–52.

[816] 18 CFR 292.207(c)(1).

recertification to demonstrate that the claims raised in the protest are incorrect and that certification is, in fact, warranted.

527. QF self-certification is effective upon filing and would remain effective if a protest is filed, until such time as the Commission rules that certification is revoked. The Commission proposed that it would issue an order within 90 days of the date the protest is filed. The Commission also reserved the right to request more information from the protester, the entity seeking QF status, or both.[817] If the Commission requests more information, the time period for the Commission order would be extended to 60 days from the filing of a complete answer to the information request.

528. There may be instances, however, when the Commission may need additional time to review the record in light of the nature of the protests. In those cases, the Commission proposed that, in addition to any extension resulting from a request for information, the Commission also may toll the 90-day period during which the Commission commits to act within one additional 60-day period. The Commission proposed to delegate to the Commission's Secretary, or the Secretary's designee, the authority to toll the 90-day period for this purpose.

529. The Commission believed these procedures would allow for timely but thorough review of protested self-certifications and self-recertifications. The Commission sought comment on whether these procedures impose an undue burden on the QF even though the QF remains certified pending the review.

2. Comments

530. Many commenters raise the issue of granting legacy treatment, colloquially known as ''grandfathering,'' to existing QF certifications and their future recertifications.[818] Most of these comments support granting legacy treatment to current QFs and their future recertifications.[819] Several commenters note that the application of the rule to existing or recertifying QFs will create uncertainty and cause disruptions of the sale of these QFs.[820]

531. New England Small Hydro warns that applying the proposed rule to existing QFs could trigger financing defaults if those QFs lose their status.[821] The Southeast Public Interest Organizations state that the proposed rebuttable presumption has implications for existing solar QFs in the Southeast, noting that QFs would be required to seek recertification as their existing PPAs expire, adding a significant burden.[822] The Southeast Public Interest Organizations provide maps showing the ten-mile radius of utility-scale projects could lead to many overlapping affiliated territories under the new rules.[823] SC Solar Alliance also notes the large number of small solar QFs overlapping within a ten-mile radius across North Carolina and South Carolina and finds that the application of the more-than-one-but-less-than-10-miles rebuttable presumption to recertifications will be burdensome and unwieldy.[824] NIPPC, CREA, REC, and OSEIA warn that the application of the new rule to existing QFs will effectively bar the transfer or sale (or potentially any number of less significant changes) of existing assets that were lawfully qualified under the one-mile rule but would pass the 80 MW aggregate threshold under the new rule. NIPPC, CREA, REC, and OSEIA find this to be a violation of the existing QFs contractual and constitutional rights.[825]

532. Terna Energy states that granting legacy treatment to existing QFs and their recertifications is necessary to protect investment decisions and contracts made under the long-standing one-mile rule.[826] Terna Energy contends that, without clarification on the legacy treatment of recertifications, QFs could lose their status even for non-substantive revisions to their FERC Form No. 556s such as contact information, street address, ownership or operation.[827] Terna Energy warns that absent the clarification of legacy treatment for existing QF recertifications, QFs might go to extremes to avoid updating their FERC Form No. 556s with information changes.[828]

533. Solar Energy Industries state that retroactively applying a more-than-one-but-less-than-10-miles rebuttable presumption to physical facilities that were developed based on the original one-mile rule will inject instability, will erode trust from the investment community, and will discourage the development of QFs as well as investment in the industry in general.[829] Ares notes that not granting legacy treatment to existing QFs is inconsistent with past Commission actions on PURPA, such as the granting of legacy treatment to existing QF contracts in Order No. 671 or other QF related proceedings.[830]

534. New England Small Hydro supports granting legacy treatment to existing QFs to avoid upsetting the settled expectations of existing generation.[831] New England Small Hydro gives the example of three hypothetical projects, each located nine miles apart that, when capacities are totaled, exceed 80 MW. If there is an ownership change that triggers the need for a recertification but the entities remain affiliates, under the Commission's proposed rule, all three projects would lose QF status. According to New England Small Hydro, this could trigger defaults under financing documents and the utility might be able to terminate the power contract, because many PPAs for QFs require the project to remain a QF for the term of the PPA. New England Small Hydro states that, as a result, a minor ownership change could have cascading negative effects to QFs.[832]

535. Terna Energy requests that existing QFs be granted legacy treatment as long as they do not make changes to electrical generating equipment of the facility, because that is the equipment that determines compliance with the one-mile rule. Terna Energy argues that otherwise an existing QF could be subject to challenge anytime it makes a non-substantive revision to its FERC Form No. 556, including a change to contact information, street address, ownership, or operator, effectively

[817] Such information requests could be issued by the Commission or by staff under any applicable delegated authority. For example, under 18 CFR 375.307(b)(3)(ii), the Director of the Office of Energy Market Regulation is authorized to ''[i]ssue and sign requests for additional information regarding applications, filings, reports and data processed by the Office of Energy Market Regulation.''

[818] Ares Comments at 12; Basin Comments at 11; BluEarth Comments at 2; DC Commission at 9; New England Small Hydro Comments at 17; Industrial Energy Consumers Comments at 17; NIPPC, CREA, REC, and OSEIA Comments at 74; Solar Energy Industries Comments at 61–63; SC Solar Alliance Comments at 18; Southeast Public Interest Organizations Comments at 29–31; Terna Energy Comments at 16–18.

[819] Ares Comments at 12; BluEarth Comments at 2; New England Small Hydro Comments at 17; Industrial Energy Consumers Comments at 17; NIPPC, CREA, REC, and OSEIA Comments at 74; Solar Energy Industries Comments at 61–63; SC Solar Alliance Comments at 18; Southeast Public Interest Organizations Comments at 29–31; Terna Energy Comments at 16–18.

[820] New England Small Hydro Comments at 17; NIPPC, CREA, REC, and OSEIA Comments at 74; Terna Energy Comments at 16–18.

[821] New England Small Hydro Comments at 17.

[822] Southeast Public Interest Organizations Comments at 29.

[823] *Id.* at 30–31.

[824] SC Solar Alliance Comments at 18.

[825] NIPPC, CREA, REC, and OSEIA Comments at 75.

[826] Terna Energy Comments at 1–2.

[827] *Id.* at 2.

[828] *Id.* at 7.

[829] Solar Energy Industries Comments at 62.

[830] Ares Comments at 12.

[831] New England Small Hydro Comments at 17.

[832] *Id.*

eliminating legacy treatment.[833] Terna Energy states that granting legacy treatment is necessary to protect the sanctity of investments and contracts made in reliance upon the Commission's current PURPA regulations and the one-mile rule.[834] Terna Energy submits revised language for 18 CFR 292.204(a)(2) and (3) to clarify that existing QF recertifications, unless they change the electrical generating equipment, should not be subject to the new rules.[835]

536. Basin, on the other hand, asks the Commission to be clear that recertifications filed by QFs will trigger application of the proposed rule.[836] Basin also recommends the Commission allow petitions seeking de-certification of QFs that have previously filed self-certifications because some QFs self-certify at an early stage of project development and ultimately never proceed to development.[837]

537. The DC Commission would like the Commission to clarify whether the changes to the one-mile rule will apply to QFs under construction when the rule goes into effect.[838] The DC Commission would like the Commission to leave the issue of legacy treatment of existing QFs up to the states.[839]

538. Several commenters oppose the NOPR proposal to allow a party to protest a self-certification or self-recertification of a facility without being required to file a separate petition for declaratory order and pay the associated filing fee.[840] Several commenters argue that this proposal will lead to a flood of challenges that will discourage the growth of QFs.[841] Several commenters state that there will be substantial costs associated with this proposal that will fall on ratepayers and QFs.[842] Several commenters state that the proposed changes will lead to increased administrative burden and expense[843] or litigation risk.[844] Several commenters state that the proposed changes will lead to uncertainty[845] and deter development.[846]

539. Solar Energy Industries state that the proposed changes to the one-mile rule will substantially increase the regulatory burden on QFs and the self-certification process will no longer be quick.[847] Solar Energy Industries is concerned that QFs may need to defend numerous self-certifications over a facility's lifetime, and assert that QFs could be forced to recertify any time the information represented in the Form No. 556 changes, including ownership changes to affiliated facilities located within 10 miles.[848] Solar Energy Industries state that the burden will be increased exponentially if the one-mile rule is expanded in a ten-mile rule.[849] Solar Energy Industries state that the NOPR's estimate of an additional eight hours and $632 per docket for each QF self-certification or re-certification is a substantial underestimation.[850] Solar Energy Industries estimate that it would require an additional approximately 90 to 120 hours per year to comply with the new requirements. Solar Energy Industries state that a QF could be forced to recertify any time the information represented changes, including ownership changes to affiliated facilities located within 10 miles. Solar Energy Industries note that a QF may have to engage in multiple defenses of its status, each time needing to engage legal counsel and devote internal company resources to preserve the status of its already-installed plant.[851] Solar Energy Industries assert that the flood of self-certification filings and updates would be a substantial burden on Commission staff and provide little value to the Commission or the public.[852] Solar Energy Industries also state that, unless and until the Commission makes a determination on the burden associated with collecting, reporting, and updating the Connected Entity[853] information, it would be unjust and unreasonable for the Commission to impose similar burdens on QF entities through the FERC Form No. 556.[854] Solar Energy Industries state that the increased regulatory burden that will arise for these entities is similar in scope and the Commission has not provided a rationale for the increased information collection requirements.[855]

540. Allco describes the Commission's Regulatory Flexibility Act (RFA) analysis of the proposed rules' effect on small businesses as improperly limited to proposed paperwork changes, ignoring the impact on small QFs' abilities to construct facilities.[856] Allco states that the Commission did not attempt to minimize the impacts on small renewable energy producers, consider alternative structures, or describe these steps or considerations in a mandatory final RFA analysis.[857] Allco asserts that the Commission failed to support its finding that the NOPR's proposed revisions will not significantly impact a substantial number of small entities (specifically, solar energy QFs); Allco therefore claims that the Commission violated the Small Business Regulatory Enforcement Fairness Act.[858]

541. Solar Energy Industries state that the NOPR lacks important details such as whether the Commission's determination is subject to rehearing, and whether a final decision can be appealed under the FPA to an appellate court.[859] Solar Energy Industries state that an adverse determination by the Commission could impose upwards of $100 million in harm on a QF, and it is unclear whether the QF would have a path to relief if the Commission erred in its determination. Solar Energy

[833] Terna Energy Comments at 2.

[834] *Id.* at 1–2.

[835] *Id.* at 8–9.

[836] Basin Comments at 11.

[837] *Id.*

[838] DC Commission Comments at 9.

[839] *Id.*

[840] Allco Comments at 21; BluEarth Comments at 3; CARE Comments at 7; Con Edison Comments at 5; Distributed Sun Comments at 3; ENGIE Comments at 4; Public Interest Organizations Comments at 9, 97–98; Western Resource Councils Comments at 144; Solar Energy Industries Comments at 57–59.

[841] Allco Comments at 21; BluEarth Comments at 3; Distributed Sun Comments at 3; Public Interest Organizations Comments at 97; Western Resource Councils Comments at 144.

[842] Con Edison Comments at 5; ENGIE Comments at 4; Public Interest Organizations Comments at 97; Solar Energy Industries Comments at 58.

[843] Ares Comments at 6; Borrego Solar Comments at 4; Con Edison Comments at 5; Public Interest Organizations Comments at 97–98; Solar Energy Industries Comments at 51–52, 54, 57–58; SC Solar Alliance Comments at 15–18; Southeast Public Interest Organizations Comments at 29, 35; sPower Comments at 14.

[844] Con Edison Comments at 5; Distributed Sun Comments at 3; ELCON Comments at 19–20; NIPPC, CREA, REC, and OSEIA Comments at 71–72; Public Interest Organizations Comments at 97–98; Solar Energy Industries Comments at 58–60; SC Solar Alliance Comments at 16, 18; Southeast Public Interest Organizations Comments at 29,35; sPower Comments at 14.

[845] Ares Comments at 9; Distributed Sun Comments at 3; ELCON Comments at 19–20, 38; NIPPC, CREA, REC, and OSEIA Comments at 69–72; Public Interest Organizations Comments at 97–98; Solar Energy Industries Comments at 58–60, 62–63; SC Solar Alliance Comments at 16, 18; Southeast Public Interest Organizations Comments at 29, 35, 38, 93, 97–98; sPower Comments at 14.

[846] Allco Comments at 16; Borrego Solar Comments at 4–5; Biological Diversity Comments at 9; Con Edison Comments at 4–5; Distributed Sun Comments at 3; NIPPC, CREA, REC, and OSEIA Comments at 72–73; North Carolina DOJ Comments at 8; Public Interest Organizations Comments at 93, 99; Solar Energy Industries Comments at 51–52, 59–63; SC Solar Alliance Comments at 2, 18; Southeast Public Interest Organizations Comments at 31–36, 38, 93.

[847] Solar Energy Industries Comments at 52.

[848] Solar Energy Industries at 57.

[849] *Id.* at 53.

[850] *Id.* at 52.

[851] *Id.* at 58.

[852] *Id.* at 53–54.

[853] *Id.* at 54 (citing *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes,* Order No. 860, 168 FERC ¶ 61,039, at P 183 (2019)).

[854] *Id.* at 54, 57.

[855] *Id.* at 54.

[856] Allco Comments at 33.

[857] *Id.*

[858] *Id.*

[859] *Id.* at 58.

Industries state that the current practice, where the challenger bears the responsibility of seeking declaratory relief, strikes an appropriate balance.[860]

542. Several commenters, on the other hand, support the NOPR proposal to allow a party to protest a self-certification or self-recertification of a facility without being required to file a separate petition for declaratory order and to pay the associated filing fee.[861] Several commenters argue that the proposed amendment would strike the right balance and distribute the burdens of proof appropriately.[862] Several commenters also state that this proposal would increase the efficiency of the process, reduce administrative costs, and could solve potential certification problems before they even begin.[863]

543. Other commenters support the NOPR proposal, but with caveats or extra requests.[864] Golden Valley recommends that the 30-day clock to challenge QF self-certification or self-recertification begins when the QF serves notice to the interested electric utility, not when the QF makes its filing with the Commission.[865] NIPPC, CREA, REC, and OSEIA state that the Commission should provide a 60-day deadline after the filings are complete by which time a failure of the Commission to rule results in the objection being denied by operation of law.[866]

544. NorthWestern requests the QFs be subject to various discovery requests when they self-certify or self-recertify.[867] Two commenters argue that any challenging party should be required to include an affidavit from a company official.[868]

545. NorthWestern and Northern Laramie Range Alliance request that QF developers seeking certification with the Commission should be required to publish notice in local newspapers in the states in which the development would be located, in order to alert affected parties so they could intervene in the certification process.[869] El Paso Electric is concerned by the proposal to limit the ability to challenge QF status once it has been certified in a Commission certification proceeding or in response to a challenge unless the new challenger can demonstrate a change in the facility circumstances that threaten the validity of the previous finding. El Paso Electric states that sometimes QFs fail to provide utilities with their QF application and so the utility does not know to protest.[870]

546. Ares notes that small power production QFs could be aggregated under the more-than-one-but-less-than-10-miles rebuttable presumption and not even be aware of the other small power production QFs because of a lack of information.[871]

3. Commission Determination

547. We adopt the NOPR proposal to revise 18 CFR 292.207(a) to allow an interested person or entity to seek to intervene and to file a protest of a self-certification or self-recertification of a QF, and not have to file a petition for declaratory order and pay the filing fee for petitions.[872] We also adopt the other changes to the QF certification process proposed in the NOPR, with the additions detailed below. We find that any increased administrative burden or litigation risk imposed by the new rule is justified by the need to ensure that QFs meet the statutory criteria for QF status.

548. The ability to intervene and to file a protest of a self-certification or self-recertification of a QF without having to file a petition for declaratory order and pay the filing fee for petitions is effective as of the effective date of the final rule. However, we will grant legacy treatment to existing QFs under certain circumstances, as we explain below. With the exceptions noted below, protests pursuant to this final rule will not be allowed to QF certifications and recertifications (including self-certifications and self-recertifications) that are submitted before the effective date of the final rule, although entities may still challenge by filing a petition for declaratory order and submitting the required fee. Conversely, protests *can* be made to QF certifications (both self-certification and application for Commission certification) or recertifications (both self-recertification and application for Commission recertification) that are submitted on or after the effective date of this final rule. We note here that it is the date of filing for certification or recertification, and not the date of construction, that determines whether our new protest rule applies to the certification or recertification.

549. Many commenters have argued for expansive legacy treatment for recertification of existing projects. They have noted that QFs need to recertify when property is transferred, PPAs expire, or even for non-substantive changes, such as changes in contact information or street address.[873] Commenters argue that, if the new protest rules apply to recertifications, existing QFs could lose their QF status, even if their configuration or other relevant factors do not materially change, when they file their recertifications, upsetting the settled expectations under which the QFs built their facilities.

550. We agree that QF recertifications to implement or address non-substantive changes should not be subject to our new protest rule; the settled expectations of the QFs should be respected in such instances. Accordingly, we find that protests may be filed to an initial certification (both self-certification and application for Commission certification) filed on or after the effective date of this final rule, but only to a recertification (both self-recertification and application for Commission recertification) that makes substantive changes to the existing certification and that are filed on or after the effective date of this final rule. Substantive changes that may be subject to a protest may include, for example, a change in electrical generating equipment that increases power production capacity by the greater of 1 MW or 5 percent of the previously certified capacity of the QF, or a change in ownership in which an owner increases its equity interest by at least 10% from the equity interest previously reported. We find that recertifications (both self-recertifications and applications for Commission recertifications) making ''administrative only'' changes should not be subject to

[860] *Id.* at 59.

[861] Alaska Power Comments at 2; Alliant Energy Comments at 22–23; APPA Comments at 31–35; Duke Energy Comments at 23–24; Indiana Municipal Comments at 10; NRECA Comments at 21–22; Portland General Comments at 21–22; Ohio Commission Energy Advocate Comments at 10; Chamber of Commerce Comments at 8; We Stand Comments at 3.

[862] APPA Comments at 31–35; NRECA Comments at 21–22; Ohio Commission Energy Advocate Comments at 10.

[863] Indiana Municipal Comments at 10; NRECA Comments at 21–22; Portland General Comments at 21–22.

[864] DTE Electric Comments at 9–10; Golden Valley Electric Comments at 1–2, 3–7; Industrial Energy Consumers Comments at 14; Northern Laramie Range Alliance Comments at 3; NorthWestern Comments at 17–18; ELCON Comments at 19–20, 37–38.

[865] Golden Valley Electric Comments at 2.

[866] NIPPC, CREA, REC, and OSEIA Comments at 74.

[867] NorthWestern Comments at 17–18.

[868] Industrial Energy Consumers Comments at 14; ELCON Comments at 20, 38.

[869] NorthWestern Comments at 3; Northern Laramie Range Alliance Comments at 3.

[870] El Paso Electric Comments at 5.

[871] Ares Comments at 6.

[872] We amend the proposed regulation in the NOPR to move the sections referring to protests and interventions from 18 CFR 292.204 to 18 CFR 292.207.

[873] NIPPC, CREA, REC, and OSEIA Comments at 75; Terna Energy Comments at 1–2, 7.

a protest pursuant to this final rule.[874] We believe that excepting from protests QF recertifications making non-substantive changes will allow QFs to make such changes and recertify without potentially losing their QF status.

551. Solar Energy Industries asserts that the certification process will no longer be quick, and estimates that it would require an additional approximately 90 to 120 hours per year to comply with these new requirements. Solar Energy Industries is concerned that QFs may need to defend numerous self-certifications over a facility's lifetime, and asserts that QFs could be forced to recertify any time the information represented in the Form No. 556 changes.[875]

552. We do not agree with Solar Energy Industries' estimates. First, we note that 18 CFR 292.207(d) (which we are not altering in this rule except to renumber as 18 CFR 292.207(f)) already states that if a QF fails to conform with any material facts or representations presented in the certification, the QF status of the facility may no longer be relied upon,[876] and hence it is long-standing practice that a QF must recertify when material facts or representations in the Form No. 556 change.

553. Second, certifications and recertifications are already subject to protests, albeit in the form of petitions for declaratory order, and therefore dealing with objections to a certification or recertification is not new. Although the new procedures may result in more protests being filed than the number of petitions that have been filed, we believe that the conditions we impose in this final rule will limit the number of protests filed. The Commission anticipates that most, though not all, of the protests filed pursuant to the new 18 CFR 292.207(a) will relate to the new more-than-one-but-less-than-10-miles rebuttable presumption.[877] Such protests will necessarily be limited because not all certifications and recertifications will be subject to the new more-than-one-but-less-than-10-miles rebuttable presumption. Only small power production facilities seeking QF status that have an affiliated small power production QF more than one but less than 10 miles away and that uses the same energy resource are subject to the rebuttable presumption. Small power production facilities that do not have multiple small power production facilities or affiliates will not be affected by the new rebuttable presumption. Nor will cogeneration QFs be affected by the new rebuttable presumption.[878] Additionally, in general as described above, protests may only be made to an initial certification (both self-certification and application for Commission certification) filed on or after the effective date of this final rule, and only to a recertification (self-recertification or application for Commission recertification) that makes substantive changes to the existing certification that are filed after the effective date of this final rule.

554. Third, we are also instituting time limits on protests that may be filed under this final rule. We adopt the NOPR proposal that interested parties will have 30 days from the date of the filing of the Form No. 556 at the Commission to file a protest (without paying a fee).[879] Additionally, a protestor must concurrently serve its protest on the Form No. 556 applicant pursuant to 18 CFR 385.2010.

555. Fourth, regarding Solar Energy Industries' concern that a QF may have to engage in multiple defenses of its status, in addition to the above limits on protests, once the Commission has affirmatively certified an applicant's QF status in response to a protest opposing a self-certification or self-recertification, or in response to an application for Commission certification or Commission recertification, any later protest to a recertification (self-recertification or application for Commission recertification) making substantive changes to a QF's existing certification, *e.g.,* asserting that the entity seeking QF status is at the same site as affiliated small power production QFs more than one but less than 10 miles from it, must demonstrate changed circumstances from the facts on which the Commission acted on the certification filing that call into question the continued validity of the earlier certification.

556. Finally, even if it indeed takes *some* small power production facilities an additional 90 to 120 hours (and we think that unlikely), that is not an unreasonable burden to impose to ensure that a generating facility that seeks to be a QF is, in fact, entitled to QF status and complying with PURPA.[880]

557. Turning to the requirements for a protest, as proposed in the NOPR, we will require any person or entity filing a protest to specify facts that make a prima facie demonstration that the facility described in the certification (both self-certification and application for Commission certification) or recertification (both self-recertification or application for Commission recertification) does not satisfy the requirements for QF status. We will also require any protest to be adequately supported with any supporting documents, contracts, or affidavits, as appropriate. Just as public utilities are typically not subject to discovery with regard to their rate filings under section 205 of the FPA prior to the Commission's instituting trial-type evidentiary hearings,[881] we similarly decline to make QFs subject to discovery requests when they self-certify or self-recertify.

558. The Commission also orders here that an applicant's response to a protest will be allowed under 18 CFR 385.213(a)(2). By this final rule, we are consistent with that regulation, ''otherwise order[ing]'' that such answers may be filed. They will be due no later than 30 days after the filing of the protest.

559. Rooftop solar developers frequently finance the initial development of rooftop solar photovoltaic (PV) systems of individual homeowners, and then retain ownership of such PV systems for extended periods of time until the ownership is

[874] As noted elsewhere in this final rule, our allowing protests does not eliminate the ability to file a petition for declaratory order seeking revocation of qualifying status.

[875] Solar Energy Industries at 57.

[876] 18 CFR 292.207(d), which this final rule will renumber to 18 CFR 292.207(f).

[877] While we anticipate that most protests will involve interested persons or entities attempting to rebut the presumption of separate sites for affiliated small power production qualifying facilities that are more than one and less than 10 miles apart, we note that protesters may also protest any fact or representation in the Form No. 556, or other aspect of a QF's filing they believe is inconsistent with PURPA or our PURPA Regulations.

[878] The 80 MW limit and same site determination only apply to small power production facilities, not cogeneration facilities. *See* 16 U.S.C. 796(17)(A).

[879] We note that section 292.207(c) of the PURPA Regulations requires the applicant to concurrently with its filing serve a copy of the filing on each applicable electric utility as well as the applicable State regulatory authority. We expect an applicant seeking QF status (or recertifying its status) to timely comply with that regulation. Therefore, a utility should also receive the filing at the same time that the filing is made at the Commission.

[880] The regulations adopted in this final rule explicitly make self-certifications and self-recertifications effective upon filing and allow them to remain effective even if challenged until such time as the Commission finds that a facility does not qualify to be a QF. Additionally, entities seeking QF status can file self-certifications years in advance of facility operation, such that the few months contemplated by the new process should not cause delay. Finally, with regard to the time it may take to fill in the Form No. 556, we note that while an entity seeking QF status *may choose* to preemptively defend against claims that it should be considered to be at the same site as affiliated small power production qualifying facilities located more than one but less than 10 miles from it, this is optional, not required.

[881] 18 CFR 385.401(a).

eventually transferred to the relevant homeowners. While these rooftop solar PV systems are owned by the developer, each individual rooftop solar PV system would be considered affiliated electrical generating equipment of every other rooftop solar PV system owned by that developer. When there are multiple co-owned rooftop solar PV systems within a mile, and thus at the same site, they may exceed 1 MW and therefore be required to file for certification or recertification unless they receive a waiver.[882] Moreover, whenever they add an additional rooftop solar PV system to their portfolio, or alternatively transfer the ownership of such a rooftop solar PV system to the relevant homeowner, their facility could be viewed as no longer conforming with the material facts in their prior certification or recertification; thus they would need to recertify.

560. Due to the unique nature of rooftop solar PV developers, the Commission finds the recertification requirement for PV developers could be unduly burdensome. Therefore, to lessen the burden on such developers when recertifying, we will permit rooftop solar PV developers an alternative option to file their recertification applications. That is, rather than be required to file for recertification each time the rooftop solar developer adds or removes a rooftop facility, a rooftop solar PV developer may recertify on a quarterly basis. The filing would be due within 45 days after the end of the calendar quarter. However, if in any quarter a rooftop solar PV developer either has no changes or only has changes of power production capacity of 1 MW or less, then it would not be required to recertify until it has accumulated changes greater than 1 MW total over the quarters since its last filing.[883] Additionally, we note that rooftop solar PV developers, like all small power production facilities, will not be subject to protests when they file recertifications that are ''administrative only'' in nature, but would be subject to such protests when they make substantive changes to the existing certification as detailed above in this section.

561. We take this opportunity to clarify that, when the Commission issues an order revoking QF certification, such order is subject to rehearing and appeal pursuant to the FPA.[884] The Commission's authority to determine whether or not a facility is a qualifying small power production facility stems from PURPA section 201, which amended FPA section 3 to add paragraph (17).[885] Similarly, FPA section 3(18) grants the Commission authority to determine whether a cogeneration facility meets the Commission's requirements.[886] Because the Commission's authority is grounded in the FPA, the Commission's order revoking QF certification is subject to rehearing and appeal pursuant to FPA section 313.[887]

562. El Paso Electric states that sometimes the utility does not know to protest, because sometimes QFs fail to provide utilities with their QF application, and El Paso Electric is therefore concerned by the Commission's proposal to limit protests by requiring that once the Commission has affirmatively certified an applicant's QF status, any later protest must demonstrate changed circumstances. We note that a QF that is filing a FERC Form No. 556 is currently required by 18 CFR 292.207(c) (which we are not altering in this rule except to renumber as 18 CFR 292.207(e)) to serve a copy on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up or maintenance power from, and the state regulatory authority of each state where the facility and each affected utility is located. This final rule does not change that requirement and we expect applicants to timely comply with that regulation. Should an issue arise, though, the Commission can address it on a case-by-case basis as the circumstances warrant. Additionally, we note that, if a self-certification or self-recertification is not protested within the 30 day-period permitted for protests, then, just as it could prior to this final rule, a challenger still has the ability to file a petition for declaratory order, with the filing fee, without being required to show changed circumstances to do so.

563. Regarding Basin's request to allow petitions seeking de-certification of QFs that have previously filed self-certifications and ultimately never proceed to development,[888] as we note above we limit the ability to file a protest (rather than a petition for declaratory order, with the accompanying filing fee) to within 30 days of the date of the filing of the self-certification or self-recertification. If an interested party would like to contest a self-certification or self-recertification later than 30 days after the date of its filing, then the interested party may file a petition for declaratory order with the accompanying filing fee, just as they could prior to the effective date of this final rule.

564. We decline to adopt the requests that QF developers seeking certification with the Commission be required to publish notice in local newspapers in the states in which the development would be located. We find that the service requirement already in our regulations cited above should serve to provide adequate notice to affected entities.

565. We decline to impose a 60-day deadline after which a failure of the Commission to rule on the protest results in the protest being denied by operation of law. Self-certification will be effective upon filing and we adopt the NOPR proposal that the self-certifications will remain effective after a protest has been filed, until such time as the Commission issues an order revoking certification. We also clarify that self-recertifications will likewise remain effective after a protest has been filed, until such time as the Commission issues an order revoking certification.

566. We also will adopt the NOPR's proposed timeline for issuance of an order following protests to a QF self-certification and self-recertification. The

[882] *See Sunrun, Inc.*, 167 FERC ¶ 61,059 (2019).

[883] For example, if a rooftop solar QF increases its power production capacity by 0.9 MW in a quarter, it would not need to file to recertify for that quarter. However, if in the next quarter the rooftop solar QF increased its power production capacity by 0.9 MW, it would need to recertify for that quarter because cumulatively over the quarters since its last filing it has changed its power production capacity by more than 1 MW (*i.e.*, under this example the rooftop solar QF changed its power production capacity since its last recertification filing by 1.8 MW).

[884] Similarly, when the Commission issues an order affirmatively certifying an applicant's QF status (in response to a protest opposing a self-certification or self-recertification, or in response to an application for Commission certification or recertification), any party to that proceeding aggrieved by the order, including the protestant, may seek rehearing and appeal pursuant to the FPA.

[885] 16 U.S.C. 796(17). Section 3(17) of the FPA mandates a size requirement for a small power production facility: It must have ''a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts.''

[886] 16 U.S.C. 796(18).

[887] 16 U.S.C. 825*l*. The Commission has previously entertained rehearing of an order revoking QF status, *Golden Valley Elec. Ass'n, Inc.*, 167 FERC ¶ 61,208 (2019), *reh'g denied*, 170 FERC ¶ 61,025 (2020), and of an order denying petitions to revoke QF status, *N. Laramie Range All.*, 138 FERC ¶ 61,171, *reh'g denied*, 139 FERC ¶ 61,190 (2012), *appeal dismissed*, 733 F.3d 1030. There have also been appeals of orders denying petitions to revoke QF status. *N. Laramie Range All.* v. *FERC*, 733 F.3d 1030 (10th Cir. 2013) (dismissing appeal on other grounds); *Brazos Elec. Power Coop. Inc.*, v. *FERC*, 205 F.3d 235 (5th Cir. 2000) (denying petition for review). Unlike PURPA section 210, PURPA section 201 amends the FPA and is therefore subject to FPA section 313. *See Portland Gen. Elec. Co.* v. *FERC*, 854 F.3d 692, 700 (2017); *Midland Power Coop.* v. *FERC*, 774 F.3d 1, 3 (2014).

[888] Basin Comments at 11.

Commission will issue an order within 90 days of the filing of a protest. However, if the Commission requests more information, the time period for the Commission order would be extended to 60 days from the filing of a complete answer to the information request. In addition to any extension resulting from a request for information, the Commission also may toll the 90-day period during which the Commission commits to act for one additional 60-day period. We clarify, however, that, absent Commission action by the date of the expiration of the tolling period, a protest will be deemed denied, and the self-certification or self-recertification will remain effective. We find that this timeline provides both QFs and other interested persons with certainty about the QFs' status within a reasonable amount of time.

567. Regarding Ares' concern that small power production QFs could be aggregated under the new rule without being aware of the other small power production QFs with which they are aggregated, the Commission notes that this concern would only apply to small power production facilities owned by the same person or its affiliates; it is unlikely that the owner(s) of one facility would not be aware of other, affiliated QFs. Furthermore, the presumption continues to be that a small power production facility seeking QF status that is located more than one but less than 10 miles from any affiliated small power production QFs is at a separate site from those affiliated small power production QFs, and the Commission here is simply making this presumption rebuttable. If an entity challenges that presumption, the applicant seeking QF status would necessarily be served with the protest [889] and thus informed of the challenge, and given the opportunity to defend against the challenge.

568. Regarding Solar Energy Industries contention regarding the currently pending Connected Entity proceeding, that is a separate proceeding and beyond the scope of this proceeding. Moreover, the data collection at issue in that proceeding does not eliminate the need for the Commission to collect the data required by the FERC Form No. 556 so that the Commission has the information it needs to determine whether a facility qualifies to be a QF consistent with the standards laid out in the statute. In any event, we note that the Connected Entity rulemaking was about market-based rate sellers, not QFs, and it is likely that the Connected Entity rulemaking would not apply to many QFs in the first place since they often nether seek nor have the authority to sell at market-based rates.

569. Regarding Allco's concerns about the RFA, we discuss the RFA issue in section VII.

F. Corresponding Changes to the FERC Form No. 556

1. NOPR Proposal

570. The Commission proposed changes to the FERC Form No. 556, corresponding to the new rules discussed above regarding whether QFs are at separate sites. Currently, item 8a of FERC Form No. 556 requires that the applicant identify any facilities with electrical generating equipment within one mile of the instant facility's electrical generating equipment, as shown below:

8a Identify any facilities with electrical generating equipment located within 1 mile of the electrical generating equipment of the instant facility, and for which any of the entities identified in lines 5a or 5b, or their affiliates, holds at least a 5 percent equity interest.

Check here if no such facilities exist. ☐

	Facility location (city or county, state)	Root docket # (if any)	Common owner(s)	Maximum net power production capacity
1)		QF ___ - ___		___ kW
2)		QF ___ - ___		___ kW
3)		QF ___ - ___		___ kW

☐ Check here and continue in the Miscellaneous section starting on page 19 if additional space is needed

571. The Commission proposed adding a new item 8b,[890] which would be similar to the current item 8a, except that it would cover affiliated facilities whose nearest electrical generating equipment is *greater than 1 mile and less than 10 miles* from the electrical generating equipment of the instant facility.

572. The Commission proposed that the instructions for the new item 8b would also allow applicants with facilities identified under item 8b (*i.e.,* facilities more than one mile apart and less than 10 miles apart) to, if they choose, explain (in the Miscellaneous section starting on page 19 of the form) why the facilities identified under item 8b should be considered separate facilities,[891] considering the relevant physical and ownership factors. The Commission further proposed to provide reference, in the instructions to the new item 8b, to the paragraphs of this final rule which discuss the relevant physical and ownership factors that may be asserted to defend against rebuttal.

573. The Commission sought comment on whether item 8a (existing) should be revised and item 8b (as proposed) written to require that the applicant specify the distance from the instant facility to each affiliated facility listed. We also sought comment on whether items 8a and (new) 8b should require the applicant to document (in the Miscellaneous section on page 19 of the FERC Form No. 556) how the distances reported were calculated. Specifically, we sought comment on whether the applicant should be required to identify the particular electrical generating equipment and associated geographic coordinates used

[889] 18 CFR 385.211(b).

[890] Subsequent items in that section of the FERC Form No. 556 would be retained but re-numbered and moved down accordingly.

[891] As discussed in detail in section IV.D.1.d, this final rule will change the references to "separate facilities" or "the same facility" to "at separate sites" or "at the same site."

in calculating the distance(s) between the facilities.

574. The Commission noted that item 8a currently requires applicants to list all affiliated ''facilities.'' Under this requirement, an applicant would have to list all affiliated QFs as well as affiliated *non*-QFs. We requested comment on whether such a requirement is more burdensome than necessary. It was not clear that requiring the listing of affiliated *non*-QFs is necessary in monitoring for compliance with the relevant QF regulations, which are concerned only with the distance between affiliated *QFs.*

575. The Commission also sought comment on whether item 3c (geographic coordinates) and the Geographic Coordinates instructions on page 4 of the current FERC Form No. 556 should be modified such that reporting of geographic coordinates should be required for *all* applications, rather than only for applications where there is no facility street address (as has been the case). We believed such information may provide more transparency in measuring distances between facilities, and that such transparency may be useful for both the public and Commission staff in monitoring compliance with the Commission's QF regulations.

576. The Commission noted, as it did in Order No. 732,[892] and as in the general form instructions on page 4 of the FERC Form No. 556, that such coordinates can be obtained through certain free online map services (with links and instructions available through the Commission's QF website); GPS devices (including smartphones, which are now nearly ubiquitous); Google Earth; property surveys; various engineering or construction drawings; property deeds; or municipal or county maps showing property lines. The Commission also noted that the Commission has a link on its QF web page (*https://www.ferc.gov/industries-data/electric/power-sales-and-markets/purpa-qualifying-facilities*) which provides assistance with determining geographic coordinates of facilities. As such, the Commission believed that the burden that would be created by requiring every QF to provide geographic coordinates would be limited. Even so, the Commission sought comment on whether the value of the information to the public and the Commission would outweigh the limited burden.

2. Comments

577. A few commenters oppose the changes to FERC Form No. 556 as proposed in the NOPR.[893] Solar Energy Industries and the Southeast Public Interest Organizations contend that the proposed new item 8b that requests a list of all affiliated facilities within one to 10 miles from the certifying QF would be a significant increase in information collection, time, effort, and cost of QF certification.[894]

578. The Southeast Public Interest Organizations further object that the obligation to show how distances are calculated and to identify electrical generating equipment and their associated geographic coordinates are overly burdensome for facilities that are presumed to be separate and contradicts the rebuttable presumption of separate facilities, which usually places the burden on the challenger.[895]

579. The Southeast Public Interest Organizations also assert it would be reasonable to ask for only affiliated QFs and to exclude non-QF affiliates from the questions in item 8.[896]

580. Several commenters support changes to FERC Form No. 556 as proposed in the NOPR.[897] A few commenters support the proposed changes to item 8a and proposed new item 8b and argue that the additional information might be otherwise difficult to find and will be useful to clarify if the assumption of separate facilities is appropriate.[898] Some commenters support requiring all applicants to supply geographic coordinates in item 3c, regardless of whether they have a street address.[899]

581. Two commenters support the collection of information for all affiliated facilities, not just QF affiliates, within the one or ten-mile radius requested in item 8a and proposed item 8b, respectively, because they believe it will be needed to identify QFs not complying with the proposed rule.[900]

582. Solar Energy Industries assert that the proposed item 8b to the Form No. 556, requiring a listing of all affiliated facilities whose nearest electrical generating equipment is greater than one mile and less than 10 miles from the electrical generating equipment of the certifying QF, is a substantial expansion of the information collection requirements and goes against the Commission's previously-granted blanket exemptions for QFs to relieve the burden of public utility regulation. Solar Energy Industries argue that this is not a mere information collection requirement, but a request for information that is not otherwise publicly available and is inconsistent with the Commission's finding on the burden of collecting Connected Entity information. Solar Energy Industries argue that collecting such information from QFs is unwarranted discriminatory treatment and is arbitrary and capricious.[901]

583. A few commenters requested additional changes to FERC Form No. 556.[902] North American-Central would like the Commission to create separate Form No. 556 forms for small power producers and cogeneration QFs for a more distinct and simplified application process.[903] EEI would like Form No. 556 to explicitly include battery storage.[904] EEI requests that the Form No. 556 collect information on the rated capacity and notes that net capacity may not be the appropriate measure of power production. Solar Energy Industries also noted that the Commission stated in Order No. 732 that future changes to Form No. 556 would not go through a rulemaking and would instead be reviewed by the Office of Management and Budget with a period for public comments.[905]

3. Commission Determination

584. We adopt the NOPR proposals regarding changes to the FERC Form No. 556, with the further clarifications and additions described below. The revised Form No. 556 will be attached to this rule in eLibrary, but will not be published in the **Federal Register** or Code of Federal Regulations. The Commission finds that the added information collected by these changes

[892] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility,* Order No. 732, 130 FERC ¶ 61,214, at P 100 (2010).

[893] Solar Energy Industries Comments at 8; Southeast Public Interest Organizations Comments at 36–37.

[894] Solar Energy Industries Comments at 56; Southeast Public Interest Organizations Comments at 36–37.

[895] Southeast Public Interest Organizations Comments at 37–38.

[896] *Id.*

[897] APPA Comments at 23; EEI Comments at 50; Portland General Comments at 17–18; Subsurface Engineering Association Comments at 1.

[898] APPA Comments at 23–24; EEI Comments at 50.

[899] EEI Comments at 50; Idaho Commission Comments at 7; Subsurface Engineering Association Comments at 1.

[900] EEI Comments at 50–51; Portland General Comments at 18.

[901] Solar Energy Industries Comments at 56–57.

[902] EEI Comments at 51; El Paso Electric Comments at 5–6; North American-Central Comments at 7.

[903] North American-Central Comments at 7.

[904] EEI Comments at 51–52.

[905] Solar Energy Industries Comments at 56.

is necessary to implement the changes made to the regulations in this final rule, and thus justifies the increase in reporting burden.

585. The currently effective Form No. 556 contains a ''Who Must File'' section which specifies when an applicant seeking QF status or recertification of QF status must file a self-certification, and when such applicant is exempt from the filing requirement. We will revise the ''Who Must File'' section to clarify that the exemption from the requirement to complete or file a Form No. 556 applies to an applicant seeking QF status for a small power production facility that, together with any affiliated small power production QFs within one mile of the entity seeking small power production QF status, has a net power production capacity of 1 MW or less. While we did not seek comment on this corrective change in the NOPR, this change is consistent with the Commission's determination in *SunE B9 Holdings LLC,* [906] and serves to make the Form No. 556 more transparent in its application.

586. We also revise the ''Who Must File'' section to include a ''Recertification'' section which provides the text of revised 18 CFR 292.207(f), (previously 18 CFR 292.207(d)) which states that a QF must file for recertification whenever the QF ''fails to conform with any material facts or representation presented . . . in its submittals to the Commission.'' [907]

This addition does not alter our recertification requirements, and we include it here simply to make the Form No. 556 clearer in its application.

587. The total burden estimates in the ''Paperwork Reduction Act Notice'' section of FERC Form No. 556 will be updated based on the changes in this final rule, to provide the following estimates: 1.5 hours for self-certifications of facilities of 1 MW or less; 1.5 hours for self-certifications of a cogeneration facility over 1 MW; 50 hours for applications for Commission certification of a cogeneration facility; 3.5 hours for self-certifications of small power producers over 1 MW and less than a mile or more than 10 miles from affiliated small power production QFs that use the same energy resource; 56 hours for an application for Commission certification of a small power production facility over 1 MW and less than a mile or more than 10 miles from affiliated small power production QFs that use the same energy resource; 9.5 hours for self-certifications of small power producers over 1 MW with affiliated small power production QFs more than one but less than 10 miles that use the same energy resource; 62 hours for an application for Commission certification of a small power production facility over 1 MW with affiliated small power production QFs more than one but less than 10 miles that use the same energy resource.

588. We find that an explanatory ''Protest to the Filing'' section should be added to the FERC Form No. 556 to note that, pursuant to 18 CFR 292.207, an interested person or entity has 30 days from the date of the filing of the FERC Form No. 556 to intervene or file a protest. The ''Protest to the Filing'' section will state that the protestor must concurrently serve a copy of such filing, pursuant to 18 CFR 385.211(b), on the Form No. 556 applicant. The ''Protest to the Filing'' section will also state that the Form No. 556 applicant will have 30 days to file any answer to a protest. The ''Protest to the Filing'' section will also state that protests may be made to any initial certification, and any recertifications on or after the effective date of this final rule making substantive changes to the existing certification, which may include, for example, a change in electrical generating equipment that increases power production capacity by the greater of 1 MW or 10 percent of the previously certified capacity of the QF, or a change in ownership in which an owner increases their equity interest by at least 10% from the equity interest previously reported. The ''Protest to the Filing'' section will note that ''administrative only'' changes will not be subject to protests.

589. The Commission finds that item 3c (geographic coordinates) and the Geographic Coordinates instructions on page 4 of the current FERC Form No. 556 will be revised to require all applicants to report the applicant facility's geographic coordinates, rather than only for applications where there is no street address (as was the case previously). We find that such information will provide more transparency regarding the location of each site, and that such transparency may be useful for both the public and Commission staff in monitoring compliance with the Commission's QF regulations.

590. The Commission will change item 8a, which currently requires applicants to list all affiliated facilities within one mile, to instead require that the applicant only list affiliated *small power production QFs using the same energy resource* within one mile.

591. We modify the NOPR's proposal to add the collection of information for affiliated facilities whose nearest electrical generating equipment is more than one but less than 10 miles from the electrical generating equipment of the applicant's facility to instead add the collection of information for affiliated small power production QFs using the same energy resource located more than one mile but less than 10 miles from the electrical generating equipment of the applicant's facility. However, rather than adding a separate item 8b to the Form No. 556 specifically for such QFs, as proposed in the NOPR, we are expanding the existing item 8a to require the applicant to list all affiliated small power production QFs using the same energy resource whose nearest electrical generating equipment is *less than 10 miles* from the electrical generating equipment of the entity seeking small power production QF status.

592. We determine that the revised item 8a will require the applicant to list the geographic coordinates of the nearest ''electrical generating equipment'' of both its own facility and the affiliated small power production QF in question based on the definitions adopted in this final rule. The distance between the entity seeking small power production QF status and each affiliated small power production QF will be automatically calculated based on these coordinates. For any affiliated small power production QFs that cannot be described in item 8a due to space limitations, the instructions will direct applicants to provide the required information for such small power production QFs in the Miscellaneous section of the form. To facilitate the uniform calculation of distances for facility data that are entered into the Miscellaneous section of the form, a distance calculator will be added to the form, and the form instructions will direct applicants to use the calculator to convert their facilities' geographic coordinates into distance.

593. The Commission also adopts the NOPR proposal to allow applicants with affiliated small power production QFs *greater than one mile and less than 10 miles* from the electrical generating equipment of the entity seeking small power production QF status identified under item 8a to, if they choose, explain why the affiliated small power production QFs *greater than one mile and less than 10 miles* from the nearest electrical generating equipment of the entity seeking QF status identified

[906] 157 FERC ¶ 61,044 at P 16 (''the one-mile rule of section 292.204(a)(2) is a size determination which the Commission has consistently applied generally to the regulations pursuant to PURPA, and which applies here to determining the applicability of the less-than-1–MW exemption of section 292.203(d)'') (internal citations omitted).

[907] 18 CFR 292.207(d).

under item 8a should be considered to be at separate sites from the entity seeking QF status, considering the relevant physical and ownership factors. The instructions will provide references to the relevant physical and ownership factors, as defined in this final rule, that may be asserted to defend against rebuttal.

594. Regarding Solar Energy Industries' concern regarding the expansion of the information collection requirements, we find that the added information collected by item 8a of the Form No. 556 is necessary to implement the changes made to the regulations in this final rule, and thus justifies the increase in reporting burden. As noted in section IV.E, the currently pending Connected Entity proceeding is a separate proceeding and beyond the scope of this proceeding. Moreover, the data collection at issue in that proceeding does not eliminate the need for the Commission to collect the data required by the FERC Form No. 556 so that the Commission has the information it needs to determine whether a facility qualifies to be a QF consistent with the standards laid out in the statute.

595. We note that these changes and any future changes to Form No. 556 will continue to be reviewed by the Office of Management and Budget following solicitation of comments from the public, as described in Order No. 732.[908]

596. We find the requests for additional changes to FERC Form No. 556 beyond the scope of this proceeding.

G. PURPA Section 210(m) Rebuttable Presumption of Nondiscriminatory Access to Markets

1. PURPA Section 210(m) Implementation

a. NOPR Proposal

597. In 2006, when Order No. 688 was issued, the organized electric markets had been in existence for only a few years and were not well understood by all market participants. Now, fourteen years later, the markets are more mature, and the mechanics of participation in such markets are improved and better understood. Consequently, in the NOPR, the Commission determined that small power production facilities below 20 MW should now be able to participate in such markets under most circumstances. The Commission therefore proposed to revise 18 CFR 292.309(d) to reduce the net power production capacity level at which the presumption of nondiscriminatory access to a market attaches for small power production facilities, but not cogeneration facilities, from 20 MW to 1 MW.

598. The Commission determined that, in light of the maturation of organized electric markets, such a reduction was consistent with Congress's intent to relieve electric utilities of their obligation to purchase when a QF has nondiscriminatory access to competitive markets.

599. The Commission noted that, in establishing the original presumption that QFs whose net power production capacity was 20 MW or below lacked nondiscriminatory access to markets defined in sections 210(m)(1)(A)–(C) of PURPA, it had acknowledged that ''there is no unique and distinct megawatt size that uniquely determines if a generator is small.''[909] The Commission noted that, in using 20 MW to separate the presumption that large QFs had nondiscriminatory access and small QFs lacked such access, the Commission had recognized: (1) Order No. 671's exemption for QFs that are 20 MW or smaller from sections 205 and 206 of the FPA; and (2) Order Nos. 2006 and 2006–A's setting 20 MW as the demarcation for different interconnection standards between small and large generators.[910] The NOPR stated that, while the Commission had not (and likewise did not in the NOPR) propose to revise the exemptions for QFs from sections 205 and 206 of the FPA, the Commission had elsewhere taken steps to ease both interconnection and market access for generation resources with small capacities since it first implemented section 210(m) of PURPA.

600. For example, the Commission noted that it had required public utilities to provide a Fast-Track interconnection process for some interconnection customers whose capacity is up to and including 5 MW (up from the previous 2 MW threshold),[911] and had required each RTO/ISO to revise its tariff to include a participation model for electric storage resources that establishes a minimum size requirement for participation in the RTO/ISO markets that does not exceed 100 kW.[912] While both of these changes do not apply only to generation types that could become QFs or only to RTOs/ISOs, the Commission stated that it believed they generally show that small power production facilities below 20 MW, specifically those whose capacity exceeds 1 MW, now have greater access to the markets defined in section 210(m)(1) of PURPA than they did when the Commission first established the presumptions of market access. The Commission also stated that, under the NOPR proposal and like QFs over 20 MW today, small power production facilities over 1 MW would still be able to rebut the presumption of access due to operational characteristics or transmission constraints.[913]

601. The Commission did not propose to make the same reduction applicable to cogeneration facilities. The Commission stated that, unlike small power production facilities, which are constructed solely to produce and sell electricity, cogeneration facilities seeking QF certification after February 2, 2006 are statutorily required to show that they are intended primarily to provide heat for an industrial, commercial, residential or institutional process rather than fundamentally for sale to an electric utility.[914] Consequently, the production and sale of electricity is a byproduct of these thermal processes, and owners of cogeneration facilities might not be as familiar with energy markets and the technical requirements for such sales. The Commission stated that retention of the existing 20 MW level for the presumption of access to markets therefore would be appropriate for cogeneration facilities.

b. Comments in Opposition

602. Numerous commenters oppose the NOPR proposal to revise 18 CFR 292.309(d) to reduce the net power production capacity level at which the presumption of nondiscriminatory

[908] Order No. 732, 130 FERC ¶ 61,214.

[909] Order No. 688–A, 119 FERC ¶ 61,305 at P 97.

[910] *See* Order No. 688, 117 FERC ¶ 61,078 at P 76, *order on reh'g,* Order No. 688–A, 119 FERC ¶ 61,305 at P 97; *see also* 18 CFR 292.601(c)(1) (''[S]ales of energy or capacity made by qualifying facilities 20 MW or smaller, or made pursuant to a contract executed on or before March 17, 2006 or made pursuant to a state regulatory authority's implementation of section 210 the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a–1, shall be exempt from scrutiny under sections 205 and 206.''); *Revised Regulations Governing Small Power Production and Cogeneration Facilities,* Order No. 671, 114 FERC ¶ 61,102, at P 98, *order on reh'g,* Order No. 671–A, 115 FERC ¶ 61,225 (2006) (establishing exemption for QFs 20 MW or below from 205 and 206 of FPA); *Standardization of Small Generator Interconnection Agreements and Procedures,* Order No. 2006, 111 FERC ¶ 61,220, at P 75, *order on reh'g,* Order No. 2006–A, 113 FERC ¶ 61,195 (2005), *order granting clarification,* Order No. 2006–B, 116 FERC ¶ 61,046 (2006).

[911] *Small Generator Interconnection Agreements and Procedures,* Order No. 792, 145 FERC ¶ 61,159, at P 103 (2013), *clarifying,* Order No. 792–A, 146 FERC ¶ 61,214 (2014).

[912] Order No. 841, 162 FERC ¶ 61,127 at P 265.

[913] *See* 18 CFR 292.309(c), (e), (f).

[914] *See* 16 U.S.C. 824a–3(n); 18 CFR 292.205(d)(3). We recognize that cogeneration facilities seeking certification 5 MW or smaller after February 2, 2006 are presumed to satisfy this requirement. 18 CFR 292.205(d)(4).

access to a market attaches for small power production facilities, but not cogeneration facilities, from 20 MW to 1 MW.[915]

i. Insufficient Evidentiary Support

603. Several commenters argue that the record does not support the proposal.[916]

604. Advanced Energy Economy asserts that, when an agency reverses course on a policy issue, and the ''new policy rests upon factual findings that contradict those which underlay'' the previous policy, then the agency must ''provide a more detailed justification than what would suffice for new policy created on a blank slate.'' [917] Advanced Energy Economy argues that the NOPR falls short of that standard.[918]

605. Public Interest Organizations and NIPPC, CREA, REC and OSEI argue that the Commission fails to cite any evidence supporting the premise that the markets are more mature, and that the mechanics of participation in such markets are improved and better understood. Public Interest Organizations and NIPPC, CREA, REC, and OSEIA state that the Commission asserts that QFs smaller than 20 MW can now participate in markets on a nondiscriminatory basis ''under most circumstances,'' but that the Commission does not explain what those ''circumstances'' are, or whether they apply as a general matter to most small QFs.[919]

606. Several commenters state that, in Order No. 688–A, the Commission, rejected utility proposals to set the threshold at 1 MW, and confirmed that 20 MW was an appropriate threshold.[920] Advanced Energy Economy states that the Commission's explanation in Order No. 688–A, which stated that the rebuttable presumptions were based on the Commission's experience of implementing non-discriminatory open access transmission over the past 11 years, dealing with QF issues over the past 29 years and its experience with RTO/ISO markets for almost 10 years, contradicts the Commission's justification in the NOPR of limited experience with organized electric markets.[921] Advanced Energy Economy and Southeast Public Interest Organizations assert that, since Order No. 688, the Commission has repeatedly found that utilities in organized markets have failed to rebut the presumption of nondiscriminatory access to QFs, instead finding that QFs 20 MW and under do not have sufficient access.[922]

607. Public Interest Organizations and NIPPC, CREA, REC, and OSEIA argue that the Commission fails to explain the relevance of its Fast-Track interconnection process or energy storage order or which barriers these developments alleviate for small QFs' access to markets.[923] Advanced Energy Economy asserts that the expansion of the Fast-Track procedures only applied to a narrow slice of inverter-based resources under 20 MW and is insufficient to support a rebuttable presumption that all QFs under 20 MW have nondiscriminatory access.[924]

608. Solar Energy Industries and New England Hydro argue that, just because some small QFs participate in energy markets, that is not sufficient justification to find that all small QFs meet the statutory standard required for granting waiver for all QFs 20 MW or less.[925] Public Interest Organizations assert that proper implementation of section 210(m) requires that exemption from the mandatory purchase obligation only applies where QF development will be stimulated by market forces; otherwise Congress intended QF development to continue to be encouraged by the mandatory purchase obligation.[926] Protesters assert that the record does not provide evidence that could reasonably allow the Commission to conclude that small QF development will be stimulated by market forces. On the contrary, the Public Interest Organizations assert that the Commission's proposal placing the burden on small QFs to rebut the presumption of access is itself a barrier to QF development.[927]

609. Solar Energy Industries argue that, along with the energy markets, the capacity markets in the RTO/ISO regions have not evolved to provide a meaningful opportunity for any QF to sell long-term capacity.[928] Solar Energy Industries argue that PURPA section 210(m) requires the Commission to find that a QF has nondiscriminatory access to a market for long-term sales of capacity prior to relieving the purchase obligation. Solar Energy Industries provide several examples such as MISO's Planning Resources Auction that only provides a one-year purchase agreement, PJM not purchasing capacity since the Commission's July 2019 Order, and that SPP does not have a centralized capacity market. Solar Energy Industries argue that without a specific finding that RTO/ISO markets provide QFs with an opportunity to sell long-term capacity, the Commission is statutorily required to maintain utilities' obligation to purchase output from QFs 20 MWs or less.[929]

610. Mr. Mattson asserts, without elaboration, that FPA sections 205 and 206 disallow the Commission from lowering the nondiscriminatory access threshold from 20 MW to 1 MW, and, therefore, claims it would amount to a violation of state-jurisdictional rights and a taking of property.[930]

ii. Administrative Burden and Complex Market Rules

611. The DC Commission state that QFs 20 MW or less lack the capability

[915] Allco Comments at 2, 17–19; Advanced Energy Economy Comments at 1–12; AllEarth Comments at 2; Biogas Comments at 2–3; Biological Diversity Comments at 8–9; California Commission Comments at 31–33; CARE Comments at 5–6; Con Edison Comments at 5; Covanta Comments at 10–12; DC Commission Comments at 4–5; Distributed Sun Comments at 2–3; ELCON Comments at 18, 31–35; Energy Recovery Comments at 4–5; ENGIE Comments at 3–4; Commissioner Slaughter Comments at 2, 4; Green Power Comments at 3; Industrial Energy Consumers Comments at 6–10; Massachusetts AG Comments at 6–8; Michigan Commission Comments at 6–7; North American-Central at 2–4; One Energy Comments at 2; South Dakota Commission Comments at 5; Solar Energy Industries Comments at 44–51; State Entities Comments at 5–6; Western Resource Councils Comments at 1–144.

[916] AllEarth Comments at 2; Advanced Energy Economy Comments at 5–9; Biological Diversity Comments at 9; ELCON Comments at 31–32; Industrial Energy Consumers Comments at 8; New England Hydropower Comments at 11–12; NIPPC, CREA, REC, and OSEIA Comments at 77; Public Interest Organizations Comments at 76–78; SC Solar Alliance Comments at 12; Solar Energy Industries Comments at 45–48; Southeast Public Interest Organization Comments at 39–40.

[917] Advanced Energy Economy Comments at 6 (citing *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. at 515).

[918] *Id.* at 7.

[919] Public Interest Organizations Comments at 78; NIPPC, CREA, REC, and OSEIA Comments at 77 (citing NOPR, 168 FERC ¶ 61,184 at P 126).

[920] Advanced Energy Economy Comments at 5–6; ELCON Comments at 31–32.

[921] Advanced Energy Economy Comments at 8–9.

[922] *Id.* (citing, *e.g., PPL Elec. Utils Corp.,* 145 FERC ¶ 61,053, at P 24 (2013); *City of Burlington,* 145 FERC ¶ 61,121, at P 36 (2013); *Fitchburg Gas and Elec. Light Co.,* 146 FERC ¶ 61,186, at PP 32–33 (2014); *Va. Elec. & Power Co.,* 151 FERC ¶ 61,038, at P 21 (2015); *N. States Power Co.,* 151 FERC ¶ 61,110 (2015)); Southeast Public Interest Organizations Comments at 39–40.

[923] NIPPC, CREA, REC, and OSEIA at 77; Public Interest Organizations Comments at 78 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (explaining that an agency's failure to consider the relevant factors and supply a ''rational connection between the facts found and the choice made'' renders its decision arbitrary and capricious)).

[924] Advanced Energy Comments at 7–8.

[925] Solar Energy Industries Comments at 46; New England Hydro Comments at 11–12.

[926] Public Interest Organizations Comments at 76 (citing *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, 117 FERC ¶ 61,078, at P 6 (2006), *order on reh'g,* Order No. 688–A, 119 FERC ¶ 61,305 (2007), *aff'd sub nom. Am. Forest and Paper Ass'n* v. *FERC,* 550 F.3d 1179).

[927] *Id.*

[928] Solar Energy Industries Comments at 45.

[929] *Id.* at 49.

[930] Mr. Mattson Comments at 10.

to participate in a complicated wholesale market such as PJM where there is a need to understand membership obligations and rules in order to appropriately execute transactions.[931]

612. Allco argues that, in retail choice states, PURPA is the only way small QFs can sell to utilities. Allco asserts that in retail choice states there is a shifting retail customer base, therefore utilities want obligations reduced and contracts limited to a year. Allco asserts that utilities and state commissions cannot limit contracts due to a potentially disappearing customer base and then argue that a sufficient wholesale market exists for long-term sales of electric energy and capacity to support nondiscriminatory access for small QFs under 20 MW.[932]

613. Public Interest Organizations argue that giving special exemptions to cogeneration facilities is discriminatory against small power producer QFs.[933] Two commenters also assert that small QFs are at an inherent disadvantage compared to larger QFs because smaller QFs are often engaged in other business enterprises, such as governmental units distributing irrigation water or local companies unfamiliar with energy markets.[934]

c. Comments in Support

614. Numerous commenters support the proposal to revise 18 CFR 292.309(d) for small power production facilities but not cogeneration facilities, to reduce the net power production capacity level at which the presumption of nondiscriminatory access to a market applies from 20 MW to 1 MW.[935] DTE Electric argues that RTO/ISOs can now provide smaller resources non-discriminatory access, and therefore electric utilities should no longer be required to purchase electric energy from them.[936] EEI supports the proposal because resource diversity has improved and markets have evolved as smaller resources, including QFs, are increasingly participating in the RTO/ISO markets. RTOs/ISOs have also increasingly adjusted their bidding rules, forecasts, and operations to better accommodate variable resources.[937] Alliant and the Ohio Commission Energy Advocate state that small resources have increased access to wholesale markets and that RTO/ISO rule flexibility allows for the non-discriminatory participation of very small resources and the aggregation of even smaller resources in the markets, therefore the 20 MW threshold is no longer appropriate.[938]

615. Consumer Alliance and EEI argue that reducing the threshold will reduce costs to customers because currently some QFs with access to markets are foregoing the opportunity to participate in those markets and electing to contract with electric utilities under state-implemented PURPA programs, which EEI argues compensate QFs at an above-market rate.[939]

616. The Ohio Commission Energy Advocate argues that the rebuttable presumption process for QFs provides an appropriate safety valve for the lower threshold.[940]

d. Comments Requesting Modifications/Clarifications

617. Institute for Energy Research requests that the Commission expand the rebuttable presumption of non-discriminatory access to QFs 1 MW and below if the market structure in a given state is appropriate. Institute for Energy Research gives the example of Texas's open market model, where generation is open to all comers of all sizes. Institute for Energy Research also suggests that the Commission should include some threshold now such that when other states achieve similar open access market designs QFs 1 MW and below could be rebuttably presumed to have non-discriminatory access to those markets, without the need to undertake, at that time, a separate rulemaking on QFs 1 MW and below.[941]

618. The Connecticut Commission suggests reducing the threshold at which the presumption of nondiscriminatory access attaches to 0 MW because the markets are more mature, the mechanics of participating in the markets are improved and the law requires nondiscriminatory access to the markets for all resources.[942] Missouri River Energy recommends lowering the threshold to 500 kW.[943] FirstEnergy recommends the Commission treat both small power production resources and cogeneration resources consistently by lowering the rebuttable presumption threshold from 20 MW to 1 MW for all QFs.[944] Indiana Municipal requests that the Commission automatically apply the 1 MW threshold to utilities that have already been granted waiver for QFs over 20 MW to promote the efficient use of the Commission's resources and savings to utilities.[945]

619. The Michigan Commission requests clarification on the NOPR proposal specifically regarding: (1) How existing contracts with QFs greater than 1 MW but below 20 MWs are to be treated under the NOPR, and if they would be subject to early termination or would be granted legacy treatment indefinitely or until the end of the existing contract term; (2) whether utilities that have already received relief from the mandatory purchase obligation from the Commission for operating within the footprint of an organized wholesale electricity market automatically qualify for relief under the 1 MW threshold; and (3) how interconnection requirements would be considered for QFs between 1 MW and 20 MWs—specifically whether these projects would need to interconnect at transmission level voltages to be considered as having access to the wholesale electricity market.[946] The Michigan Commission notes that there is some tension between the proposal and the market rules for MISO and PJM.[947]

620. Several commenters request that the Commission expand the exemption for cogeneration to small power QFs whose primary purpose is to self-supply but still rely on PURPA when making occasional sales to the interconnected utility when QF output exceeds on-site consumption.[948] Industrial Energy

[931] DC Commission Comments at 4–5.

[932] Allco Comments at 18.

[933] Public Interest Organizations Comments at 74.

[934] NIPPC, CREA, REC, and OSEIA Comments at 18–19, 24–25; Mr. Mattson Comments at 15.

[935] Alliant Energy Comments at 13–16; Tax Reform Comments at 2; APPA Comments at 24–26; Arizona Public Service Comments at 8–10; Basin Comments at 12–13; Freedom Center Comments at 2; Colorado Independent Energy Comments at 14; Connecticut Commission Comments at 21–22; Conservative Action Comments at 2; Consumers Alliance Comments at 1–2; Consumers Energy Comments at 4–5; DTE Electric Comments at 4–5; East Kentucky Comments at 3; East River Comments at 2; EEI Comments 54–59; FirstEnergy Comments at 2–3; Idaho Power comments at 14; Indiana Municipal Comments at 6–9; Institute for Energy Research Comments at 2; Kentucky Commission Comments at 8; Missouri River Energy Comments at 3–4; NorthWestern at 14; TAPS Comments at 4; Ohio Commission Energy Advocate Comments at 8; Taxpayers Protection Alliance Comments at 2; Chamber of Commerce Comments at 7; We Stand Comments at 1–144; Taxpayer Protection Alliance Comments at 2; TAPS Comments at 4.

[936] DTE Electric Comments at 5–6.

[937] EEI Comments at 56–58.

[938] Alliant Energy Comments at 13–14; Ohio Commission Energy Advocate Comments at 7–8.

[939] EEI Comments at 58–59; Consumers Alliance Comments at 1–2.

[940] Ohio Commission Energy Advocate Comments at 8.

[941] Institute of Energy Research Comments at 2.

[942] Connecticut Commission Comments at 21–23.

[943] Missouri River Energy Comments at 3.

[944] FirstEnergy Comments at 2–3.

[945] Indiana Municipal Comments at 8–9.

[946] Michigan Commission Comments at 6–7

[947] *Id.* at 7 (commenting that MISO, for example, utilizes a 5 MW threshold as the cut off point for Network Modeling purposes and that resources less than 5 MW are modeled on a case-by-case basis only).

[948] ELCON Comments at 32–33; Industrial Energy Consumers Comments at 6–8; Chamber of Commerce Comments at 7.

Consumers suggest that small power producers seeking a 20 MW self-supply exemption meet the ''fundamental use test'' which currently applies to cogeneration facilities.[949] Other commenters assert that behind-the-meter distributed energy resources,[950] Waste to Energy resources,[951] and baseload renewables [952] are similar to cogeneration facilities and should be included in the exemption.

621. Public Interest Organizations request that the Commission clarify that utilities are required to petition to eliminate the must-purchase obligation for small QFs, even for those utilities that have previously made such a showing for QFs larger than 20 MW.[953] NRECA, concerned over a potential change in aggregation for distributed energy resources in RTOs/ISOs, requests that the Commission clarify that the presumption will only apply to those facilities having sufficient transmission access to the RTO/ISO markets.[954]

622. Hydropower Association asserts that, despite their potential, hydropower resources do not receive the same tax treatment and eligibility for state RPSs and therefore have not enjoyed the same growth rate as other renewable energy small power producers. Hydropower Association urges the Commission to retain the 20 MW rebuttable presumption for hydropower resources, as would be the case for cogenerators, because hydropower resources are required by the FPA section 10(a) to be best adapted for comprehensive uses, including non-power generation purposes such as irrigation, flood control, navigation, recreation, environmental restoration, and wildlife preservation. Hydropower Association states that non-powered dams by definition were not constructed to generate power. Because power generation is therefore a secondary use of these facilities, Hydropower Association asserts that subjecting these facilities to new avoided cost calculations will necessarily burden hydropower resources more than other small power production facilities. Hydropower Association also asserts that there is almost 5 GW of potential non-power dams that could be developed and that the 20 MW exemption should be retained for these resources.[955]

623. Ohio Consumers Counsel states that lowering the rebuttable presumption could permit electric utilities and state policies to deny QFs and distributed energy resources under 20 MW from having unrestricted and nondiscriminatory access to wholesale markets. For example, Ohio Consumers Counsel states that the NOPR would permit electric distribution utilities to limit the availability of after-the-meter generation and storage from PJM's markets, such as through restrictive net metering requirements, unreasonably low compensation for distributed energy resources, or other state regulatory and policy restrictions. Ohio Consumers Counsel urges the Commission to require that investor-owned electric distribution utilities demonstrate that they have not restricted market access to QFs and distributed energy resources rated between 1 MW and 20 MW.[956]

e. Commission Determination

624. We agree with commenters that, in Order Nos. 688 and 688–A, given conditions at the time, the Commission established the rebuttable presumption at QFs 20 MW or less. Furthermore, as commenters noted in reviewing several individual cases in 2013–2015, the Commission continued to find that those individual small power production facilities 20 MW or less still needed the additional protections and encouragement.[957] However, since Order Nos. 688 and 688–A the Commission has recognized multiple examples of small power production facilities under 20 MW participating in RTO/ISO energy markets. The Commission found that the electric utilities in those proceedings rebutted the presumption of no market access and therefore terminated the mandatory purchase obligation.[958]

625. We adopt the proposal to revise 18 CFR 292.309(d) to reduce the net power production capacity level at which the presumption of nondiscriminatory access to a market attaches for small power production facilities, but not for cogeneration facilities. However, recognizing some of the challenges that QFs near 1 MW have in participating in such markets that have been identified by commenters, in this final rule we lower the rebuttable presumption from 20 MW to 5 MW, rather than from 20 MW to 1 MW as proposed in the NOPR. Under the final rule, small power production facilities with a net power production capacity at or below 5 MW will be presumed *not* to have nondiscriminatory access to markets, and, conversely, small power production facilities with a net power production capacity over 5 MW will be presumed to have nondiscriminatory access to markets.

626. A number of commenters oppose the reduction below 20 MW, arguing the lack of a record to support the proposal. We disagree. In Order Nos. 688 and 688–A, the Commission determined that small QFs may not have nondiscriminatory access to wholesale markets and, therefore, it was reasonable to establish a presumption for small QFs. At that time, the Commission found that it was ''reasonable and administratively workable'' to define ''small'' for purposes of this regulation to be QFs below 20 MW.[959] We also note that a number of commenters, including state entities which are charged with applying PURPA in their jurisdictions,[960] supported a reduction in the 20 MW threshold.

627. The Commission acknowledged that there is no unique number to draw a line for determining what is a small entity.[961] In establishing 20 MW presumption as the line between large and small QFs for purposes of section 210(m), the Commission looked at other non-QF rulemaking orders in which it considered what was a small entity and those orders showed 20 MW was a reasonable number at which to draw the line.[962] But, as explained below, the Commission has since determined, based on changed circumstances since the issuance of Order Nos. 688 and 688–A, that entities with capacity lower than 20 MW have nondiscriminatory access to the markets and, therefore, capacity

[949] Industrial Energy Consumers Comments at 9–10.

[950] One Energy Comments at 2.

[951] Industrial Energy Consumers Comments at 9–10.

[952] Renewable Baseload Coalition Comments at 2.

[953] Public Interest Organizations Comments at 76.

[954] NRECA Comments at 18–19.

[955] Hydropower Association Comments at 2–7 (citing 16 U.S.C. 803).

[956] Ohio Consumers Counsel Comments at 2–5.

[957] *PPL Elec. Utilities Corp.,* 145 FERC ¶ 61,053 at P 24; *Va. Elec. & Power Co.,* 151 FERC ¶ 61,038, at P 21; *N. States Power Co.,* 151 FERC ¶ 61,110.

[958] *See, e.g., Fitchburg Gas and Elec. Light Co.,* 146 FERC ¶ 61,186, at P 33 (2014); *City of Burlington, Vt.,* 145 FERC ¶ 61,121, at P 33 (2013).

[959] *See* Order No. 688, 117 FERC ¶ 61,078 at PP 74–78 (establishing rebuttable presumption); Order No. 688–A, 119 FERC ¶ 61,305 at P 95 (''There is no perfect bright line that can be drawn and we have reasonably exercised our discretion in adopting a 20 MW or below demarcation for purposes of determining which QFs are unlikely to have nondiscriminatory access to markets.'').

[960] *See* Connecticut Commission Comments at 20–21; Kentucky Commission Comments at 8.

[961] Order No. 688–A, 119 FERC ¶ 61,305 at P 97 (''Although there is no unique and distinct megawatt size that uniquely determines if a generator is small, in other contexts the Commission has used 20 MW, based on similar considerations to those presented here, to determine the applicability of its rules and policies.'').

[962] *See* Order No. 688, 117 FERC ¶ 61,078 at P 76; Order No. 688–A, 119 FERC ¶ 61,305 at PP 96–97.

level of 20 MW may no longer be a reasonable place to establish the presumption on what constitutes a smaller entity under our regulations.

628. Similar to our analysis in Order No. 688, we have determined that entities below 20 MW now can participate in RTO/ISO markets.[963] Here, we are updating the rebuttable presumption based on industry changes since Order No. 688. Moreover, it is reasonable to update the rebuttable presumption as markets defined in PURPA section 210(m)(1)(A), (B), and (C) evolve because that statute itself does not establish a presumption and we are updating the rules, as PURPA provides we will do from time to time, to ensure we comply with PURPA. However, because the revised presumption established in this final rule is a rebuttable presumption, QFs can seek to overcome it.

629. Over the last 15 years, the RTO/ISO markets have matured, market participants have gained a better understanding of the mechanics of such markets, and, as a result, we find that it is reasonable to presume that access to the RTO/ISO markets has improved and that it is appropriate to update the presumption for smaller production facilities. As we did in Order No. 688, we have looked to indicia in other orders to determine where the presumption should be set.

630. We find that at this time, market rules are inclusive of power producers below 20 MW participating in markets. For example, since the issuance of Order No. 688, the Commission has required public utilities to increase the availability of a Fast-Track interconnection process for projects up to 5 MW.[964] That the Commission chose a 5 MW cut-off for eligibility for the fast-track procedures represents an implicit judgment by the Commission that facilities larger than 5 MW do not need such procedures to be able to interconnect to the grid.

631. While the existence of Fast-Track interconnection processes does not on its own demonstrate nondiscriminatory access for resources under 20 MW, it does indicate that entities smaller than 20 MW have access to the market. Presuming that QFs above 5 MW have such access is therefore a reasonable approach to identifying a capacity level at which to update the rebuttable presumption of nondiscriminatory market access.

632. Additionally, since the issuance of Order No. 688 the Commission has required each RTO/ISO to update its tariff to include a participation model for electric storage resources that established a minimum size requirement for participation in the RTO/ISO markets that does not exceed 100 kW.[965] These proposals require RTO/ISOs to revise their tariffs to provide easier access for smaller resources. Requiring markets to accommodate storage resources to as low as 100 kW also supports that resources smaller than 20 MW have nondiscriminatory access to those RTO/ISO markets. The Commission believes that these developments support updating the 20 MW presumption to a lower number.

633. Commenters argue that individually each of these changes in circumstances, standing alone, may not support the reduction of the threshold below 20 MW. But when the changes are viewed together, we find that their cumulative effect demonstrates that it is reasonable for the Commission to maintain a small entity rule but update its determination of what is a small entity under this presumption under the PURPA regulations. Additionally, the prospect of increased participation of distributed energy resources in energy markets further supports the proposition that wholesale markets are accommodating resources with smaller capacities.[966]

634. The Commission recognizes that certain of these precedents would support reducing the presumption below 5 MW, and perhaps even lower than 1 MW. However, the Commission has carefully considered the comments detailing the problems that QFs have had in participating in RTO/ISO markets, problems that necessarily are more acute for smaller QFs at or near the 1 MW threshold proposed in the NOPR.[967] The Commission therefore has determined that a 5 MW is a more reasonable threshold of non-discriminatory access to RTO/ISO markets.

635. Based on the foregoing, we find it reasonable to update the presumption under these regulations as to what constitutes a small entity that has non-discriminatory access to RTO/ISO markets and markets of comparable competitive quality below 20 MW, and that 5 MW represents a reasonable new threshold that accounts for the change of circumstances indicating that 20 MW no longer is appropriate but also accommodates commenters' concerns that a 1 MW threshold would be too low. We acknowledge that ''there is no unique and distinct megawatt size that uniquely determines if a generator is small.'' [968] We find that a 5 MW threshold accords with PURPA's mandate to encourage small power production facilities, recognizes the progress made in wholesale markets as discussed above, and balances the competing claims of those seeking a lower threshold and those seeking a higher threshold.

636. Individual small power production QFs that are over 5 MW and less than 20 MW can seek to make the case, however, that they do not truly have nondiscriminatory access to a market and should still be entitled to a mandatory purchase obligation.

637. Regarding Advanced Energy Economy's argument that the Commission failed to sufficiently justify its change in policy, we disagree.[969] In *FCC* v. *Fox Television,* the court stated that, when an agency makes a change in policy, the agency must show that there are good reasons for the change, ''[b]ut it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.'' [970]

638. To be clear, we are maintaining our determination from Order No. 688 that small entities potentially may not have non-discriminatory access for purposes of PURPA section 210(m). However, as explained above, the Commission has determined that using 20 MW as an indicator of what constitutes a small entity is no longer valid. Entities below 20 MW increasingly have access to the markets, become familiar with practices and procedures, and that markets have since

[963] In fact, when the Commission established the rebuttable presumption of 20 MW, commenters in that proceeding cited instances where QFs at 1 MW or above had already had nondiscriminatory access to RTOs/ISOs. *See* Order No. 688, 117 FERC ¶ 61,078 at PP 64–66.

[964] Order No. 792, 145 FERC ¶ 61,159, at P 103, *clarified,* Order No. 792–A, 146 FERC ¶ 61,214.

[965] Order No. 841, 162 FERC ¶ 61,127 at P 265.

[966] *See, e.g., Elec. Participation in Mkts Operated by Reg'l Transmission Orgs and Independent Sys. Operators,* 157 FERC ¶ 61,121, P 129 (2016) (''The costs of distributed energy resources have decreased significantly, which when paired with alternative revenue streams and innovative financing solutions, is increasing these resources' potential to compete in and deliver value to the organized wholesale electric markets.'' (footnote omitted)).]

[967] *See, e.g.,* Allco Comments at 17–19; Advanced Energy Economy Comments at 10–11; DC Commission Comments at 5; Public Interest Organizations Comments at 89–90; SEIA Comments at 45–49.

[968] Order No. 688–A, 119 FERC ¶ 61,305 at P 97.

[969] Advanced Energy Economy Comments at 6 (citing *FCC* v. *Fox Television,* 556 U.S. at 515).

[970] *FCC* v. *Fox Television,* 556 U.S. at 515.

implemented several changes to provide easier access to smaller facilities, including small power production QFs, storage facilities, and distributed energy resources. These changes demonstrate a change in facts since the time we issued Order No. 688 which supports our updating of what constitutes a small entity for purposes of PURPA section 210(m).

639. Accordingly, we decline to adopt Ohio Consumers Counsel's suggestion that electric utilities continue to have the burden to demonstrate that certain small power production QFs under 20 MW have nondiscriminatory access to markets like PJM before being relieved of the mandatory purchase obligation for such QFs.

640. While we find that it is reasonable to update the rebuttable presumption from 20 MW to 5 MW, we recognize commenters' concerns regarding specific barriers to participation in RTO markets that may affect the nondiscriminatory access to those markets of some individual small power production facilities between 5 MW and 20 MW.

To address these concerns, we additionally are revising 18 CFR 292.309(c)(2)(i)–(vi) to include factors that small power production facilities between 5 MW and 20 MW can point to in seeking to rebut the presumption that they have nondiscriminatory access. These factors are in addition to the existing ability, pursuant to 18 CFR 292.309(c), to rebut the presumption of access to the market by demonstrating, *inter alia,* operational characteristics or transmission constraints.

641. Specifically, the Commission adds to 18 CFR 292.309(c) the following five factors: (1) Specific barriers to connecting to the interstate transmission grid, such as excessively high costs and pancaked delivery rates; (2) the unique circumstances impacting the time/length of interconnection studies/queue to process small power QF interconnection requests; (3) a lack of affiliation with entities that participate in RTO/ISO markets; (4) a predominant purpose other than selling electricity which would warrant the small power QF being treated similarly to cogenerators (*e.g.,* municipal solid waste facilities, biogas facilities, run-of-river hydro facilities, and non-powered dams); (5) the QF has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; and (6) the QF lacks access to markets due to transmission constraints, including that it is located in an area where persistent transmission constraints in effect cause the QF not to have access to markets outside a persistently congested area to sell the QF output or capacity. This is not intended to be an exhaustive list of the factors that a QF could rely upon in seeking to rebut the presumption. These factors, among other indicia of lack of nondiscriminatory access, will be assessed by the Commission on a case-by-case basis in considering a claim that the presumption of nondiscriminatory access to the defined markets should be considered rebutted for a specific QF.

642. The addition of these factors addresses commenters' concern that not all small power production facilities between 5 and 20 MW may have nondiscriminatory access to competitive markets, and facilitates the ability of small power production facilities facing barriers to participation in RTO markets to demonstrate their lack of access. For example, while a small power production facility between 5 MW and 20 MW does not need to be physically interconnected to transmission facilities to be considered as having access to the statutorily-defined wholesale electricity markets, we recognize there are some small power production facilities between 5 MW and 20 MW that may face additional barriers, such as excessively high costs and pancaked delivery rates, to access wholesale markets.

643. For example, several commenters express concern over the resources or administrative burden for some small power QFs that lack the necessary experience or expertise to participate in energy markets. Recognizing these concerns, we have added consideration of both the fact that some small power production facilities will face additional difficulties due to costs, administrative burdens, length of the interconnection study process and the size of the queues, and the fact that some small power production QFs do not have access to the expertise of affiliated entities.

644. We agree with commenters that some small power production facilities are similar to cogeneration facilities because their predominant purpose is not power production. Like cogeneration facilities, the sale of electricity from these small power production facilities is a byproduct of another purpose and these facilities might not be as familiar with energy markets and the technical requirements for such sales. Therefore, we will allow the small subset of small power production facilities that are between 20 MW and 5 MW to rebut the presumption of access to markets where the predominant purpose of the facility is other than selling electricity, and the sale of electricity is simply a byproduct of that purpose. Finally, like all QFs over 20 MW, we recognize that there may be particular small power production facilities with certain operational characteristics or that are located in an area where persistent transmission constraints in effect cause the QF not to have access to markets outside a persistently congested area to sell the QF output or capacity.

645. While we appreciate Indiana Municipals' concern over preserving Commission resources, we will deny its request to automatically apply the lower threshold to utilities that have already been granted termination for QFs over the 20 MW threshold. We find that it is appropriate to require utilities that were previously granted termination of the mandatory purchase obligation for new contracts and obligations for QFs above 20 MW, but are now seeking to terminate the mandatory purchase obligation for new contracts and obligations for small power production facilities between 5 and 20 MW to follow the procedures in 18 CFR 292.310, including procedures for providing notice to those potentially affected QFs within their footprint. That is, those utilities for which the Commission has already granted relief from the mandatory purchase obligation for small power production facilities over 20 MW must reapply with the Commission requesting relief from the mandatory purchase obligation for small power production facilities between 5 MW and 20 MW.

646. Among other factors, the regulation's notice provision mentioned above will allow small power production facilities between 5 MW and 20 MW an opportunity, if applicable, to present evidence that their facility does not have nondiscriminatory access to defined markets based on the factors discussed above.[971] In the proceeding in which the utility seeks to terminate the mandatory purchase obligation between 5 MW and 20 MW, we will not entertain arguments that the utility should lose its previously granted termination of purchase obligation at 20 MW and above; our regulations provide how a mandatory purchase obligation can be reinstated. We do not, in this final rule, change a QF's right to seek reinstatement of the mandatory purchase obligation where the conditions set forth in 18 CFR 292.309(a), (b), or (c) are no longer met.[972]

647. Regarding the Michigan Commission's questions, this final rule

[971] 18 CFR 292.310.

[972] *See* 18 CFR 292.311.

preserves the rights or remedies of any party under existing contracts or obligations, in effect or pending approval before the appropriate state regulatory authority or non-regulated electric utility on or before December 31, 2020 with QFs between 5 MW and 20 MW. Consistent with Commission precedent, this final rule defines the term ''obligations'' broadly to encompass any existing legally enforceable obligation.[973]

2. Reliance on RFPs and Liquid Market Hubs To Terminate Purchase Obligation Under PURPA Section 210(m)

a. NOPR Discussion

648. In the NOPR, the Commission noted that NARUC had proposed that the Commission allow utilities to rely on RFPs (in combination with liquid market hubs) to establish eligibility to terminate a utility's purchase obligation pursuant to PURPA section 210(m)(1)(C).[974] After describing generally how such a proposal might be structured, NARUC suggested that ''[t]he Commission should create a yardstick of characteristics that describe in detail how a utility could qualify for an exemption under subparagraph (C).'' [975]

649. The Commission stated that, under the PURPA Regulations, electric utilities already may seek to terminate their mandatory purchase obligation pursuant to PURPA section 210(m)(1)(C) by demonstrating that a particular market is of comparable competitive quality to markets described in PURPA section 210(m)(1)(A) and (B).[976] The Commission further noted that the current PURPA Regulations are not prescriptive about how an electric utility must make such a demonstration and nothing in the PURPA Regulations or precedent would bar an electric utility from arguing that RFPs in combination with liquid market hubs are sufficient to satisfy PURPA section 210(m)(1)(C).

650. The Commission then stated that it believed that a properly structured proposal along the lines proposed by NARUC potentially could satisfy the statutory requirements under PURPA section 210(m)(1)(C) and that it would consider such proposals on a case-by-case basis. Although the Commission did not propose additional criteria a utility or utilities may rely on to satisfy PURPA section 210(m)(1)(C), the Commission sought comments on any specific factors that would be useful to consider in determining how a utility or utilities may satisfy PURPA section 210(m)(1)(C).[977]

b. Comments

i. Comments in Opposition

651. A few commenters do not support allowing competition to be an alternative to the mandatory purchase obligation.[978] ELCON is concerned that no state competitive procurement is robust enough to replace avoided capacity costs.[979] Solar Energy Industries supports using RFPs to set avoided cost rates, but does not support using RFPs to vitiate utilities' mandatory purchase obligations.[980]

652. Public Interest Organizations contend that RFPs are not comparable in quality to PURPA section 210(m)(1)(A) or (B) markets because there is only a single buyer and there are no safeguards against the anti-competitive behavior of that buyer, such as favoring its own or an affiliate's generation.[981] NIPPC, CREA, REC, and OSEIA state that, while they agree in principle that competition should be the motivating force in energy markets, their experience shows that utility-sponsored RFP programs often fall far short of genuine competition.[982]

653. Public Interest Organizations state that Order No. 688–A specifies that demonstrating that a market offers ''a meaningful opportunity to sell'' usually requires evidence of QF transactions, which is not possible with a market hub.[983] Public Interest Organizations argue that market hubs are not equivalent to PURPA section 210(m)(1)(A) or (B) markets because, unlike an independently administered auction, there is no guarantee that a QF will be able to sell their energy even if it is the lowest cost resource.[984]

654. Public Interest Organizations further contend that the Commission does not have the authority to approve RFPs or liquid market hubs as PURPA section 210(m)(1)(C) wholesale markets because they are not of comparable qualify to Day 1 or Day 2 markets, *i.e.,* to PURPA section 210(a)(1)(A) or (B) markets.[985]

ii. Comments in Support

655. Several commenters support allowing competition to be an alternative to the mandatory purchase obligation.[986] ELCON supports competitive procurements that exempt industrial self-supply.[987]

656. APPA supports the Commission reviewing factors that would determine if a market is competitive and comparable to PURPA sections 210(m)(1)(A) and (B).[988] Xcel proposes that the PURPA section 210(m)(1)(C) test should evaluate whether market players have a reasonable opportunity to participate in the market, rather than whether the type of market is similar to PURPA section 210(m)(1)(A) and (B) markets.[989] A few commenters requested a technical conference to identify the criteria for determining what processes are competitive.[990] Colorado Independent Energy would like the RFP standard for PURPA section 210(m)(1)(C) status to be higher than for QF pricing and include evaluation of bid data and the modeling process to show the absence of bias against renewable and cogeneration

[973] *See Cedar Creek Wind LLC,* 137 FERC ¶ 61,006, at PP 35–36 n.62 (2011) (stating that courts have recognized negotiations regarding terms that parties to the negotiations intend to become finalized or written contract, may in some circumstances result in legally enforceable obligations on those parties notwithstanding the absence of a writing). *See generally Burbach Broadcasting Co. of Delaware* v. *Elkins Radio Corp.,* 278 F.3d 401, 407–09 (4th Cir. 2002); *Adjustrite Systems, Inc.* v. *GAB Business Serv., Inc.,* 145 F.3d 543, 550 (2d Cir. 1998); *Miller Constr. Co.* v. *Stresstek,* 697 P.2d 1201, 1202–04 (Idaho 1985).); *see also JD Wind 1, LLC,* 129 FERC ¶ 61,148 at P 25; *Grouse Creek Wind Park, LLC,* 142 FERC ¶ 61,187 at PP 40–41.

[974] NOPR, 168 FERC ¶ 61,184 at P 131 (citing NARUC Supplemental Comments, Docket No. AD16–16–000 (filed Oct. 17, 2018)).

[975] *Id.,* attach. A at 9.

[976] *Id.* P 132 (citing Order No. 688–A, 119 FERC ¶ 61,305 at P 43 (''Congress believed the two types of markets identified in subparagraphs (A) and (B), while distinct between themselves, contain certain competitive qualities that justify termination of the purchase requirement for any QF with nondiscriminatory access to those markets. Subparagraph (C) directs the Commission to consider these competitive qualities when analyzing whether there are other markets that, while not meeting the specific requirements of subparagraphs (A) and (B), are sufficiently competitive to justify termination of the purchase requirement.'')); *cf. Pub. Serv. Co. of N.M.,* 140 FERC ¶ 61,191, at PP 29–38 (2012) (denying application to terminate mandatory purchase obligation on the grounds that the Four Corners Hub is not of comparable competitive quality to markets in sections 210(m)(1)(A) and (B) of PURPA)).

[977] *Id.* P 133.

[978] Allco Comments at 17–19; Public Interest Organizations Comments at 90.

[979] ELCON Comments at 19.

[980] Solar Energy Industries Comments at 24 (citing Solar Energy Industries, Supplemental Comments, Docket No. AD16–16–000, at 10–37, 40–58 (filed Aug. 28, 2019)).

[981] Public Interest Organizations Comments at 93.

[982] NIPPC, CREA, REC, and OSEIA Comments at 66.

[983] Public Interest Organizations Comments at 92 (citing Order No. 688–A, 119 FERC ¶ 61,305 at P 38).

[984] *Id.*

[985] *Id.* at 90–91.

[986] Advanced Energy Economy Comments at 12; APPA Comments at 29; Colorado Independent Energy Comments at 7; Xcel Comments at 11.

[987] ELCON Comments at 19.

[988] APPA Comments at 26–29.

[989] Xcel Comments at 11.

[990] Advanced Energy Economy Comments at 13; ELCON Comments at 19.

projects and likewise the absence of bias for utility self-build projects.[991]

657. Arizona Public Service agrees with NARUC that the Commission should allow utilities to rely on RFPs to establish eligibility to terminate the utility's purchase obligation pursuant to PURPA section 210(m)(1)(C). Arizona Public Service believes this proposal is one way a utility could demonstrate that a market is of comparable competitive quality to the markets described in PURPA sections 210(m)(1)(A) and (B).[992]

658. APPA argues that market hubs should be considered as possibly comparable, particularly to PURPA section 210(m)(1)(B), which requires that QFs have access to Commission-approved transmission service and competitive wholesale markets for long and short-term capacity and energy sales.[993] APPA highlights the Commission finding that the Mid-Columbia and Palo Verde hubs have sufficient liquidity to find just and reasonable rates and adds that an empirical test of market liquidity could be created.[994]

c. Commission Determination

659. In this final rule, we affirm that we will consider utility proposals to terminate the purchase obligation pursuant to PURPA section 210(m)(1)(C) on a case-by-case basis, including utility proposals based on competitive solicitations or liquid market hubs.

660. In response to Public Interest Organizations, as explained above in Section IV.A.1, PURPA section 210(m) obligates the Commission to grant any request to terminate a utility's obligation to purchase from a QF with nondiscriminatory access to the specified markets that satisfy that provision. Whether any particular market is of comparable quality to a Day 1 or Day 2 market necessarily must be determined in the context of an individual case.

661. We refrain from outlining here an exhaustive list of factors that will be used in any such case-by-case evaluation, but at a minimum we will be guided by the important criteria discussed previously in this rule in section IV.B.8 on the use of competitive solicitations to determine avoided costs.

662. Consistent with our findings and discussion in section IV.B.4 on the use of market hubs to determine avoided cost, the Commission finds that competitive market prices in general should reflect the avoided cost energy rates of utilities with access to such markets in a given region. We will therefore consider, on a case-by-case basis, whether a properly run RFP or competitive acquisition process may also justify termination of the PURPA purchase obligation pursuant to PURPA section 210(m)(1)(C).

H. Legally Enforceable Obligation

1. NOPR Proposal

663. The Commission proposed to add regulatory text in 18 CFR 292.304(d)(3) to require QFs to demonstrate that a proposed project is commercially viable and that the QF has a financial commitment to construct the proposed project pursuant to objective, reasonable, state-determined criteria in order to be eligible for a LEO. The Commission further proposed to provide that states have flexibility as to what constitutes an acceptable showing of commercial viability and financial commitment.

664. The Commission stated that its objective in requiring a showing of commercial viability and the QF's financial commitment to construct the project was to ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development and, therefore, for which it would be unreasonable for a utility to include in its resource planning, while at the same time ensuring that the purchasing utility does not unilaterally and unreasonably decide when its obligation arises. The NOPR proposed that states may require a showing, for example, that a QF has satisfied, or is in the process of undertaking, at least some of the following prerequisites: (1) Obtaining site control adequate to commence construction of the project at the proposed location; (2) filing an interconnection application with the appropriate entity; (3) securing local permitting and zoning; or (4) other similar, objective, reasonable criteria that allow a QF to demonstrate its commercial viability and financial commitment to construct the facilities. The NOPR stated that these proposed indicia were not intended to be exhaustive and the Commission sought comment on these indicia and others that also might be appropriate for consideration.

665. The Commission stated that it believed requiring QFs to demonstrate their commercial viability and financial commitment to construct the facilities based on such indicia before obtaining a LEO would allow electric utilities to reliably plan their systems while ensuring resource adequacy. Additionally, the development and definition of objective and reasonable factors to determine commercial viability and financial commitment to construct a facility would encourage the development of QFs by providing QFs with more certainty as to when they will obtain a LEO.[995]

2. Comments

a. Comments in Opposition

666. Several commenters oppose the Commission's proposal to require QFs to demonstrate that a proposed project is commercially viable and the QF has a financial commitment to construct the proposed project pursuant to objective, reasonable, state-determined criteria in order to be eligible for a LEO and that states have flexibility as to what constitutes an acceptable showing of commercial viability and financial commitment, arguing it undermines PURPA's intent to promote QF development.[996]

667. NIPPC, CREA, REC, and OSEIA argue that developers cannot obtain financing without the financial commitment of a PPA or LEO from the utility and therefore requiring financial viability as a condition precedent to obtain a LEO is problematic.[997] Western Resource Councils argues that the NOPR proposal represents an onerous financial and bureaucratic barrier that will lead to a substantial reduction in the number of QFs.[998]

668. Southeast Public Interest Organizations argue that the proposal does not sufficiently narrow the range of divergent LEO tests that have already been adopted by the states and opposes allowing states additional flexibility in establishing criteria up to a fully executed agreement.[999] sPower requests that the Commission establish specific criteria and prohibit states from imposing any additional criteria.[1000] Solar Energy Industries requests that the Commission develop a concrete baseline

[991] Colorado Independent Energy Comments at 6, 11–12.

[992] Arizona Public Service Comments at 8–10.

[993] APPA Comments at 27.

[994] *Id.* at 28.

[995] Because QFs already in operation have necessarily demonstrated a commitment to construct the project, the Commission stated that it does not intend commercial viability and financial commitment requirements to serve as prerequisites to QFs already in operation with existing LEOs to obtaining new LEOs.

[996] NIPPC, CREA, REC, and OSEIA Comments at 81; Public Interest Organizations Comments at 98; Western Resource Councils Comments at 144.

[997] NIPPC, CREA, REC, and OSEIA Comments at 81.

[998] Western Resource Councils Comments at 144.

[999] Southeast Public Interest Organizations Comments at 43

[1000] sPower Comments at 14.

in determining when a QF is entitled to a purchase contract.

669. Solar Energy Industries and Public Interest Organizations argue that requiring developers to invest additional capital prior to obtaining a LEO will prevent smaller companies who are unable to invest heavily in early state development activity from participating.[1001] Solar Energy Industries argue that it is unjust and unreasonable to require QFs to invest millions of dollars in site control, permit acquisition and interconnection costs in order to secure the opportunity to negotiate with the purchasing utility. For those states that do not willingly disclose their avoided cost rates or methodology, the NOPR's LEO proposal requires QFs to incur substantial expense to establish their commercial viability without a reasonable understanding of what their rate may be.[1002]

670. In striking a balance between interconnection and development risk, Solar Energy Industries proposes that the first prerequisite to a LEO formation be either: (a) The completion of the System Impact Study (or the equivalent in the state interconnection process); or (b) where the utility cannot complete the System Impact Study within a reasonable period of time, one year after tendering an interconnection request to the host utility.[1003] Where a QF has obtained site control, initiated state permitting processes, submitted an interconnection request and associated study deposit, and has been certified through the submission of a Form No. 556, the Commission should find that the QF is eligible to establish a LEO to sell to the purchasing utility, provided that: (1) The QF has received a System Impact Study report (or equivalent) or one year has elapsed since the QF's interconnection request was tendered to the host utility; and (2) the QF commits to achieving commercial operation within 180 days of the completion of all interconnection facilities and network upgrades by the utility.[1004] Solar Energy Industries asserts that QFs would, upon satisfaction of these criteria, be legally entitled to negotiate with the purchasing utility to develop a PPA setting forth the terms and conditions of the purchase, including liability if the QF fails to perform. Projects that reach agreement will proceed according to the terms of the PPA and the purchasing utility can establish milestones with enough financial protection to ensure that ratepayers will not be harmed if the QF fails to begin operations.[1005]

671. American Dams argues that Interconnection Agreements are generally processed far too slowly, a problem that should be addressed by the Commission.[1006]

672. Southeast Public Interest Organizations support the requirement of demonstrating site control, but state that requiring permits can be time-consuming and costly such that pre-financing QFs may not have the resources for the lengthy permitting process, and it is unreasonable to expect a QF to incur these expenses until it has secured a price for its output so that it can in turn secure financing for the project.[1007]

b. Comments in Support

673. Numerous commenters support the NOPR's LEO proposal, asserting that state agencies are better positioned to develop criteria that reflect their unique operational circumstances, resource planning needs and risk appetite.[1008] Several commenters note that the proposed factors provide a reasonable balance between the planning needs of the connecting utility and certainty to QF developers.[1009] Several commenters assert that requiring QFs to demonstrate commercial viability and financial commitment will reduce the reliability or other risks a utility faces by having to plan for its system needs or resource adequacy around a QF that is never developed.[1010]

674. Several commenters agree that the proposed regulations will provide certainty to host utilities and state commissions while decreasing systems impact and associated costs.[1011]

675. Connecticut Authority supports the proposal arguing that the factors included in the NOPR will provide greater certainty and less risk to QF developers and purchasing utilities which is consistent with PURPA's goal of developing renewable resources.[1012] The Chamber of Commerce argues that the proposed factors indicate a developer's good-faith intention to ultimately develop its proposed QF.[1013] The Michigan Commission states that it supports the proposal, currently has a rulemaking and several cases pending regarding LEOs, and appreciates any additional clarity the Commission could provide.[1014]

c. Comments Requesting Modification

676. NIPPC, CREA, REC, and OSEIA request that the Commission: (1) Further define the terms ''commercial viability'' and ''financial commitment'' to avoid litigation; (2) clarify that any changes to the LEO rules will not affect the viability of any executed contract between a developer and utility, regardless of the facility's development status; and (3) clarify that the LEO rules will not preclude nor bar any utility from executing a PPA before the QF may be able to demonstrate compliance with the implementation of LEO rules.[1015]

i. Studies

677. NorthWestern requests that the Commission require more than just the submission of an interconnection application prior to obtaining a LEO in order to demonstrate that the proposal is more than a speculative paper project.[1016] Portland General requests that the Commission allow states to require developers to have completed the first interconnection study.[1017] The South Dakota Commission states that developers should be required to have completed a transmission feasibility study or system impact study with a determination of the interconnection costs the QF would be required to pay prior to obtaining a LEO.[1018] Portland General requests that off-system QFs be required to have completed the first study milestone of the transmission service request.[1019]

678. SC Solar Alliance requests that the Commission adopt a recent South Carolina Commission ruling that a QF should be able to establish a LEO after

[1001] Solar Energy Industries Comments at 41; Public Interest Organization Comments at 80–82.

[1002] Solar Energy Industries Comments at 41.

[1003] *Id.* at 43.

[1004] *Id.*

[1005] *Id.*

[1006] American Dams Comments at 5–6.

[1007] Southeast Public Interest Organization Comments at 43–44.

[1008] Alaska Power Comments at 1–2; APPA Comments at 30; Chamber of Commerce at 8; Colorado Independent Energy Comments at 13; Connecticut Authority Comments at 24–25; Consumer Alliance Comments at 2; Consumers Energy Comments at 5; East Kentucky Comments at 3–4; East River at 2; El Paso Electric Comments at 6–7; Golden Valley Comments at 7–8; Indiana Municipal Comments at 11–12; Institute for Energy Research Comments at 2; Massachusetts DPU Comments at 10; NARUC Comments at 7–8; NIPPC, CREA, REC, and OSEIA Comments at 81; NRECA Comments at 21; North Carolina Commission Staff Comments at 6; Northern Laramie Range Alliance Comments at 3–4; Ohio Commission Energy Advocate Comments at 10; Oregon Commission at 6.

[1009] Alliant Energy Comments at 21; Industrial Energy Consumers Comments at 14–16.

[1010] Duke Energy Comments at 19; EEI Comments at 37.

[1011] Alliant Energy Comments at 21–22; NRECA at 21; Northern Laramie Range Alliance Comments at 3–4.

[1012] Connecticut Authority Comments at 24–25.

[1013] Chamber of Commerce Comments at 8.

[1014] Michigan Commission Comments at 7–8.

[1015] NIPPC, CREA, REC, and OSEIA Comments at 81–83.

[1016] NorthWestern Comments at 15–16.

[1017] Portland General Comments at 20.

[1018] South Dakota Commission Comments at 2.

[1019] Portland General Comments at 20.

receiving a System Impact Study or within one year if a System Impact Study is not provided in a timely manner and that PPA in-service dates must be extended based on interconnection delays.[1020]

ii. Commercial Viability

679. Alliant Energy requests that the Commission consider requiring QF developers to have contracts in place with equipment suppliers and an analysis of interconnections needed.[1021]

680. North Carolina Commission Staff requests that the Commission adopt a North Carolina Commission standard that QFs must (1) commit to sell their power via a written notice of commitment by the earlier of 105 days after submission of an interconnection request or upon receipt of the system impact study, (2) have filed a report of proposed construction, and (3) submitted an interconnection request under the state's interconnection protocol which requires the QF to demonstrate site control.[1022] sPower argues that option contracts should be sufficient to demonstrate site control.[1023]

iii. Financial Viability

681. Portland General and sPower suggest requiring developers to pay a deposit to state commissions to demonstrate financial viability with the amount based on the capacity of the QF and released upon project completion.[1024] Portland General asserts that having to post a deposit encourages developers to perform sufficient due diligence prior to claiming a LEO.[1025]

682. North Carolina Commission Staff argues that, in order to protect ratepayers from QFs gaming the process, any project that backs out of its notice of commitment should only receive as-available rates for two years.[1026]

iv. Rejecting QF Purchases and Expanded Curtailment Rights

683. North Carolina Commission Staff suggests that the Commission update its regulations to allow curtailing QFs when it would be uneconomic for the utility to make such purchases.[1027] The Institute for Energy Research argues that the Commission should allow a utility to reject purchases from QFs if the utility has no need for additional capacity. The Institute for Energy Research states that such need could be determined separately, on an annual basis, a stand-alone basis, or as part of an IRP process.[1028]

3. Commission Determination

684. In this final rule, we adopt the NOPR proposal to require QFs to demonstrate that a proposed project is commercially viable and that the QF has a financial commitment to construct the proposed project, pursuant to objective, reasonable, state-determined criteria in order to be eligible for a LEO.[1029] We also affirm that the states have flexibility as to what constitutes an acceptable showing of commercial viability and financial commitment, albeit subject to the criteria being objective and reasonable. We find that requiring a showing of commercial viability and financial commitment, based on objective and reasonable criteria, will ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development, and therefore, for which it would be unreasonable for a utility to include in its resource planning. At the same time, the criteria ensure that the purchasing utility does not unilaterally and unreasonably decide when its obligation arises. We believe this strikes the right balance for QF developers and purchasing utilities and should encourage development of QFs.

685. Examples of factors a state could reasonably require are that a QF demonstrate that it is in the process of at least some of the following prerequisites: (1) Taking meaningful steps to obtain site control adequate to commence construction of the project at the proposed location and (2) filing an interconnection application with the appropriate entity. The state could also require that the QF show that it has submitted all applications, including filing fees, to obtain all necessary local permitting and zoning approvals. We note that the factors that the state requires must be factors that are within the control of the QF. Thus, we clarify that it is appropriate for states to require a QF to demonstrate that it is in the process of obtaining site control or has applied for all local permitting and zoning approvals, rather than requiring a QF to show that it has obtained site control or secured local permitting and zoning.

686. We agree with Southeast Public Interest Organizations' concerns regarding requiring QFs to obtain permits in order to determine commercial viability. In some regions the permitting and zoning process can be lengthy and expensive, making obtaining the permits and zoning changes a condition to a LEO unreasonable. Therefore, instead of requiring a QF to have secured local permitting and zoning, states can require QFs to have applied for all of the necessary permits and zoning variances, including the payment of all necessary fees, as a factor in demonstrating the QF's commercial viability. States may require a showing that such applications have been submitted to the relevant regulatory bodies (including payment of the application fees).

687. Several commenters argue that requiring QFs to demonstrate financial viability prior to obtaining a LEO is problematic because QFs need a LEO to obtain financing.[1030] However, demonstrating the required financial commitment does not require a demonstration of having obtained financing. Requiring QFs to, for example, apply for all relevant permits, take meaningful steps to seek site control, or meet other objective and reasonable milestones in the QF's development can sufficiently demonstrate QF developers' financial commitment in the QF development and allows utilities to reasonably rely on the LEO in planning for system resource adequacy. Obtaining a PPA or financing cannot be required to show proof of financial commitment.

688. The intent of these factors is to provide a reasonable balance between providing QFs with objective and transparent milestones up front that are needed to obtain a LEO, allowing states the flexibility to establish factors that address the individual circumstances of each state, and increasing utilities' ability to accurately plan their systems.[1031] Establishing objective and reasonable factors is intended to limit the number of unviable QFs obtaining LEOs and unnecessarily burdening utilities that currently have to plan for QFs that obtain a LEO very early in the process but ultimately are never developed.[1032] In adopting this provision, the Commission is raising the bar to prevent speculative QFs from obtaining LEOs, and the associated burden on purchasing utilities, but is

[1020] SC Solar Alliance Comments at 15.

[1021] Alliant Energy Comments at 22.

[1022] North Carolina Commission Staff Comments at 6.

[1023] sPower Comments at 15.

[1024] Portland General Comments at 15–16; sPower Comments at 14–15.

[1025] Portland General Comments at 20–21.

[1026] North Carolina Commission Staff Comments at 6.

[1027] *Id.* at 8.

[1028] Institute for Energy Research Comments at 2–3.

[1029] NOPR, 168 FERC ¶ 61,184 at P 140.

[1030] NIPPC, CREA, REC, and OSEIA Comments at 81; Western Resource Council Comments at 144.

[1031] Alliant Energy Comments at 21; Industrial Energy Consumers Comments at 14–16.

[1032] Duke Energy Comments at 19; EEI Comments at 37.

not establishing a barrier for financially committed developers seeking to develop commercially viable QFs.

689. We disagree that establishing reasonable, transparent factors is an onerous barrier or will cause a substantial reduction of QFs. The objective and reasonable criteria we have established will protect QFs against onerous requirements for a LEO that hinder financing, such as a requirement for a utility's execution of an interconnection agreement [1033] or power purchase agreement,[1034] or requiring that QFs file a formal complaint with the state commission,[1035] or limiting LEOs to only those QFs capable of supplying firm power,[1036] or requiring the QF to be able to deliver power in 90 days.[1037] We find that, by making clear that such conditions are not permitted, and by providing objective criteria to clarify when a LEO commences, the LEO provisions we have adopted will encourage the development of QFs.

690. For those commenters that requested that the Commission establish specific factors for the states to apply, or to establish a baseline for eligible factors, or to otherwise limit states' flexibility, we decline to do so. Since its inception, the Commission's PURPA Regulations have established rules and defined boundaries allowing states flexibility within those boundaries in implementing PURPA as appropriate for each state. As commenters noted, this allows states to address their unique circumstances and best address each states' needs. Furthermore, existing precedent establishes a baseline [1038] and this final rule's requirement that states adopt objective and reasonable criteria for determining when a QF has obtained a LEO provides additional safeguards (in addition to that baseline) applicable to both QFs and utilities. Similarly, regarding Solar Energy Industries' proposed pre-requisites and factors, for the reasons stated above, we find that states are in the best position to determine what specific factors would best suit the specific circumstances of that state, so long as they are objective and reasonable, and we provide the suggested prerequisites above as examples of objective and reasonable factors.[1039] While Solar Energy Industries' proposed criteria may be reasonable, we decline to mandate specific terms for the entire country.

691. Contrary to Solar Energy Industries' assertions, nothing in this final rule limits a QF developer's or utility's ability to negotiate rates, terms or conditions.[1040]

692. With regard to the argument that the NOPR's LEO proposal is unreasonable in states that do not disclose their avoided cost rate because it would require QFs to incur substantial expense to establish commercial viability without a reasonable understanding of the purchase rate, we find that such state-specific implementation issues can be addressed case-by-case. To the extent that entities believe that a particular state's avoided cost rates or rate setting methodologies do not provide sufficient transparency to support a QF's ability to make reasonable commercial viability investment decisions, such entities could file a petition for enforcement against the state at the Commission and, if the Commission declines to act, later file a petition against the state in U.S. district court (pursuant to PURPA section 210(h)(2)(B)).

693. NIPPC, CREA, REC, and OSEIA request that we further define the terms commercial viability and financial commitment. We decline. As discussed above, we believe the best course is to allow states the flexibility (employing objective and reasonable factors) to determine what constitutes commercial viability and financial commitment relative to the unique conditions or circumstances in each state but also recognizing that existing Commission precedent establishes boundaries of what would be considered reasonable and not discriminatory limits for requirements in establishing a LEO.[1041]

694. Additionally, we clarify that any changes to the LEO rules adopted herein do not affect the viability of any executed contract or LEO between a QF developer and utility in place as of the effective date of this final rule, regardless of the facility's development status. Further we clarify that nothing in the LEO rules adopted herein precludes any utility from choosing to execute a PPA before a QF has demonstrated compliance with the LEO rules adopted here.

Several commenters requested that the Commission require QFs to do more than just file an interconnection application; instead, for example, suggesting requiring completion of system impact study, interconnection or transmission feasibility study.[1042] We disagree. The approach taken here recognizes the need for a QF to demonstrate that its project is more than mere speculation, such that it is reasonable for a utility to consider the resource in its planning projections. A QF that has submitted an application for interconnection, as well as having taken meaningful steps to obtain site control and has applied for all relevant permits, while not a guarantee that the project will be completed, are all objective and reasonable indicators that the QF developer is seriously pursuing the project and has spent time and resources in developing the project to show a financial commitment. As numerous commenters have explained, QFs need a LEO in order to obtain financing to complete the project, and we find that, as an illustrative example, requiring the submission of an interconnection request (as opposed to the completion of a system impact study or transmission feasibility study) as one criteria strikes an appropriate balance between the competing needs.

695. Moreover, it bears remembering that the concept of a LEO was specifically adopted to prevent utilities from circumventing the mandatory purchase requirement under PURPA by refusing to enter into contracts.[1043] The Commission thus has found that requiring a QF to have a utility-executed contract or interconnection agreement, or requiring the completion of a utility-controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA.[1044] When reviewing factors to demonstrate commercial viability and financial commitment, states thus should place emphasis on those factors that show that the QF has taken meaningful steps to

[1033] *See, e.g., FLS Energy, Inc.,* 157 FERC ¶ 61,211, at P 26 (2016) (*FLS*) (stating that requiring signed interconnection agreement as prerequisite to LEO is inconsistent with PURPA Regulations).

[1034] *See, e.g., Murphy Flat Power, LLC,* 141 FERC ¶ 61,145, at P 24 (2012) (finding that requiring a signed and executed contract with an electric utility as a prerequisite to a LEO is inconsistent with PURPA Regulations).

[1035] *See, e.g., Grouse Creek Wind Park, LLC,* 142 FERC ¶ 61,187, at P 40 (2013).

[1036] *Exelon Wind 1, L.L.C.* v. *Nelson,* 766 F.3d 380, 400 (5th Cir. 2014).

[1037] *Power Resource Group, Inc.* v. *Public Utility Com'n of Texas,* 422 F.3d 231, (5th Cir. 2005).

[1038] For example, the Commission has held that requiring a fully-executed contract or executed interconnection agreement as a condition precedent to obtaining a LEO is inconsistent with PURPA. *See FLS,* 157 FERC ¶ 61,211 at P 26; *Cedar Creek Wind LLC,* 137 FERC ¶ 61,006 at P 35.

[1039] *See supra* P 685.

[1040] *See* 18 CFR 292.301(b).

[1041] *See FLS,* 157 FERC ¶ 61,211 at P 26; *Cedar Creek Wind LLC,* 137 FERC ¶ 61,006 at P 35.

[1042] NorthWestern Comments at 15–16, Portland General Comments at 20, South Dakota Commission Comments at 2.

[1043] *JD Wind 1, LLC,* 129 FERC ¶ 61,148 at P 25, *reh'g denied,* 130 FERC ¶ 61,127 (citing Order No. 69 FERC Stats. & Regs. ¶ 30,128 at 30,880; *see also Midwest Renewable Energy Projects, LLC,* 116 FERC ¶ 61,017 (2006).

[1044] *FLS,* 157 FERC ¶ 61,211 at P 23 (finding such requirements ''allows a utility to control whether and when a legally enforceable obligation exists—*e.g.* by delaying the facilities study.'').

develop the QF that are within the QF's control to complete, and not on those factors that a utility controls. For example, requiring a QF to make a deposit as Portland General and sPower proposed or whether the QF has applied for system impact, interconnection or other needed studies are the types of factors that may show that the QF has taken meaningful steps to develop the QF that are within the QF's control and the type of objective and reasonable standards that states can consider in their implementation.[1045]

696. Requests by parties to expand utilities' rights to curtail QF sales are outside the scope of this proceeding. Additionally, requests to allow a utility to reject purchases from QFs if a utility has no need for additional capacity are outside the scope of this proceeding.

V. Information Collection Statement

697. The Paperwork Reduction Act [1046] requires each federal agency to seek and obtain the Office of Management and Budget's (OMB) approval before undertaking a collection of information (including reporting, record keeping, and public disclosure requirements) directed to 10 or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contemplated by proposed rules (including deletion, revision, or implementation of new requirements).[1047] Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

Public Reporting Burden: The Commission is revising its regulations implementing PURPA. At the Notice of Proposed Rulemaking (NOPR) stage, the Commission stated the principal changes that affect information collection involved the FERC Form No. 556.[1048] In response to comments arguing that the NOPR proposals would cause additional reporting burdens, in this final rule we have analyzed whether there are additional incremental reporting burdens that result from other aspects of this final rule. As described further below, we find that there is one additional potential reporting burden arising from this final rule. It relates to reducing the PURPA section 210(m) rebuttable presumption regarding small power production QFs' nondiscriminatory access to certain markets from 20 MW to 5 MW. Specifically, this reporting burden would arise from electric utilities located in markets who choose to submit to the Commission a PURPA section 210(m) petition for termination of the PURPA mandatory purchase obligation (affecting information collection FERC–912) for small power production QFs between 20 MW and 5 MW.

698. With respect to the FERC Form No. 556, the Commission affirms that the relevant burdens derive from the change from the Commission's current ''one-mile rule'' for determining whether generation facilities should be considered to be at the same site for purposes of determining qualification as a qualifying small power production facility, to allowing an interested person or other entity challenging a QF certification the opportunity to file a protest, without a fee, to rebut the presumption that affiliated small power production QFs using the same energy resource and located more than one mile and less than 10 miles from the applicant facility are considered to be at separate sites.

Specifically, as more fully explained in section IV.F above, and as demonstrated by the revised Form No. 556 attached to this final rule (but not published in the **Federal Register** or Code of Federal Regulations),[1049] the Commission makes the following changes to the FERC Form No. 556 which affect the burden of the information collection:

- Allow an interested person or other entity challenging a QF certification the opportunity to file a protest, without a fee, to an initial certification (both self-certification and application for Commission certification) filed on or after the effective date of this final rule, or to a recertification (self-recertification or application for Commission recertification) that makes substantive changes to the existing certification that is filed on or after the effective date of this final rule.
- Require *all* applicants to report the applicant facility's geographic coordinates, rather than only for applications where there is no street address.
- Change the current requirement to identify *any* affiliated facilities with electrical generating equipment within one mile of the applicant facility's electrical generating equipment to instead require applicants to list only affiliated small power production QFs using the same energy resource one mile or less from the applicant facility.
- Additionally require applicants to list affiliated small power production QFs using the same energy resource whose nearest electrical generating equipment is greater than one mile and less than 10 miles from the electrical generating equipment of the applicant facility.
- Require the applicant to list the geographic coordinates of the nearest ''electrical generating equipment'' of both its own facility and the affiliated small power production QF in question based on the definitions adopted in this final rule.
- Provide space for the applicant to explain, if it chooses to do so, why the affiliated small power production QFs using the same energy resource, that are more than one mile and less than 10 miles from the electrical generating equipment of the applicant facility, should be considered to be at separate sites from the applicant's facility, considering the relevant physical and ownership factors identified in this final rule.

As explained in the body of this final rule, these changes in burden are appropriate because they are necessary to meet the statutory requirements contained in PURPA.

699. In this final rule, the Commission is revising its regulations implementing PURPA, which will affect the information collections for the FERC Form No. 556 and FERC–912. Below, the first table includes estimated changes to the burden and cost of the FERC Form No. 556 due to the final rule. As demonstrated by the table, we believe that QFs will spend more time to identify any affiliated small power production QFs that are less than one mile, between one and 10 miles, and more than 10 miles, apart. The Commission expects that there will be an increase due to the revisions to the Commission's regulations, and that the changes to the ''one-mile rule'' and the ability to protest without a fee will affect self-certifications and applications for Commission certification.

[1045] Portland General Comments at 15–16; sPower Comments at 14–15.

[1046] 44 U.S.C. 3501–21.

[1047] *See* 5 CFR 1320.11.

[1048] The change to the FERC–556 described by the NOPR was submitted under a temporary interim information collection no., FERC–556A (OMB Control No. 1902–0316) because another item for FERC–556 was pending OMB review at the time and only one item per OMB Control No. can be pending OMB review at a time. The final rule is being submitted to OMB under FERC–556.

[1049] The Form 556 and instructions will be available in the Commission's eLibrary.

FERC–556, CHANGES DUE TO FINAL RULE IN DOCKET NOS. RM19–15–000 AND AD16–16–000 [1050]

Facility type	Filing type	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Increased average burden hours and cost per response ($) (4)	Increased total annual burden hours and total annual cost ($) (3) * (4) = (5)	Increased annual cost per respondent ($) (5) ÷ (1 = (6)
Cogeneration and Small Power Production Facility ≤ 1 MW [1051].	Self-certification ...	no change (692) ..	no change (1.25)	no change (865) ..	no change (1.5 hrs.); $0.	no change (1,297.5 hrs.); $0.	0
Cogeneration Facility > 1 MW.	Self-certification ...	no change (63)	no change (1.25)	no change (78.75)	no change (1.5 hrs.); $0.	no change (118.125 hrs.); $0.	0
Cogeneration Facility > 1 MW.	Application for FERC certification.	no change (1)	no change (1.25)	no change (1.25)	no change (50 hrs.); $0.	no change (62.5 hrs.); $0.	0
Small Power Production Facility > 1 MW, ≤ 1 Mile from Affiliated Small Power Production QF.	Self-certification ...	no change (899) [1052].	no change (1.25)	no change (1,123.75).	2 hrs.; $166	2,247.5 hrs.; 186,542.5.	207.5
Small Power Production Facility > 1 MW, ≤ 1 Mile from Affiliated Small Power Production QF.	Application for FERC certification.	no change (0)	no change (1.25)	no change (0)	6 hrs.; $498	no change (0 hrs.); $0.	0
Small Power Production Facility > 1 MW, > 1 Mile, < 10 Miles from Affiliated Small Power Production QF.	Self-certification ...	no change (900) ..	no change (1.25)	no change (1,125)	8 hrs.; $664	9,000 hrs.; $747,000.	830
Small Power Production Facility > 1 MW, > 1 Mile, < 10 Miles from Affiliated Small Power Production QF.	Application for FERC certification.	no change (0)	no change (1.25)	no change (0)	12 hrs.; $996	no change (0 hrs.); $0.	0
Small Power Production Facility > 1 MW, ≥ 10 Miles from Affiliated Small Power Production QF.	Self-certification ...	no change (899) ..	no change (1.25)	no change (1,123.75).	2 hrs.; $166	2,247.5 hrs.; $186,542.5.	207.5
Small Power Production Facility > 1 MW, ≥ 10 Miles from Affiliated Small Power Production QF.	Application for FERC certification.	no change (0)	no change (1.25)	no change (0)	6 hrs.; $498	no change (0 hrs.); $0.	0
FERC–556, Total Additional Burden and Cost Due to Final Rule.	....	no change (3,454)	....	no change (4,317.5).	....	13,495 hrs.; $1,120,085.	....

700. The table below reflects the additional estimated public reporting burdens associated with reducing the PURPA section 210(m) rebuttable presumption regarding small power production QFs' nondiscriminatory access to certain markets from 20 MW to 5 MW, which affects the FERC–912.[1053] The FERC–912 is optional, but if electric utilities located in relevant markets choose to submit to the

[1050] The figures in this table reflect estimated changes to the current OMB-approved inventory for the FERC Form No. 556 (approved by the Office of Management and Budget (OMB) on November 18, 2019).

Where ''no change'' is indicated, the current figure is included parenthetically for information only. Those parenthetical figures are not included in the final total for column 5.

Commission staff believes that the industry is similarly situated in terms of wages and benefits. Therefore, cost estimates are based on FERC's 2020 average hourly wage (and benefits) of $83.00/hour. (The submittal to and approval of OMB in 2019 for FERC Form No. 556 was based on FERC's 2018 average annual wage hourly rate of $79.00/hour. Because the change from the $79.00 hourly rate to the current $83.00 hourly rate was not due to the final rule, this chart does not depict this increase.)

[1051] Not required to file.

[1052] In the FERC Form No. 556 approved by OMB in 2019, for the category ''Small Power Production Facility > 1 MW, Self-certification,'' we estimated the number of respondents at 2,698. We have now divided that category into three categories: ''Small Power Production Facility > 1 MW, ≤ 1 Mile from Affiliated Small Power Production QF,'' ''Small Power Production Facility > 1 MW, > 1 Mile, < 10 Miles from Affiliated Small Power Production QF,'' ''Small Power Production Facility > 1 MW, ≥ 10 Miles from Affiliated Small Power Production QF.'' In this column, the numbers 899, 900, and 899 are a distribution of those same estimated 2,698 respondents across the three categories.

[1053] This information was not included in the burden estimates in the NOPR.

Commission a PURPA section 210(m) petition for termination of the PURPA mandatory purchase obligation for small power production QFs between 20 MW and 5 MW, then we would expect the following burdens and cost estimates to apply.

FERC–912, CHANGES DUE TO FINAL RULE IN DOCKET NOS. RM19–15–000 AND AD16–16–000

(Termination of obligation to purchase)	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) × (2) = (3)	Increased average hours and cost per response ($) (4)	Increased total annual burden hours and total annual cost ($) (3) * (4) = (5)	Increased annual cost per respondent (at $83/hr.) (5)/(1) = (6)
Electric utility burden of reducing 210(m) rebuttable presumption from 20 MW to 5 MW [1054].	30	1	30	12 hrs.; $996	360 hrs.; $29,880	$996
Total	30	1	30	12 hrs.; $996	360 hrs.; $29,880	996

Title: FERC–556 (Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility), and FERC–912 (PURPA Section 210(m) Notification Requirements Applicable to Cogeneration and Small Power Production Facilities).

Action: Revisions to existing information collections FERC–556 and FERC–912.

OMB Control No.: 1902–0075 (FERC–556) and 1902–0237 (FERC–912).

Respondents: Facilities that are self-certifying their status as a cogenerator or small power producer or that are submitting an application for Commission certification of their status as a cogenerator or small power producer; electric utilities filing to terminate their obligation to purchase, at avoided cost rates, the output of small power production QFs between 5 MW and 20 MW.

Frequency of Information: Ongoing.

Necessity of Information: The Commission directs the changes in this final rule revising its implementation of PURPA in order to continue to meet PURPA's statutory requirements.

Internal Review: The Commission has reviewed the changes and has determined that such changes are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry.

701. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director], by email to *DataClearance@ferc.gov* or by phone (202) 502–8663].

Please send comments concerning the collection of information and the associated burden estimates to: Office of Information and Regulatory Affairs, Office of Management and Budget [Attention: Federal Energy Regulatory Commission Desk Officer]. Due to security concerns, comments should be sent directly to *www.reginfo.gov/public/do/PRAMain.* Comments submitted to OMB should be sent within 30 days of publication of this notice in the **Federal Register** and should refer to FERC–556 (OMB Control No. 1902–0075) and FERC–912 (OMB Control No. 1902–0237).

VI. Environmental Analysis

702. The Commission in the NOPR explained that it was not possible to determine the environmental effects of the changes proposed, given the numerous uncertainties regarding the potential effects of the changes proposed. The Commission in the NOPR stated that, given these uncertainties, the National Environmental Policy Act of 1969 (NEPA) [1055] does not require that the Commission conduct an environmental review of the proposed revised PURPA Regulations.[1056]

A. Comments

703. Several commenters argue that the Commission erred in failing to conduct such a review.[1057]

704. Biological Diversity asserts an urgent need to take measures to reduce greenhouse gas emissions to address climate change.[1058] Biological Diversity states that the Commission's rationale for revising the PURPA Regulations, namely the increased availability of "fossil gas," requires the Commission to consider the reasonably foreseeable impacts on climate and the environment, including on threatened and endangered species, in order to fulfill its responsibilities under NEPA and the Endangered Species Act (ESA).[1059] Biological Diversity includes a list of what it alleges are reasonably foreseeable impacts from increased use of "fossil gas." [1060] Biological Diversity maintains that the proposed revised PURPA Regulations would prevent renewable energy development and lock in "fossil gas" development and supply, thereby requiring the Commission to prepare an environmental impact statement and to obtain a biological opinion before proceeding to a final rule.[1061]

705. NIPPC, CREA, REC, and OSEIA state that "the Commission must, at a minimum, complete the requisite scoping and other process associated with an EA and then revise and reissue, or abandon, the NOPR after considering the issues developed in the EA." [1062] NIPPC, CREA, REC, and OSEIA argue that it would not be too speculative for the Commission to undertake a NEPA analysis.[1063] NIPPC, CREA, REC, and OSEIA state that it is possible to study the environmental effects of the NOPR proposals because the Commission undertook a NEPA analysis when it first implemented PURPA, imposing a moratorium on certifying cogeneration facilities as QFs until it completed an

[1054] The staff estimates a total of 90 discretionary responses may be submitted in Years 1–3, with an annual average of 30.

[1055] 42 U.S.C. 4321 *et seq.*

[1056] NOPR, 169 FERC ¶ 61,184 at PP 154–55.

[1057] Allco Comments at 21–22; Biological Diversity Comments at 14; NIPPC, CREA, REC, and OSEIA Comments at 83; Public Interest Organizations Comments at 21.

[1058] Biological Diversity Comments at 2–7.

[1059] *Id.* at 14.

[1060] *Id.* at 15–17.

[1061] *Id.* at 17.

[1062] NIPPC, CREA, REC, and OSEIA Comments at 83–85 (citing, *e.g.,* 42 U.S.C. 4332(A); 18 CFR 380.5, 380.4, 380.11; 40 CFR 1500.1, 1502.5; *LaFlamme* v. *FERC,* 852 F.2d 389, 397 (9th Cir. 1988); *Am. Bird Conservancy, Inc.* v. *FCC,* 516 F.3d 1027, 1033–34 (D.C. Cir. 2008); *N. Plains Res. Council, Inc.* v. *Surface Transp. Bd.,* 668 F.3d 1067, 1075 (9th Cir. 2011) (*N. Plains Res. Council*)).

[1063] NIPPC, CREA, REC, and OSEIA Comments at 92–94 (citing, *e.g., Am. Bird Conservancy, Inc.* v. *FCC,* 516 F.3d 1033); *N. Plains Res. Council,* 668 F.3d at 1076, 1078–79.

Environmental Impact Statement (EIS) and recognizing the environmental benefits from encouraging the development of QFs, and also studied the environmental impacts for Order No. 888.[1064]

706. Public Interest Organizations state that the Commission must prepare an Environmental Assessment (EA) in order to support its position that this rulemaking may not have any significant foreseeable environmental impacts.[1065] Public Interest Organizations describe the NOPR's ''cursory treatment of the Commission's environmental review obligations'' as undermining NEPA's purposes ''that agencies give due consideration to environmental impacts when making major environmental decisions, and guaranteeing that the public is informed of such impacts.''[1066] Public Interest Organizations argue that states' exercise of new flexibility granted by the proposed revised PURPA Regulations are reasonably foreseeable indirect and cumulative impacts that the Commission must study. Public Interest Organizations assert that the Commission likely will ''need to prepare a full EIS to evaluate the serious environmental impacts that will result from dismantling regulations that continue to play an important role in development of renewable generation resources across the country.''[1067]

707. NIPPC, CREA, REC, and OSEIA argue that the Commission has failed to explain how eliminating the market for at least 10% to 20% of renewable energy facilities would have no impact on the human environment.[1068] NIPPC, CREA, REC, and OSEIA contend that the Commission has failed to analyze how the proposals would impact regions like the Northwest that lack robust implementation of PURPA, the 21 states without renewable power standards (such as the Idaho, whose Legislature affirmatively refused to adopt a renewable power standard), or the one third of the country that is not located in an RTO or ISO.[1069]

708. Allco argues that it is reasonably foreseeable that the proposed revisions to the PURPA Regulations and resulting increased fossil fuels use could add significant levels of greenhouse gas emissions to the atmosphere and endanger the climate.[1070] The effects of such endangerment to the climate from fossil fuel use and reduced renewable energy QF generation, according to Allco, include mass extinction of species, in violation of the ESA.[1071] Allco contends that the Commission's failure to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services) prior to issuing the NOPR constituted a violation of its obligations under the ESA, ''to insure that its actions are not likely to jeopardize the continued existence of endangered or threatened species, or result in the destruction or adverse modification of critical habitat.''[1072]

709. According to Allco, the PURPA NOPR triggered the ESA's consultation requirement because the proposed changes will increase fossil fuel generation that will, in turn, displace ''over 2 [terawatts (TWs)] of solar generation over the next 20 years as compared to the baseline scenario of application and faithful adherence to existing PURPA rules.''[1073] Allco alleges that increased fossil-fuel generation will ''increase land and ocean temperatures above what they would have been, . . . resulting in increased pollution to the waters of the United States, and harming federally endangered and threatened species, including, without limitation, the Piping plover and the Right whale.''[1074]

B. Commission Determination

710. We find that no EA or EIS of the final rule is required. NEPA requires federal agencies to prepare a detailed statement on the environmental impact of ''major Federal actions significantly affecting the quality of the human environment.''[1075] The Council on Environmental Quality's (CEQ) regulations implementing NEPA provide that federal agencies can comply with NEPA by preparing: (a) An Environmental Impact Statement (EIS); or (b) an Environmental Assessment (EA) to determine whether the proposed action significantly affects the quality of the human environment and requires the preparation of an EIS.[1076] CEQ regulations also state that federal agencies are not obligated to prepare either an EIS or an EA if they find that a categorical exclusion applies.[1077] Additionally, courts have held that an EIS or EA is not required under NEPA ''unless there is a particular project that 'define[s] fairly precisely the scope and limits of the proposed development.' ''[1078]

711. No EA or EIS of the final rule is required because, as discussed below, the final rule does not propose or authorize, much less define, the scope and limits of any potential energy infrastructure and, as a result, there is no way to determine whether issuance of the rule will significantly affect the quality of the human environment. In the alternative, a categorical exclusion applies so that an EA or EIS need not be prepared. For similar reasons, there is no requirement that the Commission engage in consultation pursuant to the ESA with respect to this action.

1. No EIS or EA Is Required

a. There Is No Project That Defines the Scope and Limits of QF Development

712. In *Center for Biological Diversity,* the court held that no NEPA review was required with respect to actions taken by the United States Forest Service that were similar in all relevant respects to the action taken here by the Commission in promulgating the final rule. That case involved the designation by the Forest Service, pursuant to the Healthy Forests Restoration Act (HFRA), of certain forests as ''landscape-scale areas.'' Such designation meant that specific treatments could be proposed to address insect infestation in those designated ''landscape-scale areas.''[1079] The court held that no NEPA review was required for the designations, noting that no specific projects were proposed for any of the landscape-scale areas and stating that ''[i]n such circumstances, 'any attempt to produce an [EIS] would be little more than a study . . . containing estimates of potential development and attendant environmental consequences.' ''[1080] The court concluded that ''unless there is a particular project that 'define[s] fairly

[1064] *Id.* at 94–96.

[1065] Public Interest Organizations Comments at 21.

[1066] *Id.*

[1067] *Id.* at 26.

[1068] NIPPC, CREA, REC, and OSEIA Comments at 86–87.

[1069] *Id.* at 87–88.

[1070] Allco Comments at 31.

[1071] *Id.*

[1072] *Id.* at 34 (quoting 16 U.S.C. 1536(a)(2)) (internal quotations omitted).

[1073] *Id.*

[1074] *Id.* at 34–35.

[1075] 42 U.S.C. 4332(C) (2018); *see also Regulations Implementing the National Environmental Policy Act,* Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987) (cross-referenced at 41 FERC ¶ 61,284).

[1076] 40 CFR 1501.4 (2019).

[1077] CEQ regulations state that a categorical exclusion ''means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.'' 40 CFR 1508.4 (2019).

[1078] *Center for Biological Diversity* v. *Ilano,* 928 F.3d 774, 780 (9th Cir. 2019) (*Center for Biological Diversity*) (quoting *Kleppe* v. *Sierra Club,* 427 U.S. 390, 402 (1976)).

[1079] *Center for Biological Diversity,* 928 F.3d at 778.

[1080] *Id.* at 780 (quoting *Kleppe* v. *Sierra Club,* 427 U.S. 390, 402 (1976)).

precisely the scope and limits of the proposed development of the region,' there can be 'no factual predicate for the production of an [EIS] of the type envisioned by NEPA.' '' [1081]

713. Similarly, here, the final rule does not authorize the development or construction of any facilities, but simply addresses the rates that QFs can charge and certain requirements under which proposed facilities may qualify as a QF.[1082] The final rule does not fund any particular QFs, or issue permits for their construction or operation (neither of which the Commission has jurisdiction to do). The Commission does not, in its regulations or in this final rule, authorize or prohibit the use of any particular technology or fuel, nor does it mandate or prohibit where QFs should be or are built. This final rule does not exempt QFs from any Federal, state, or local environmental, siting, or similar laws or regulatory requirements, (again something the Commission has no authority to do).

714. Even with respect to rates, while the Commission has established and here revises the factors and approaches that states can take into account when they set QF rates, it is ultimately the states and not the Commission that set those rates. The final rule continues to give states wide discretion and it is impossible to know what the states may choose to do in response to this final rule, whether they will make changes in their current practices or not, and how those state choices would impact QF development and the environment in any particular state, let along any particular locale.

715. Moreover, the scope of this final rule is even less defined than the landscape-scale area designations at issue in the *Center for Biological Diversity* case. PURPA applies throughout the entire United States, and the revisions implemented by the final rule theoretically could affect future QF development anywhere in the country.

716. While courts have held that NEPA requires ''reasonable forecasting,'' ''NEPA does not require a 'crystal ball' inquiry.'' [1083] Further, an agency ''is not required to engage in speculative analysis'' or ''to do the impractical, if not enough information is available to permit meaningful consideration'' [1084] or to ''foresee the unforeseeable.'' [1085] In that vein, ''[i]n determining what effects are 'reasonably foreseeable,' an agency must engage in 'reasonable forecasting and speculation,' . . . with *reasonable* being the operative word.'' [1086] Environmental impacts are not reasonably foreseeable if the impacts would result only through a lengthy causal chain of highly uncertain or unknowable events.[1087]

717. Commenters' allegations regarding potentially reduced QF development hinge on the claim that the NOPR proposed to ''repeal'' or ''eliminate'' critical PURPA Regulations, which is not true. The Commission proposed in the NOPR, which this final rule generally affirms, to clarify some existing PURPA regulations and modify other PURPA Regulations to make them consistent with the statute, based on changed circumstances since the time those regulations originally were promulgated. Any consideration of whether the revised rules could potentially result in significant new environmental impacts due to less QF development and increased development of coal, nuclear, and combined cycle natural gas plants, would be highly speculative, based on the difficulty in determining which additional flexibilities the final rule provides to the states that each state will adopt, if any; how such state rules would impact QF development going forward; and whether any reduction in QF renewables would be replaced by the much greater amount of non-QF renewable resources with similar environmental characteristics.[1088]

718. As was the case in *Center for Biological Diversity,* any attempt to evaluate the environmental effects of the final rule by necessity would involve nothing less than hypothesizing the potential development of QFs and the resultant environmental consequences. Indeed, any attempt by the Commission to estimate the potential environmental effects of the final rule would be considerably more speculative than the estimates of potential development and attendant environmental consequences that the court in *Center for Biological Diversity* held are not required under NEPA. That case involved limited zones in which some projects to treat insect infestation almost certainly would be proposed. Here, it simply is not possible to provide any reasonable forecast of the effects of the final rule on future QF development, whether any affected potential QF would be a renewable resource (such as solar or wind) or employ carbon-emitting technology (*e.g.,* a fossil-fuel-burning cogenerator or a waste-coal-burning small power production facility). Moreover, environmental effects on land use, vegetation, water quality, etc. are all dependent on location, which are unknown and could be anywhere in the United States.

719. Because, even more so than in *Center for Biological Diversity,* the final rule does not authorize, or define any limit on the scope of, any potential QF or other infrastructure development, any attempt to prepare an analysis of the potential effects of the final rule on future QF development would be so speculative as to render meaningless any environmental analysis of these impacts. Therefore, no such analysis is required by NEPA.

b. A Categorical Exclusion Applies

720. There is a separate and independent alternative reason why no environmental analysis is warranted: the final rule falls within a categorical exclusion promulgated by the Commission pursuant to the CEQ's NEPA regulations.[1089] Specifically, the final rule falls within the categorical exclusion for rules that: (1) Are clarifying in nature, (2) are corrective in nature, (3) are procedural in nature, or (4) do not substantially change the effect of the regulation being amended.[1090] Here, each of the revisions to the PURPA Regulations implemented by the

[1081] *Id.* (quoting *Kleppe,* 427 U.S. at 402); *see also Northcoast Environmental Center* v. *Glickman,* 136 F.3d 660, 668 (9th Cir. 1998) (citing *Kleppe* in support of its holding that NEPA does not require agency to complete environmental analysis where environmental effects are speculative or hypothetical).

[1082] *See Sugarloaf Citizens Ass'n* v. *FERC,* 959 F.2d 508, 514 n.29 (4th Cir. 1992) (finding that in the QF certification context ''FERC does little more than regulate the rates paid by utilities to the qualifying facility and does not control the financing, construction or operation of the project. Although the Facility receives an economic benefit, no direct federal funding or other substantial federal assistance is provided, and no licensing action is involved.'').

[1083] *Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 534 (1978) (quoting *Nat. Res. Def. Council, Inc.* v. *Morton,* 458 F.2d 827, 837 (D.C. Cir. 1972)).

[1084] *N. Plains Res. Council* v. *Surface Transp. Board,* 668 F.3d 1067, 1078–79 (9th Cir. 2011) (citation omitted).

[1085] *Concerned About Trident* v. *Rumsfeld,* 555 F.2d 817, 830 (D.C. Cir. 1976) (citation omitted).

[1086] *Sierra Club* v. *U.S. Dep't of Energy,* 867 F.3d 189, 198 (D.C. Cir. 2017) (emphasis in original) (citation omitted).

[1087] *See Dep't of Transp.* v. *Pub. Citizen,* 541 U.S. 752, 767 (2004) (''NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause.''); *Metro. Edison Co.* v. *People Against Nuclear Energy,* 460 U.S. 766, 774 (1983) (noting effects may not fall within section 102 of NEPA because ''the causal chain is too attenuated'').

[1088] *See infra* VI.B.2.

[1089] CEQ regulations provide that agencies shall issue procedures that provide specific criteria for classes of action which ''normally do not require either an environmental impact statement or an environmental assessment (categorical exclusion)''. 40 CFR 1507.3 (2019).

[1090] *See* 18 CFR 380.4(a)(2)(ii) (categorical exclusion applies to ''promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of . . . regulations being amended.'').

final rule fits into one of these categories:

i. Changes That Are Clarifying in Nature

721. Several of the changes to the PURPA Regulations are clarifying in nature. These include the changes clarifying how market prices can be used to set as-available energy rates,[1091] the changes clarifying how fixed energy rates in contracts or LEOs may be determined,[1092] and the changes clarifying how competitive solicitations can be used to set avoided cost rates.[1093] Other non-rate related clarifying revisions in the final rule include a clarification regarding the relationship between avoided costs and decreases in a purchasing utility's load as a consequence of retail competition,[1094] a clarification as to how electric generating equipment should be defined for purposes of determining whether small power production facilities are located at the same site,[1095] and a clarification as to when a LEO is established.[1096]

ii. Changes That Are Corrective in Nature

722. The Commission interprets the categorical exclusion for changes to its regulations that are corrective in nature as including changes needed in order to ensure that a regulation conforms to the requirements of the statutory provisions being implemented by the regulation.[1097] To be clear, the Commission does not find that its existing PURPA Regulations were inconsistent with the statutory requirements of PURPA when promulgated. Rather, the Commission finds that the changes adopted in this final rule are required to ensure continued future compliance of the PURPA Regulations with PURPA, based on the changed circumstances found by the Commission in this final rule.

723. Three aspects of the final rule are corrective in nature. The first is the change allowing states to require variable energy rates in QF contracts.[1098] As the Commission explains above, this change is required based on the Commission's finding that, contrary to the Commission's expectation in 1980, there have been numerous instances where overestimates and underestimates of energy avoided costs used in fixed energy rate contracts have not balanced out, causing the contract rate to not violate the statutory avoided cost rate cap. Giving states the ability to require energy rates in QF contracts to vary based on the purchasing utility's avoided cost of energy at the time of delivery ensures that QF rates do not exceed the avoided cost rate cap imposed by PURPA.[1099]

724. The second corrective aspect is the change in the PURPA Regulations regarding the determination of what facilities are located at the same site for purposes of complying with the statutory 80 MW limit on small power production facilities located at the same site.[1100] As explained above, the Commission found, based on changed circumstances, that the current one-mile rule is inadequate to determine which facilities are located at the same site. Based on this finding, the Commission was obligated by PURPA to revise its definition of when facilities are located at the same site.[1101]

725. The third corrective aspect of the final rule relates to the implementation of PURPA section 210(m). That statutory provision allows purchasing utilities to terminate their obligation to purchase from QFs that have nondiscriminatory access to certain statutorily-defined markets, which the Commission has determined to be the RTO/ISO markets. The final rule revises the presumption in the PURPA Regulations that QFs with a capacity of 20 MW or less do not have non-discriminatory access to such markets, reducing the threshold for such presumption to 5 MW.[1102]

726. The Commission has determined in the final rule that, since the 20 MW threshold was established in 2005, the RTO/ISO markets have matured and the industry has developed a better understanding of the mechanics of market participation. This determination has rendered inaccurate the presumption currently reflected in the PURPA Regulations that QFs 20 MW and below do not have non-discriminatory access to the relevant markets. Once the Commission made this determination, it was appropriate for the Commission to update the 20 MW threshold to comply with the requirements of PURPA section 210(m).[1103]

i. Changes That Are Procedural in Nature

727. The remaining two revisions implemented by the final rule are procedural in nature. The first is a revision to the procedures that apply to QF certification.[1104] The second is a revision to the Commission's Form 556, used by QFs seeking certification.[1105]

2. The NEPA Analysis for Promulgation of the Original PURPA Regulations in 1980 Cannot Be Replicated Here

728. As commenters note, in 1980 the Commission conducted an EA and later an EIS for its initial rules implementing PURPA. Initially, the Commission found (and the Final EIS also found) that new diesel cogeneration, and dual-fuel cogeneration particularly, in New York City, could cause significant environmental effects on air quality.[1106] In Order No. 70–E, however, the Commission ultimately opted to treat such cogeneration the same as all other cogeneration given, among other things, that the PURPA Regulations were not the driving force behind the development of such cogeneration in New York City.[1107] In doing so, the Commission emphasized that QF status was not a license nor a permit to operate but instead only entitled the QF to a rate for purchases and to certain exemptions from regulation. Moreover, QFs were not exempted from any Federal, state, or local environmental, siting or other similar requirements.[1108]

[1091] *See* Sections IV.B.2–5.

[1092] *See* Section IV.B.6.

[1093] *See* Section IV.B.8.

[1094] *See* Section IV.C.

[1095] *See* Section IV.D.2.

[1096] *See* Section IV.H.

[1097] For example, the Commission relied on this categorical exclusion when it revised the PURPA Regulations in 2006 to comply with the amendments to PURPA enacted as part of EPAct 2005. *See Revised Regulations Governing Small Power Production and Cogeneration Facilities,* Order No. 671, 114 FERC ¶ 61,102 at P 118. Further, this interpretation is also consistent with the Supreme Court's holding that NEPA review is not required when an agency's action is required by statute. *See Dep't of Transp.* v. *Pub. Citizen,* 541 U.S. 752, 770 (2004) (''where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ''cause'' of the effect [and] . . . under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA.''); *see also Safari Club Intern.* v. *Jewell,* 960 F.Supp.2d 17, 79–80 (D.D.C. 2013) (relying on *Dep't of Transp.* v. *Pub. Citizen* to hold that NEPA review is not required for an agency rule issued to comply with a statutory requirement).

[1098] *See* Section IV.B.7.

[1099] *Id.*

[1100] *See* Section IV.D.

[1101] *See* Section IV.D.1.c.

[1102] *See* Section IV.G.1.

[1103] *Id.*

[1104] *See* Section IV.E.

[1105] *See* Section IV.F

[1106] Final EIS at I–7a.

[1107] *See* Order No. 70–E, 46 FR 33025, 33026 (June 18, 1981).

[1108] *Id.* The Commission stated in its EA that:

The rules provide encouragement to the development of certain types of facilities. They do not prevent any facility which does not qualify from using cogeneration or small power production, or from using any type of fuel. The rules merely grant or deny certain benefits to certain facilities.

In this environmental assessment, the environmental effects of these rules are limited to the effects resulting from the construction and/or operation of facilities which occur as a result of the granting of these benefits, or from changes in the operating characteristics of existing facilities which

729. The original PURPA EA for the pre-existing PURPA Regulations was based on a market penetration study of PURPA-induced facilities. In order to carry out that market penetration study, the original PURPA EA had to make the simplifying assumption that the mere implementation of PURPA would necessarily result in the development and operation of certain types of generation facilities that would not otherwise be developed.[1109] Based on these types of facilities, that EA identified specific resource conflicts related to each type of facility, which were nothing more than a generalized listing of potential impacts.[1110] That EA found that, because the various types of facilities operate differently, there would be no cumulative impacts and this finding, coupled with the geographic distribution of facility development from the market penetration study, resulted in a finding of no significant impact for all types of facilities except diesel and dual-fueled cogeneration facilities in the Mid-Atlantic, which that EA found could cause significant environmental impacts on air quality.[1111]

730. Subsequently, an EIS was prepared that addressed only air quality in New York City and the broader Mid-Atlantic region. The bulk of the EIS focused on how national, state, and local air pollution regimes would address air quality surrounding the construction and operation of such facilities.[1112]

731. Several commenters cite to this previous NEPA analysis conducted in connection with the original PURPA Regulations to support their assertion that a NEPA analysis similarly should be possible for this rulemaking. However, those assertions are undermined by the fact that circumstances have changed significantly since the promulgation of the original PURPA Regulations in 1980. Prior to 1980, essentially no QF generation technologies or other independent generation facilities (other than those used to supply the loads of the owners rather than to sell at wholesale) had been constructed. By contrast, today QF generation technologies and other independent generation facilities are common, and they are predominantly built and operated outside of PURPA.[1113]

732. Because there was virtually no QF or independent power development in 1980, the original PURPA EA could reasonably project that the incentives created by PURPA and the original PURPA Regulations would lead to increased development of power generated by QF technologies. The market penetration study conducted by the Commission, and the Commission's conclusion that the PURPA Regulations could lead to an increase in diesel-fired cogeneration in New York City, were based on these projections.

733. By contrast, it is not possible here to make simplifying assumptions that the mere implementation of the revised regulations necessarily would result in specific changes in the development of particular generation technologies compared to the status quo. First, the revisions to the PURPA regulations are premised on a finding that, even after the revisions, the PURPA regulations will continue to encourage QFs. Consequently, there is no way to estimate whether any reduction in QF development, as opposed to the status quo, will be focused on one or more of the many different types of QF technologies, some of which are renewable resources and some of which are fueled by fossil fuels[1114] and have emissions comparable to non-QF fossil fueled generators. Moreover, because the rule primarily increases state flexibility in setting QF rates, including giving states the option of not changing their current rate-setting approaches, there is no way to develop any estimate of the location or size of any hypothetical reduction in QF development.

734. In addition, as mentioned above, renewable generation technologies today are commonly, and even predominantly, built and operated outside of PURPA. Current projections show that most new generation construction will be of renewable resources.[1115] Indeed, the cost of renewables has declined so much that in some regions renewables are the most cost effective new generation technology available.[1116] Thus, even if the final rule was to result in reduced renewable QF development, there is little likelihood today that hypothetical, unbuilt QFs necessarily would be replaced by new conventional fossil fuel generation.

735. Alternatively, in the absence of these hypothetical, unbuilt QFs, existing generation units—whose current emissions, if any, would already be part of the baseline for any environmental analysis of the impacts of the final rule—might continue to operate without any change in their emissions; in sum, in the absence of these hypothetical, unbuilt QFs, emissions would remain at the baseline and might not increase at all. Indeed, in the current environment where stagnant load growth has prevailed in recent years, this would seem to be a more likely scenario than an alternative where these hypothetical, unbuilt QFs are replaced by brand new fossil fuel generation that would increase emissions over the baseline.

736. Given these facts, it would not be possible to perform a market penetration study of the effects of the final rule that would not be wholly speculative. Without such a study, there could be no analysis defining the types and geographic location of facilities that could serve as the basis for any NEPA analysis similar to that performed in 1980.

3. This Proceeding Does Not Trigger Any ESA Consultation Requirement

737. Similar to our finding that it would be nearly impossible to conduct a meaningful NEPA review, we disagree with Biological Diversity and Allco that either the PURPA NOPR or this final rule trigger any consultation requirement under the ESA.

The ESA requires that agencies consult with the Secretary of the Interior or the Secretary of Commerce to ''insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.''[1117]

738. The ESA regulations require consultation only if the Commission determines that a proposed action may affect listed species or critical habitat.[1118] We find that there are no

results from the granting of these benefits. If a cogeneration or small power production facility would be constructed or operated without the incentives of these rules, the environmental effects resulting therefrom cannot properly be described as environmental effects of these rules. However, a technical and environmental discussion of each technology is provided whether or not its use is expected to be encouraged by these rules.

Small Power Production and Cogeneration Facilities—Environmental Findings; No Significant Impact and Notice of Intent To Prepare Environmental Impact Statement, 45 FR 23661, 23664 (Apr. 8, 1980) (Original PURPA EA).

[1109] *Id.* at 23,665.

[1110] *Id.* at 23,675–82.

[1111] *Id.* at 23,679, 23,682–83.

[1112] Order No. 70–E, 46 FR at 33026.

[1113] *See supra* P 240.

[1114] This would include both cogeneration, which typically is fossil fueled, and those small power production facilities that are fueled by waste, which would include a range of fossil fuel-based waste. *See* 18 CFR 292.202(b), 292.204(b)(1).

[1115] EIA, Annual Energy Outlook 2020, at tbl. 9 (Jan. 29, 2020) (in table see rows labeled Cumulative Planned Additions and Cumulative Unplanned Additions in the reference case) (Annual Energy Outlook 2020), *https://www.eia.gov/outlooks/aeo/.*

[1116] *See supra* P 240.

[1117] 16 U.S.C. 1536(a)(2).

[1118] 50 CFR 402.14(a).

effects from the final rule for which the Commission could consult with the Services. Under the ESA regulations, as recently revised, the effects of an agency's action are

all consequences to listed species and critical habitat that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and *it is reasonably certain to occur.*[1119]

The ESA regulations also state that a consequence is not considered to be caused by a proposed action if ''[t]he consequence is only reached *through a lengthy causal chain that involves so many steps* as to make the consequence not reasonably certain to occur.'' [1120] This determination must be made ''based on clear and substantial information,'' [1121] and ''should not be based on speculation or conjecture.'' [1122] In addition to the above, the same ESA regulation states that factors for the agency to consider when determining whether a consequence is not caused by the proposed agency action include: ''(1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or (2) [t]he consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur[.]'' [1123]

739. Because the NOPR was a *proposed* rule that in and of itself had no legal effect, the NOPR is not an agency ''action'' under the regulations implementing the ESA, which define agency action as the ''the *promulgation* of regulations.'' [1124] Because the NOPR did not constitute agency action, the Commission was not required to engage in consultation under the ESA prior to the NOPR's issuance.

740. In this final rule, we are promulgating regulations, which does constitute agency action. Nevertheless, for the same reasons that an environmental review of the impacts of this final rule under NEPA would be impossible to conduct, there is similarly no basis to conclude that harm to endangered species is reasonably certain to occur as a result of this final rule.

741. We find that the effects on endangered and threatened species alleged by Allco are not reasonably certain to occur, not only because any such harm is completely speculative, but also because it could result only through a lengthy causal chain of highly uncertain or unknowable events, none of which are within the Commission's authority to authorize or preclude: (1) That the final rule causes a reduction in the aggregate amount of QF capacity constructed in the future; (2) that any reduction in renewable resource QFs would not be offset by increased construction of renewable resources outside of PURPA, resulting from either other incentive programs or simply the increased cost-competitiveness of such resources; (3) that construction of such non-QF renewable resources would yield an increase in carbon emissions resulting from the reduction in renewable resource QFs that is not offset by other renewable resources; and (4) that such increase in carbon emissions would have an adverse effect on endangered and threatened species. Furthermore, the consequences of this rule would be remote in time and geographically remote because it would require action by individual generators, QF or non-QF, to propose, site, permit, construct, and operate a facility, in underdetermined locations potentially anywhere in the United States. In addition, many of these generators, QF and non-QF, would be subject to state approval and permitting requirements over which the Commission has no control.

742. Further, there is no support in the record for Allco's claim that the changes proposed in the PURPA NOPR would displace over 2 TWs of solar generation over the next 20 years.[1125] Allco provides no citation or other support whatsoever for this assertion but simply makes the claim with no elaboration. We find that such speculation or conjecture provides no basis upon which to either initiate or conduct any meaningful consultation with the Services on the impacts to endangered species from this final rule.

VII. Regulatory Flexibility Act Certification

743. The Regulatory Flexibility Act of 1980 (RFA) [1126] generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. In lieu of preparing a regulatory flexibility analysis, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities.[1127] The Commission in the NOPR stated that the proposed rule would not significantly impact a substantial number of small entities. Some commenters argue otherwise.[1128]

744. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[1129] The SBA size standard for electric utilities is based on the number of employees, including affiliates.[1130] Under SBA's current size standards, the threshold for a small entity (including its affiliates) is 250 employees for cogeneration and small power production applicants in the following NAICS [1131] categories:

- NAICS code 221114 for Solar Electric Power Generation
- NAICS code 221115 for Wind Electric Power Generation
- NAICS code 221116 for Geothermal Electric Power Generation
- NAICS code 221117 for Biomass Electric Power Generation
- NAICS code 221118 for Other Electric Power Generation

The threshold for a small entity (including its affiliates) is 500 employees for NAICS code 221111 for Hydroelectric Power Generation.

745. This rule directly affects qualifying small power production facilities and cogeneration facilities, the majority of which the Commission estimates are small businesses. With respect to the changes related to the Form No. 556 and new protests allowed pursuant to this rule, as reflected in the burden and cost estimates provided above, the Commission does not anticipate that any additional reporting burden or cost imposed on QFs, regardless of their status as a small or large business, would be significant. Those revisions may result in additional information being submitted by some small power production QF applicants (especially those with affiliated small power production qualifying facilities using the same energy resource located over one and less than 10 miles away). The Commission estimates that less than 10 percent of QF applications and self-certifications meet these criteria.

[1119] 50 CFR 402.2 (emphasis added).

[1120] 50 CFR 402.17(b)(3) (emphasis added).

[1121] *Id.*

[1122] *Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation,* 84 FR 44976, 44993 (Aug. 27, 2019).

[1123] 50 CFR 402.17(b).

[1124] 50 CFR 402.2 (emphasis added).

[1125] Allco Comments at 34.

[1126] 5 U.S.C. 601–12.

[1127] 5 U.S.C. 605(b).

[1128] *See* Allco Comments at 33.

[1129] 13 CFR 121.101.

[1130] SBA final rule on ''Small Business Size Standards: Utilities,'' 78 FR 77343 (Dec. 23, 2013).

[1131] The North American Industry Classification System (NAICS) is an industry classification system that Federal statistical agencies use to categorize businesses for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. economy. United States Census Bureau, *North American Industry Classification System, https://www.census.gov/eos/www/naics/* (accessed April 11, 2018).

746. In the final analysis, the other changes in this final rule[1132] largely impact payments to QFs by electric utilities. More accurate avoided cost rates may result in lower payments from certain electric utilities to certain QFs. In this regard, the final rule provides states greater flexibility than they have today to set the rate that electric utilities will pay QFs, but there is no way to know in advance which new flexibility state regulatory authorities and nonregulated electric utilities will exercise, or what impact that new flexibility might have given the different circumstances likely to apply to each determination of avoided cost. Under the final rule, additionally, states also have the discretion to continue setting the rate as they do today and not to adopt the Commission' proposed greater rate flexibilities. Therefore, it is not possible to estimate what the dollar impact might be. However, because of the way PURPA is structured, whatever the potential dollar impacts of these changes on small QFs may be, to the extent that they reduce the amounts paid to certain QFs, such reductions could be matched dollar-for-dollar by savings experienced by purchasing electric utilities, which should be flowed through to their retail ratepayers, some of whom would also tend to qualify as small entities.[1133]

747. While Allco argues that the Commission should have attempted to minimize the impacts on small renewable energy producers and consider alternative structures, the fact is that these offsetting impacts result from changes that are necessary to ensure the Commission's regulations continue to meet PURPA's statutory requirements. For example, allowing states to use competitive prices may benefit small QFs inasmuch as the rate-setting process for purchases of energy from these entities would be more straightforward and efficient than the administrative processes currently in use. Furthermore, providing flexibility in setting energy rates may result in state entities approving longer duration contracts for capacity (at fixed rates) and energy. The impacts of these changes, therefore, are reasonable alternatives to the status quo while adhering to the requirements of PURPA.

748. This final rule establishes a rebuttable presumption that a qualifying small power production facility whose electrical generating equipment is more than one but less than 10 miles from affiliated electrical generating equipment using the same energy resource is at a separate site. The Commission finds that this rebuttable presumption imposes a lower burden than imposing a rule that any affiliated electrical generating equipment less than 10 miles apart is presumed to be at the same site. Similarly, the Commission, while removing the rebuttable presumption that qualifying small power production facilities more than 5 MW but under 20 MW lack nondiscriminatory access, has provided factors that such facilities could use to demonstrate lack of such access—allowing them to retain the mandatory purchase obligation. The Commission estimates that annual additional compliance costs on industry (detailed above) will be approximately $1,149,965 (or an average additional burden and cost per response, of 3.187 hrs. and the corresponding $264.51) to comply with these requirements.[1134]

749. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

VIII. Document Availability

750. 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*). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19).

751. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

752. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202)502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

IX. Effective Dates and Congressional Notification

753. These regulations are effective December 31, 2020. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule is being submitted to the Senate, House, Government Accountability Office, and Small Business Administration.

List of Subjects in 18 CFR Part 292

Electric power plants; Electric utilities, Reporting and recordkeeping requirements.

List of Subjects in 18 CFR Part 375

Authority delegations (Government agencies); Seals and insignia; Sunshine Act.

By the Commission. Commissioner Glick is dissenting in part with a separate statement attached.

Issued: July 16, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission amends parts 292 and 375, chapter I, title 18, Code of Federal Regulations, as follows.

SUBCHAPTER K—REGULATIONS UNDER THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978

* * * * *

[1132] I.e., use of locational marginal prices, competitive market price, and use of forecasted stream of market revenues for energy rate component of QF contracts or legally enforceable obligations; use of variable energy rates in QF contracts or legally enforceable obligations; use of competitive solicitations to set avoided energy and capacity rates; reducing the PURPA section 210(m) rebuttable presumption regarding access to markets from 20 MW to 5 MW; and the commercial viability and financial commitment to construct demonstration necessary to obtaining a legally enforceable obligation.

[1133] While this potential beneficial impact on retail ratepayers would be an indirect impact of this final rule, the Small Business Administration Office of Advocacy encourages such indirect costs to be analyzed as well: ''Although it is not required by the RFA, the Office of Advocacy believes that it is good public policy for the agency to perform a regulatory flexibility analysis even when the impacts of its regulation are indirect.'' SBA, Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* at 23 (Aug. 2017), *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf. But see Mid-Tex Elec. Co-op., Inc.* v. *FERC,* 773 F.2d 327, 343 (D.C. Cir. 1985) (''Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.'').

[1134] Annual additional cost of $1,149,965 [($1,120,085 for FERC–556) + (29,880 for FERC–912)] and average additional burden of 13,855 hours [(13,495 hrs. for FERC–556) + (360 hrs. for FERC–912)] divided by the number of affected responses of 4,347.5 [(4,317.5 for FERC–556) + (30 responses for FERC–912)].

PART 292—REGULATIONS UNDER SECTIONS 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 WITH REGARD TO SMALL POWER PRODUCTION AND COGENERATION

■ 1. The authority citation for part 292 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Amend § 292.101 by adding paragraphs (b)(12) through (16) to read as follows:

§ 292.101 Definitions.

* * * * *

(12) *Locational marginal price* means the price for energy at a particular location as determined in a market defined in § 292.309(e), (f), or (g).

(13) *Competitive Price* means a Market Hub Price or a Combined Cycle Price.

(14) *Market Hub Price* means a price for as-delivered energy determined pursuant to § 292.304(b)(7)(i).

(15) *Combined Cycle Price* means a price for as-delivered energy determined pursuant to § 292.304(b)(7)(ii).

(16) *Competitive Solicitation Price* means a price for energy and/or capacity determined pursuant to § 292.304(b)(8).

■ 3. Amend § 292.202 by adding paragraph (t) to read as follows:

§ 292.202 Definitions.

* * * * *

(t) *Electrical generating equipment* means all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar panels, inverters, fuel cell equipment and/or other primary power generation equipment used in the facility, excluding equipment for gathering energy to be used in the facility.

■ 4. Amend § 292.204 by revising paragraph (a) to read as follows:

§ 292.204 Criteria for qualifying small power production facilities.

(a) *Size of the facility*—(1) *Maximum size.* Except as provided in paragraph (a)(4) of this section, the power production capacity of a facility for which qualification is sought, together with the power production capacity of any other small power production qualifying facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

(2) *Method of calculation.* (i)(A) For purposes of this paragraph (a)(2), there is an irrebuttable presumption that affiliated small power production qualifying facilities that use the same energy resource and are located one mile or less from the facility for which qualification or recertification is sought are located at the same site as the facility for which qualification or recertification is sought.

(B) For purposes of this paragraph (a)(2), for facilities for which qualification or recertification is filed on or after December 31, 2020 there is an irrebuttable presumption that affiliated small power production qualifying facilities that use the same energy resource and are located 10 miles or more from the facility for which qualification or recertification is sought are located at separate sites from the facility for which qualification or recertification is sought.

(C) For purposes of this paragraph (a)(2), for facilities for which qualification or recertification is filed on or after December 31, 2020, there is a rebuttable presumption that affiliated small power production qualifying facilities that use the same energy resource and are located more than one mile and less than 10 miles from the facility for which qualification or recertification is sought are located at separate sites from the facility for which qualification or recertification is sought.

(D) For hydroelectric facilities, facilities are considered to be located at the same site as the facility for which qualification or recertification is sought if they are located within one mile of the facility for which qualification or recertification is sought and use water from the same impoundment for power generation.

(ii) For purposes of making the determinations in paragraph (a)(2)(i), the distance between two facilities shall be measured from the edge of the closest electrical generating equipment for which qualification or recertification is sought to the edge of the nearest electrical generating equipment of the other affiliated small power production qualifying facility using the same energy resource.

(3) *Waiver.* The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

(4) *Exception.* Facilities meeting the criteria in section 3(17)(E) of the Federal Power Act (16 U.S.C. 796(17)(E)) have no maximum size, and the power production capacity of such facilities shall be excluded from consideration when determining the size of other small power production facilities less than 10 miles from such facilities.

* * * * *

■ 5. Amend § 292.207 by:

■ a. Revising paragraphs (a), (b) intructory text, (b)(2), (c), and (d);

■ b. Adding paragraphs (e) and (f).

The revisions and additions read as follows:

§ 292.207 Procedures for obtaining qualifying status.

(a) *Self-certification.* (1) *FERC Form No. 556.* The qualifying facility status of an existing or a proposed facility that meets the requirements of § 292.203 may be self-certified by the owner or operator of the facility or its representative by properly completing a FERC Form No. 556 and filing that form with the Commission, pursuant to § 131.80 of this chapter, and complying with paragraph (e) of this section.

(2) *Factors.* For small power production facilities pursuant to § 292.204, the owner or operator of the facility or its representative may, when completing the FERC Form No. 556, provide information asserting factors showing that the facility for which qualification or recertification is sought is at a separate site from other facilities using the same energy resource and owned by the same person(s) or its affiliates.

(3) *Commission action.* Self-certification and self-recertification are effective upon filing. If no protests to a self-certification or self-recertification are timely filed pursuant to paragraph (c) of this section, no further action by the Commission is required for a self-certification or self-recertification to be effective. If protests to a self-certification or self-recertification are timely filed pursuant to paragraph (c) of this section, a self-certification or self-recertification will remain effective until the Commission issues an order revoking QF certification. The Commission will act on the protest within 90 days from the date the protest is filed; provided that, if the Commission requests more information from the protester, the entity seeking qualification or recertification, or both, the time for the Commission to act will be extended to 60 days from the filing of a complete answer to the information request. In addition to any extension resulting from a request for information, the Commission also may toll the 90-day period for one additional 60-day period if so required to rule on a protest. Authority to toll the 90-day period for this purpose is delegated to the Secretary or the Secretary's designee. Absent Commission action before the expiration of the tolling period, a protest will be deemed denied, and the self-certification or self-recertification will remain effective.

(b) *Optional procedure—Commission certification.* * * *

(2) *General contents of application.* The application must include a properly completed FERC Form No. 556 pursuant to § 131.80 of this chapter. For small power production facilities pursuant to § 292.204, the owner or operator of the facility or its representative may, when completing the FERC Form No. 556, provide information asserting factors showing that the facility for which qualification is sought is at a separate site from other facilities using the same energy resource and owned by the same person(s) or its affiliates.

* * * * *

(c) *Protests and Interventions.* (1) *Filing a Protest.* Any person, as defined in § 385.102(d) of this chapter, who opposes either a self-certification or self-recertification making substantive changes to the existing certification filed pursuant to paragraph (a) of this section or an application for Commission certification or Commission recertification making substantive changes to the existing certification filed pursuant to paragraph (b) of this section for which qualification or recertification is filed on or after December 31, 2020, may file a protest with the Commission. Any protest to and any intervention in a self-certification or self-recertification must be filed in accordance with §§ 385.211 and 385.214 of this chapter, on or before 30 days from the date the self-certification or self-recertification is filed. Any protestor must concurrently serve a copy of such filing pursuant to § 385.211 of this chapter. Any protest must be adequately supported, and provide any supporting documents, contracts, or affidavits to substantiate the claims in the protest.

(2) *Limitations on protest.* Protests may be filed to any initial self-certification or application for Commission certification filed on or after the effective date of this final rule, and to any self-recertification or application for Commission recertification that are filed on or after December 31, 2020 that makes substantive changes to the existing certification. Once the Commission has certified an applicant's qualifying facility status either in response to a protest opposing a self-certification or self-recertification, or in response to an application for Commission certification or Commission recertification, any later protest to a self-recertification or application for Commission recertification making substantive changes to a qualifying facility's certification must demonstrate changed circumstances that call into question the continued validity of the certification.

(d) *Response to protests.* Any response to a protest must be filed on or before 30 days from the date of filing of that protest and will be allowed under § 385.213(a)(2) of this chapter.

(e) *Notice requirements.* (1) *General.* An applicant filing a self-certification, self-recertification, application for Commission certification or application for Commission recertification of the qualifying status of its facility must concurrently serve a copy of such filing on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up or maintenance power from, and the State regulatory authority of each state where the facility and each affected electric utility is located. The Commission will publish a notice in the **Federal Register** for each application for Commission certification and for each self-certification of a cogeneration facility that is subject to the requirements of § 292.205(d).

(2) Facilities of 500 kW or more. An electric utility is not required to purchase electric energy from a facility with a net power production capacity of 500 kW or more until 90 days after the facility notifies the facility that it is a qualifying facility or 90 days after the utility meets the notice requirements in paragraph (c)(1) of this section.

(f) *Revocation of qualifying status.* (1)(i) If a qualifying facility fails to conform with any material facts or representations presented by the cogenerator or small power producer in its submittals to the Commission, the notice of self-certification or Commission order certifying the qualifying status of the facility may no longer be relied upon. At that point, if the facility continues to conform to the Commission's qualifying criteria under this part, the cogenerator or small power producer may file either a notice of self-recertification of qualifying status pursuant to the requirements of paragraph (a) of this section, or an application for Commission recertification pursuant to the requirements of paragraph (b) of this section, as appropriate.

(ii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a facility that has been certified under paragraph (b) of this section, if the facility fails to conform to any of the Commission's qualifying facility criteria under this part.

(iii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a self-certified or self-recertified qualifying facility if it finds that the self-certified or self-recertified qualifying facility does not meet the applicable requirements for qualifying facilities.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under paragraph (b) of this section, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status. This application for Commission recertification of qualifying status should be submitted in accordance with paragraph (b) of this section.

■ 6. Amend § 292.304 by:

■ a. Adding paragraph (b)(6) through (8); and

■ b. Revising paragraphs (d) and (e).

The additions and revisions read as follows:

§ 292.304 Rates for purchases.

* * * * *

(b) *Relationship to avoided costs.* * * *

(6) *Locational Marginal Price.* There is a rebuttable presumption that a state regulatory authority or nonregulated electric utility may use a Locational Marginal Price as a rate for as-available qualifying facility energy sales to electric utilities located in a market defined in § 292.309(e), (f), or (g).

(7) *Competitive Price.* A state regulatory authority or nonregulated electric utility may use a Competitive Price as a rate for as-available qualifying facility energy sales to electric utilities located outside a market defined in § 292.309(e), (f), or (g). A Competitive Price may be either a Market Hub Price or a Combined Cycle Price, determined as follows:

(i) A *Market Hub Price* is a price established at a liquid market hub which a state regulatory authority or nonregulated electric utility determines represents an appropriate measure of the electric utility's avoided cost for as-available energy, and is a hub to which the electric utility has reasonable access, based on an evaluation by the state regulatory authority or nonregulated electric utility of the relevant factors, including but not limited to the following:

(A) Whether the hub is sufficiently liquid that prices at the hub represent a competitive price;

(B) Whether prices developed at the hub are sufficiently transparent;

(C) Whether the electric utility has the ability to deliver power from such hub to its load, even if its load is not directly connected to the hub; and

(D) Whether the hub represents an appropriate market to derive an energy price for the electric utility's purchases from the relevant qualifying facility given the electric utility's physical proximity to the hub or other factors.

(ii) A *Combined Cycle Price* is a price determined pursuant to a formula established by a state regulatory authority or nonregulated electric utility using published natural gas price indices, a proxy heat rate, and variable operations and maintenance costs for an efficient natural gas combined-cycle generating facility. Before establishing such a formula rate, a state regulatory authority or nonregulated electric utility must determine that the resulting Combined Cycle Price represents an appropriate measure of the purchasing electric utility's avoided cost for energy, based on its evaluation of the relevant factors, including but not limited to the following:

(A) Whether the cost of energy from an efficient natural gas combined cycle generating facility represents a reasonable measure of a competitive price in the purchasing electric utility's region;

(B) Whether natural gas priced pursuant to particular proposed natural gas price indices would be available in the relevant market;

(C) Whether there should be an adjustment to the natural gas price to appropriately reflect the cost of transporting natural gas to the relevant market; and

(D) Whether the proxy heat rate used in the formula should be updated regularly to reflect improvements in generation technology.

(8) *Competitive Solicitation Price.* (i) A state regulatory authority or nonregulated electric utility may use a price determined pursuant to a competitive solicitation process to establish qualifying facility energy and/or capacity rates for sales to electric utilities, provided that such competitive solicitation process is conducted pursuant to procedures ensuring the solicitation is conducted in a transparent and non-discriminatory manner including, but not limited to, the following:

(A) The solicitation process is an open and transparent process that includes, but is not limited to, providing equally to all potential bidders substantial and meaningful information regarding transmission constraints, levels of congestion, and interconnections, subject to appropriate confidentiality safeguards;

(B) Solicitations are open to all sources, to satisfy that electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity;

(C) Solicitations are conducted at regular intervals;

(D) Solicitations are subject to oversight by an independent administrator; and

(E) Solicitations are certified as fulfilling the above criteria by the relevant state regulatory authority or nonregulated electric utility through a post-solicitation report.

(ii) To the extent that the electric utility procures all of its capacity, including capacity resources constructed or otherwise acquired by the electric utility, through a competitive solicitation process conducted pursuant to paragraph (b)(8)(i) of this section, the electric utility shall be presumed to have no avoided capacity costs unless and until it determines to acquire capacity outside of such competitive solicitation process. However, the electric utility shall nevertheless be required to purchase energy from qualifying small power producers and qualifying cogeneration facilities.

(iii) To the extent that the electric utility does not procure all of its capacity through a competitive solicitation process conducted pursuant to paragraph (b)(8)(i) of this section, then there shall be no presumption that the electric utility has no avoided capacity costs.

* * * * *

(d) *Purchases "as available" or pursuant to a legally enforceable obligation.* (1) Each qualifying facility shall have the option either:

(i) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the electric utility's avoided cost for energy calculated at the time of delivery; or

(ii) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, except as provided in paragraph (d)(2) of this section, be based on either:

(A) The avoided costs calculated at the time of delivery; or

(B) The avoided costs calculated at the time the obligation is incurred.

(iii) The rate for delivery of energy calculated at the time the obligation is incurred may be based on estimates of the present value of the stream of revenue flows of future locational marginal prices, or Competitive Prices during the anticipated period of delivery.

(2) Notwithstanding paragraph (d)(1)(ii)(B) of this section, a state regulatory authority or nonregulated electric utility may require that rates for purchases of energy from a qualifying facility pursuant to a legally enforceable obligation vary through the life of the obligation, and be set at the electric utility's avoided cost for energy calculated at the time of delivery.

(3) *Obtaining a legally enforceable obligation.* A qualifying facility must demonstrate commercial viability and financial commitment to construct its facility pursuant to criteria determined by the state regulatory authority or nonregulated electric utility as a prerequisite to a qualifying facility obtaining a legally enforceable obligation. Such criteria must be objective and reasonable.

(e) *Factors affecting rates for purchases.* (1) A state regulatory authority or nonregulated electric utility may establish rates for purchases of energy from a qualifying facility based on a purchasing electric utility's locational marginal price calculated by the applicable market defined in § 292.309(e), (f), or (g), or the purchasing electric utility's applicable Competitive Price. Alternatively, a state regulatory authority or nonregulated electric utility may establish rates for purchases of energy and/or capacity from a qualifying facility based on a Competitive Solicitation Price. To the extent that capacity rates are not set pursuant to this section, capacity rates shall be set pursuant to subsection (2).

(2) To the extent that a state regulatory authority or nonregulated electric utility does not set energy and/or capacity rates pursuant to paragraph (e)(1) of this section, the following factors shall, to the extent practicable, be taken into account in determining rates for purchases from a qualifying facility:

(i) The data provided pursuant to § 292.302(b), (c), or (d), including State review of any such data;

(ii) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(A) The ability of the electric utility to dispatch the qualifying facility;

(B) The expected or demonstrated reliability of the qualifying facility;

(C) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;

(D) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the electric utility's facilities;

(E) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(F) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(G) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

(iii) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2)(ii) of this section, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(iv) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity.

* * * * *

■ 7. Amend § 292.309 by revising paragraphs (c), (d), (e), and (f) to read as follows:

§ 292.309 Termination of obligation to purchase from qualifying facilities.

* * * * *

(c) For purposes of paragraphs (a)(1), (2) and (3) of this section, with the exception of paragraph (d) of this section, there is a rebuttable presumption that a qualifying facility has nondiscriminatory access to the market if it is eligible for service under a Commission-approved open access transmission tariff or Commission-filed reciprocity tariff, and Commission-approved interconnection rules.

(1) If the Commission determines that a market meets the criteria of paragraphs (a)(1), (2) or (3) of this section, and if a qualifying facility in the relevant market is eligible for service under a Commission-approved open access transmission tariff or Commission-filed reciprocity tariff, a qualifying facility may seek to rebut the presumption of access to the market by demonstrating, *inter alia,* that it does not have access to the market because of operational characteristics or transmission constraints.

(2) For purposes of paragraphs (a)(1), (2), and (3) of this section, a qualifying small power production facility with a capacity between 5 megawatts and 20 megawatts may additionally seek to rebut the presumption of access to the market by demonstrating that it does not have access to the market in light of consideration of other factors, including, but not limited to:

(i) Specific barriers to connecting to the interstate transmission grid, such as excessively high costs and pancaked delivery rates;

(ii) Unique circumstances impacting the time or length of interconnection studies or queues to process the small power production facility's interconnection request;

(iii) A lack of affiliation with entities that participate in the markets in paragraphs (a)(1), (2), and (3) of this section;

(iv) The qualifying small power production facility has a predominant purpose other than selling electricity and should be treated similarly to qualifying cogeneration facilities;

(v) The qualifying small power production facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(vi) The qualifying small power production facility lacks access to markets due to transmission constraints. The qualifying small power production facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

(d)(1) For purposes of paragraphs (a)(1), (2), and (3) of this section, there is a rebuttable presumption that a qualifying cogeneration facility with a capacity at or below 20 megawatts does not have nondiscriminatory access to the market.

(2) For purposes of paragraphs (a)(1), (2), and (3) of this section, there is a rebuttable presumption that a qualifying small power production facility with a capacity at or below 5 megawatts does not have nondiscriminatory access to the market.

(3) Nothing in paragraphs (d)(1) through (3) of this section affects the rights the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on or before December 31, 2020, to purchase electric energy or capacity from or to sell electric energy or capacity to a small power production facility between 5 megawatts and 20 megawatts under this Act (including the right to recover costs of purchasing electric energy or capacity).

(4) For purposes of implementing paragraphs (d)(1) and (2) of this section, the Commission will not be bound by the standards set forth in § 292.204(a)(2).

(e) Midcontinent Independent System Operator, Inc. (MISO), PJM Interconnection, L.L.C. (PJM), ISO New England Inc. (ISO–NE), and New York Independent System Operator, Inc. (NYISO) qualify as markets described in paragraphs (a)(1)(i) and (ii) of this section, and there is a rebuttable presumption that small power production facilities with a capacity greater than 5 megawatts and cogeneration facilities with a capacity greater than 20 megawatts have nondiscriminatory access to those markets through Commission-approved open access transmission tariffs and interconnection rules, and that electric utilities that are members of such regional transmission organizations or independent system operators (RTO/ISOs) should be relieved of the obligation to purchase electric energy from the qualifying facilities. A qualifying facility may seek to rebut this presumption by demonstrating, *inter alia,* that:

(1) The qualifying facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(2) The qualifying facility lacks access to markets due to transmission constraints. The qualifying facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

(f) The Electric Reliability Council of Texas (ERCOT) qualifies as a market described in paragraph (a)(3) of this section, and there is a rebuttable presumption that small power production facilities with a capacity greater than five megawatts and cogeneration facilities with a capacity greater than 20 megawatts have nondiscriminatory access to that market through Public Utility Commission of Texas (PUCT) approved open access protocols, and that electric utilities that operate within ERCOT should be relieved of the obligation to purchase electric energy from the qualifying facilities. A qualifying facility may seek to rebut this presumption by demonstrating, *inter alia,* that:

(1) The qualifying facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(2) The qualifying facility lacks access to markets due to transmission constraints. The qualifying facility may show that it is located in an area where persistent transmission constraints in

effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

* * * * *

PART 375—THE COMMISSION

■ 8. The authority citation for part 375 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 42 U.S.C. 7101–7352.

■ 9. Amend § 375.302 by revising paragraph (v) to read as follows:

§ 375.302 Delegations to the Secretary.

* * * * *

(v) Toll the time for action on requests for rehearing, and toll the time for action on protested self-certifications and self-recertifications of qualifying facilities.

The following will not appear in the Code of Federal Regulations.

UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION

	Docket Nos.
Qualifying Facility Rates and Requirements	RM19–15–000
Implementation Issues Under the Public Utility Regulatory Policies Act of 1978	AD16–16–000

(Issued July 16, 2020)

GLICK, Commissioner, *dissenting in part:*

1. I dissent in part from today's final rule (Final Rule [1]) because it effectively guts the Commission's implementation of the Public Utility Regulatory Policies Act (PURPA).[2] The Commission's basic responsibilities under PURPA are three-fold: (1) To encourage the development of qualifying facilities (QFs); (2) to prevent discrimination against QFs by incumbent utilities; and (3) to ensure that the resulting rates paid by electricity customers remain just and reasonable, in the public interest, and do not exceed the incremental costs to the utility of alternative energy.[3] I do not believe that today's Final Rule satisfies those responsibilities. Instead, the Final Rule raises as many questions as it answers, not least of which is the long-term legal viability of an approach that does so little to encourage QF development.

2. Although I have concerns about many of the individual changes imposed by the Final Rule,[4] I remain, on a broader level, dismayed that the Commission is attempting to accomplish via administrative fiat what Congress has repeatedly declined to do via legislation. I am especially disappointed because Congress expressly provided the Commission with a different avenue for ''modernizing'' our administration of PURPA. The Energy Policy Act of 2005 gave the Commission the authority to excuse utilities from their obligations under PURPA where QFs have non-discriminatory access to competitive wholesale markets.[5] Had we pursued reforms based on those provisions, rather than gutting our longstanding regulations, I believe we could have reached a durable, consensus solution that would ultimately have done more for all interested parties, even those that may celebrate the immediate effects of this Final Rule.

I. PURPA's Continuing Relevance Is an Issue for Congress To Decide

3. This proceeding began with a bang. My colleagues championed the proposed rule as a ''truly significant'' action that would fundamentally overhaul the Commission's implementation of PURPA.[6] And so it was. The NOPR proposed to alter almost every significant aspect of the Commission's PURPA regulations, thereby transforming the foundation on which the Commission had carried out its statutory responsibility to ''encourage'' the development of QFs.

4. I dissented from the NOPR in large part because I believe that it is not the Commission's role to sit in judgment of a duly enacted statute and determine whether it has outlived its usefulness. As I explained, ''almost from the moment PURPA was passed, Congress began to hear many of the arguments being used today to justify scaling the law back.'' [7] Congress, however, has seen fit to significantly amend PURPA only once in its more-than-forty-year lifespan. As part of the Energy Policy Act of 2005, Congress amended PURPA, leaving in place the law's basic framework, while adding a series of provisions that allowed the Commission to excuse utilities from its requirements in regions of the country with sufficiently competitive wholesale energy markets.[8] And while Congress considered numerous proposals to further reform the law, it never saw fit to act on them.[9] Against that background, I could not support my colleagues' willingness to ''remove[ ] an important debate from the halls of Congress and isolate[] it within the Commission.'' [10] Whatever your position on PURPA—and I recognize views vary widely—''what should concern all of us is that resolving these sorts of questions by regulatory edict rather than congressional legislation is neither a durable nor desirable approach for developing energy policy.'' [11]

5. Today's Final Rule retreats from much of the original rationale used to support the NOPR, but the effect is the same: The Commission is administratively gutting PURPA. Make no mistake, although the Commission has dropped much of the NOPR preamble's opening screed against PURPA's continuing relevance, this Final Rule is a full-throated endorsement of the conclusion that PURPA has outlived its usefulness. And while walking back the argument that PURPA is antiquated may reduce the risk that this Final Rule is overturned on appeal, that does not change the fact that today's Final Rule usurps what should be Congress's proper role.

6. Throughout this proceeding, the Commission has been quick to point to Congress's directive to from time to time

[1] *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Order No. 872, 172 FERC ¶ 61,041 (2020) (Final Rule).

[2] Public Law 95–617, 92 Stat. 3117 (1978).

[3] *See* 16 U.S.C. 824a–3(a)–(b) (2018).

[4] Notwithstanding those concerns, I support certain aspects of this Final Rule. First and foremost, I agree with the update to the ''one-mile'' rule, which prior to today provided an irrebuttable presumption that resources located more than one mile apart are separate QFs. In addition, I support requiring that QFs demonstrate commercial viability before securing a legally enforceable obligation with the relevant utility. Finally, I also support the revision to allow stakeholders to protest a QF's self-certification.

[5] Public Law 109–58, 1253, 119 Stat. 594 (2005).

[6] Sept. 2019 Commission Meeting Tr. at 8.

[7] *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Notice of Proposed Rulemaking, 168 FERC ¶ 61,184 (2019) (NOPR) (Glick, Comm'r, dissenting in part at P 3).

[8] Public Law 109–58, 1253, 119 Stat. 594 (2005).

[9] *See* Solar Energy Industries Association (SEIA) Comments at 11.

[10] NOPR, 168 FERC ¶ 61,184 (Glick, Comm'r, dissenting in part at P 4).

[11] *Id.*

amend our regulations implementing PURPA.[12] This Final Rule, however, is a wholesale overhaul of the Commission's PURPA regulations that reflects a deep skepticism of the need for the law we are charged with implementing. I doubt that is what Congress had in mind when it gave us responsibility for periodically updating our implementing regulations.

II. The Commission's Proposed Reforms Are Inconsistent With Our Statutory Mandate

7. PURPA directs the Commission to adopt such regulations as are ''necessary to encourage'' QFs,[13] including by establishing rates for sales by QFs that are just and reasonable and by ensuring that such rates ''shall not discriminate'' against QFs.[14] As explained below, many of the changes adopted by the Commission in the Final Rule fail to meet that standard. In addition, many of the reforms are unsupported—or, in many cases, contradicted—by the evidence in the record.[15] Accordingly, I believe today's Final Rule is not just poor public policy, but also arbitrary and capricious agency action.

A. Avoided Cost

8. The Final Rule adopts two fundamental changes to how QF rates are determined. First, and most importantly, it eliminates the requirement that a utility must afford a QF the option to enter a contract at a rate for energy that is either fixed for the duration of the contract or determined at the outset—*e.g.,* based on a forward curve reflecting estimated prices over the term of the contract.[16] Second, it presumptively allows states to set the rate for as-available energy at the relevant locational marginal price (LMP) or a similarly ''competitive market price.'' [17] The record in this proceeding does not support either of those changes.

[12] Final Rule, 172 FERC ¶ 61,041 at PP 24, 48, 54, 67, 296, 628; NOPR, 168 FERC ¶ 61,184 at PP 4, 16, 29, 155.

[13] A QF is a cogeneration facility or a small power production facility. *See* 18 CFR 292.101(b)(1) (2019).

[14] 16 U.S.C. 824a–3(a)–(b).

[15] *Genuine Parts Co.* v. *EPA,* 890 F.3d 304, 312 (D.C. Cir. 2018) (''[A]n agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation.'') (citations omitted); *id.* (''Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review.'' (quoting *Int'l Union, United Mine Workers* v. *Mine Safety & Health Admin.,* 626 F.3d 84, 94 (D.C. Cir. 2010)).

[16] Final Rule, 172 FERC ¶ 61,041 at P 253.

[17] *Id.* PP 151, 189, 211.

i. Elimination of Fixed Energy Rate

9. Prior to today's Final Rule, a QF generally had two options for selling its output to a utility. Under the first option, the QF could sell its energy on an as-available basis and receive an avoided cost rate calculated at the time of delivery. This is generally known as the as-available option. Under the second option, a QF could enter into a fixed-duration contract at an avoided cost rate that was fixed either at the time the QF established a legally enforceable obligation (LEO) or at the time of delivery. This is generally known as the contract option. The ability to choose between both types of sale options played an important role in fostering the development of a variety of QFs. For example, the as-available option provided a way for QFs whose principal business was not generating electricity, such as industrial cogeneration facilities, to monetize their excess electricity generation. The contract option, by contrast, provided QFs who were principally in the business of generating electricity, such as small renewable electricity generators, a stable option that would allow them to secure financing. Together, the presence of these two options allowed the Commission to satisfy its statutory mandate to encourage the development of QFs and ensured that the rates they received were non-discriminatory.

10. The Final Rule eliminates the requirement that states provide a contract option that includes a fixed energy rate.[18] Prior to this proceeding, the Commission recognized time and again that fixed-price contracts play an essential role in the financing of QF facilities, making them a necessary element of any effort to encourage QF development, at least in certain regions of the country.[19] In addition, fixed-price contracts have helped prevent discrimination against QFs by ensuring that they are not structurally disadvantaged relative to vertically integrated utilities that are guaranteed to recover the costs of their prudently incurred investments through retail rates.[20]

11. If anything, the record before us confirms the continuing importance of fixed-price contracts. Numerous entities with experience financing and developing QFs explain that a fixed revenue stream of some sort is necessary to obtain the financing needed to develop a new QF.[21] The fixed revenue stream is particularly important because QFs are overwhelmingly developed outside of the organized markets, meaning that developers cannot necessarily obtain hedging contracts to create the revenue predictability needed to obtain financing.[22] And that is why the Final Rule's parade of statistics about the growth of renewables misses the point.[23] It is true that, primarily in

[18] *Id.* P 253.

[19] *See, e.g., Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880, *order on reh'g sub nom.* Order No. 69–A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part vacated in part, Am. Elec. Power Serv. Corp.* v. *FERC,* 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst.* v. *Am. Elec. Power Serv. Corp.,* 461 U.S. 402 (1983). (justifying the rule on the basis of ''the need for certainty with regard to return on investment in new technologies''); NOPR, 168 FERC ¶ 61,184 at P 63 (''The Commission's justification for allowing QFs to fix their rate at the time of the LEO for the entire term of a contract was that fixing the rate provides certainty necessary for the QF to obtain financing.''); *Windham Solar LLC,* 157 FERC ¶ 61,134, at P 8 (2016).

[20] *See, e.g.,* ELCON Comments at 21–22 (''More varible avoided cost rates will result in unintended consequences that result in less competitive conditions and may leave consumers worse off, as utility self-builds do not face the same market risk exposure. Pushing more market risk to QFs while utility assets remain insulated from markets creates an investment risk asymmetry. This puts QFs at a competitive disadvantage''); South Carolina Solar Business Association Comments at 8 (''[A]s-available rates for QFs in vertically-integrated states therefore discriminate against QFs by requiring QFs to enter into contracts at substantially and unjustifiably different terms than incumbent utilities.''); Southern Environmental Law Center Supplement Comments, Docket No. AD16–16–000, at 6–8 (Oct. 17, 2018) (explaining that vertically integrated utilities in Indiana, Alabama, Virginia and Tennessee only offer short-term rates to QFs); sPower Comments at 13; *see also* Statement of Travis Kavulla, Docket No. AD16–16–000, at 2 (June 29, 2016).

[21] *See, e.g.,* SEIA Comments at 29; North Carolina Attorney General's Office Comments at 5; Con Ed Development Comments at 3; South Carolina Solar Business Association Comments at 6; sPower Comments at 11; Resources for the Future Comments at 6–7.

[22] *See, e.g.,* SEIA Comments at 29–30 (''As both Mr. Shem and Mr. McConnell explain, financial hedge products are not available outside of ISO/RTO markets.''); Resources for the Future Comments at 6–7 (''[W]hile hedge products do support wind and solar project financing, they would not be suited for most QF projects. To hedge energy prices, wind projects have used three products: bank hedges, synthetic power purchase agreements (synthetic PPAs), and proxy revenue swaps . . . . From U.S. project data for 2017 and 2018, the smallest wind project securing such a hedge was 78 MW, and most projects were well over 100 MW. *Additionally, as hedges rely on wholesale market access and liquid electricity trading, all of the projects were in ISO regions.*'') (emphasis added).

[23] Harvard Electricity Law Comments at 22 (referring to a similar statistical parade in the NOPR and observing that ''[a]ll [the Commission] can actually conclude from this loosely connected array of facts, data, and speculation is that some non-QF generators are developed with variable-rate energy contracts. That unremarkable conclusion has no bearing on whether repeal will discourage QF development by 'materially affect[ing] the ability of QFs to obtain financing.' '' (citing NOPR, 168 FERC ¶ 61,184 at P 69)); SEIA Comments at 30.

organized markets, independently developed renewables are able to develop without the entitlement to a fixed-price contract for energy from the relevant utility.[24] But the growth of renewables and their financeability in organized markets tells us almost nothing about what is required to sufficiently encourage QFs outside those markets.[25]

12. It would be one thing to eliminate the requirement to provide a fixed-price option for energy rates for QFs that are entitled to a fixed price for capacity. Although reasonable minds might disagree about whether a fixed price for capacity alone is sufficient encouragement, combining one with a variable price for energy would provide at least some guaranteed revenue stream with which to finance new development.[26] Indeed, much of the Commission's justification for eliminating the fixed-price contract option for energy rests on the availability of a fixed-price contract option for capacity.[27] Commission precedent, however, permits utilities to offer a capacity rate of zero to QFs when the utility does not need incremental capacity.[28] That means that, as a result of this Final Rule, QF developers will face the very real prospect of not receiving any fixed revenue stream, whether for energy or capacity, in areas where they also cannot secure hedging products or other mechanisms needed to finance a new QF.[29] It is hard for me to understand how the Commission can, with a straight face, claim to be encouraging QF development while at the same time eliminating the conditions necessary to develop QFs in the regions where they are being built.[30]

13. The Commission sidesteps this point in responding that PURPA does not require that QFs be financeable. That is true in a literal sense; nothing in PURPA directs the Commission to ensure that at least some QFs be financeable. But it does require the Commission to encourage their development, which we have previously equated with financeability.[31] If the Commission is going to abandon that standard, it must then explain why what is left of its regulations provides the requisite encouragement—an explanation that is lacking from this Final Rule, notwithstanding the Commission's repeated assertions to the contrary.

14. The Commission also does not sufficiently explain how eliminating the fixed-price contract requirement is consistent with PURPA's requirement that rates ''shall not discriminate against'' QFs.[32] Vertically integrated utilities effectively receive guaranteed fixed-price contracts through their rights to recover prudently incurred investments. The equivalent right to receive fixed-price contracts has to date proved an integral element of the Commission's ability to satisfy PURPA's prohibition on discriminatory rates.[33]

15. And yet this Final Rule fails to explain how eliminating the fixed-price option is consistent with that prohibition or, moreover, how permitting QFs to receive variable contract rates while vertically integrated utilities receive fixed ones is consistent with the Commission's obligation to promote QFs.[34] Instead, the Commission notes that, through so-called fuel adjustment clauses, vertically integrated utilities' rates change as the price of fuel changes.[35] The idea that those clauses, which ensure that utilities recover a specific variable cost (*i.e.,* their cost of fuel), is the same thing as having your entire revenue exposed to variations in prevailing market conditions is hogwash. The presence of fuel adjustment clauses in no way suggests that vertically integrated utilities are subject to anything remotely close to the level of revenue variation contemplated in this Final Rule.

16. Finally, the Commission fails to explain why allegations of QF rates exceeding a utility's actual avoided cost requires us to abandon the Commission's long-held principles regarding certainty and financing.[36] As an initial matter, the Commission has recognized that QF rates may exceed actual avoided costs, but, at the same time, recognized that avoided cost rates might also turn out to be lower than the electric utility's avoided costs over the course of the contract. The Commission has reasoned that, ''in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out.'' [37] However, when presented with a couple allegations that avoided costs were overestimated,[38] the Commission now concludes that that possibility suggests it must abandon the fixed-energy rate

[24] *See* Final Rule, 172 FERC ¶ 61,041 at P 340 (''EIA data demonstrates that net generation of energy by non-utility owned renewable resources in the United States grew by almost 700% between 2005 and 2018.''). Although independent power producers, renewable or otherwise, within the RTO/ISO markets are not entitled to fixed price contracts for energy as a matter of law, they generally do rely on alternative tools, such as commodity hedges, to lock-in energy revenue streams. *See, e.g.,* EEI Comments at 36; sPower Comments at 12.

[25] In the logical leap of the year, the Commission notes that in some areas of the country, unspecified resources are developed with a fixed-price contract for capacity and a variable price for energy and, separately, that renewables have grown nationwide more than seven-fold between 2005 and 2018. Final Rule, 172 FERC ¶ 61,041 at P 340. From those disparate observations, the Commission concludes that ''renewable resources are able to acquire financing even without the right to require long-term fixed energy rates.'' *Id.* But nothing in the record suggests that that phenomenal growth in renewables was at all the result of that bifurcated contract structure. That, it should be clear, is not reasoned decisionmaking. *Cf. Nat'l Ass'n of Recycling Indus., Inc.* v. *Fed. Mar. Comm'n,* 658 F.2d 816, 820 n.10 (D.C. Cir. 1980) (''We do not want, after all, blithely to compare apples and oranges. Likewise, an agency should also avoid unavailing comparisons of nonsubstitutes.''); *see also* Commissioner Slaughter Comments at 4 (noting the ''widespread geographic differentiation'' in renewable energy progress and ''barriers to independent renewable energy-based power producers'').

[26] *See, e.g.,* SEIA Comments at 29 (''While securing financing based on an As-Available Energy rate and a fixed capacity rate may be a rare possibility in a few sub-markets across the country, as Mr. Shem explains, it certainly is not the case in any state that does not participate in an ISO/RTO market.'').

[27] *See* Final Rule, 172 FERC ¶ 61,041 at P 36 (''This assertion that the Commission has eliminated fixed rates for QFs is not correct . . . . The NOPR thus made clear: under the proposed revisions to § 292.304(d), a QF would continue to be entitled to a contract with avoided *capacity* costs calculated and fixed at the time the LEO is incurred.'') (internal quotation marks omitted); *id.* P 237 (''The Commission stated that these fixed capacity and variable energy payments have been sufficient to permit the financing of significant amounts of new capacity in the RTOs and ISOs.'').

[28] *See, e.g., id.* P 422 (citing to *City of Ketchikan, Alaska,* 94 FERC ¶ 61,293, at 62,061 (2001)).

[29] *See, e.g.,* Resources for the Future Comments at 6; SEIA Comments at 30; Southeast Public Interest Organizations Comments at 12.

[30] *See* Public Interest Organizations Comments at 10–11 (''Obviously, rules that have an effect of *discouraging* QFs cannot be 'necessary to' encouraging them.''); *see also* Massachusetts Attorney General Maura Healey Comments at 6 (''This action may reduce investor confidence and discourage future development. That outcome is a negative one for the Commonwealth and its ratepayers.'').

[31] *See, e.g.,* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 (justifying the rule on the basis of ''the need for certainty with regard to return on investment in new technologies''); NOPR, 168 FERC ¶ 61,184 at P 63 (''The Commission's justification for allowing QFs to fix their rate at the time of the LEO for the entire term of a contract was that fixing the rate provides certainty necessary for the QF to obtain financing.'').

[32] 16 U.S. Code § 824a–3(b)(2). Unlike provisions of the Federal Power Act, PURPA prohibits any discrimination against QFs, not just undue discrimination. *See* ELCON Comments at 21–22; South Carolina Solar Business Alliance Comments at 7–8; sPower Comments at 13.

[33] *See supra* n.20; Commissioner Slaughter Comments at 4.

[34] Public Interest Organizations Comments at 51 (''[L]imiting QFs to contracts providing no price certainty for energy values, while non-QF generation regularly obtains fixed price contracts and utility-owned generation receives guaranteed cost recovery from captive ratepayers, constitutes discrimination.'').

[35] Final Rule, 172 FERC ¶ 61,041 at P 122.

[36] *See supra* n.19.

[37] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[38] Final Rule, 172 FERC ¶ 61,041 at PP 265, 268.

contract altogether. The Commission, however, makes no effort to validate these allegations,[39] or assess whether the overestimations of avoided cost were, in fact, balanced out.[40] It is arbitrary and capricious to point to only half the picture in abandoning a forty-year-old principle.

ii. Rebuttable Presumption for Setting Avoided Cost at LMP and Similar Measures

17. I also do not support the Commission's decision to treat LMP or other ''competitive market prices'' as a presumptively reasonable measure of an as-available avoided cost for energy.[41] Liquid price signals can be useful and transparent inputs and ought to be *considered* in calculating an appropriate avoided-cost figure. But considering those price signals in setting avoided cost is not the same thing as presuming that LMP or similar measures are alone sufficient to establish avoided cost. Many regions of the country—often the same regions where the debates about PURPA are most heated—have not established sufficiently competitive markets. In these regions it is not clear from the record that the prices in, for example, a neighboring RTO, are a representative measure of a utility's avoided cost. In those less competitive markets, it simply does not make sense to presume that LMP or other ''competitive market prices'' are a representative measure of avoided cost, rather than one of many criteria that should go into that determination.[42]

18. For similar reasons, I share the concern of many commenters that short-term or spot prices, such as LMP, may not reflect the long-term marginal energy costs avoided by purchasing utilities, especially outside of organized markets.[43] Although the Commission revises the NOPR's *per se* rule to be a rebuttable presumption, it nevertheless plows ahead with the conclusion that LMP, and similar measures, reflect a utility's avoided cost of energy. Where there is good reason to believe that those measures do not actually reflect the long-term value of energy that they are supposed to represent, it makes no sense to put the burden on QFs to prove the point,[44] rather than leaving the burden with the proponents of using such measures.

19. The Commission's presumptive approval of LMP and similar measures is even more problematic when combined with the decision to allow utilities to eliminate the fixed-price contract option. Following this Final Rule, QFs may be reduced to relying solely on some synthetic and highly variable measure of what spot prices *should* be in a competitive market based on gas prices and heat rates, all while the utilities whose costs the QF is avoiding recovers an effectively guaranteed rate potentially in excess of this representative ''competitive market price.'' I am not persuaded that this approach will satisfy our obligation to encourage QFs and to do so using rates that are non-discriminatory across all regions of the country.

B. Rebuttable Presumption 20 MW to 5 MW

20. Following the Energy Policy Act of 2005, the Commission established a rebuttable presumption that QFs with a capacity greater than 20 MW operating in RTOs and ISOs have non-discriminatory access to competitive markets, eliminating utilities' must-purchase obligation from those resources.[45] The Final Rule reduces the threshold for that presumption from 20 MW to 5 MW. [46] That is an improvement over the NOPR, which—without any support whatsoever—proposed to lower that threshold to 1 MW.[47] But, even so, the reduced 5 MW threshold is unsupported by the record and inadequately justified in today's Final Rule.

21. When it originally established the 20 MW threshold, the Commission pointed to an array of barriers that prevented resources below that level from having truly non-discriminatory access to RTO/ISO markets. Those barriers included complications associated with accessing the transmission system through the distribution system (a common occurrence for such small resources), challenges with reaching distant off-takers, as well as ''jurisdictional differences, pancaked delivery rates, and additional administrative procedures'' that complicate those resources' ability to participate in those markets on a level playing field.[48] In just the last few years, the Commission has recognized the persistence of those barriers ''that gave rise to the rebuttable presumption that smaller QFs lack nondiscriminatory access to markets.'' [49]

22. Nevertheless, the Final Rule abandons the 20 MW threshold based on the conclusory assertion that ''it is reasonable to presume that access to RTO/ISO markets has improved'' and it is, therefore, ''appropriate to update the presumption.'' [50] No doubt markets have improved. But a borderline-truism about maturing markets does not explain how the barriers arrayed against small resources have dissipated, why it is reasonable to ''presume'' that the remaining barriers do not inhibit non-discriminatory access, or why 5 MW is

[39] *Id.* PP 291, 293.

[40] The Commission is quick to point to ''the precipitous decline in natural gas prices'' starting in 2008 that may have caused QF contracts fixed prior to that period to underestimate the actual cost of energy. *See, e.g.,* Final Rule, 172 FERC ¶ 61,041 at P 287). However, PURPA has been in place for forty years, and the Commission does not wrestle with the magnitude of potential savings conveyed to consumers from the fixed-price energy contracts that locked-in low rates for consumers during the decades prior when natural gas prices were several times higher. *See* Energy Information Administration Total Energy, tbl. 9.10 (last viewed July 15, 2020), *https://www.eia.gov/totalenergy/data/browser/.*

[41] Final Rule, 172 FERC ¶ 61,041 at PP 151, 189, 211.

[42] Congress itself seems to have contemplated that states would not rely solely on spot market prices when establishing avoided cost. H.R. Rep. No. 95–1750, at 7833 (1978) (''In interpreting the term 'incremental cost of alternative energy,' the conferees expect that the Commission and the states may look beyond the cost of alternative sources which are instantaneously available to the utility.'').

[43] Final Rule, 172 FERC ¶ 61,041 at n.163; Hydro Comments at 11; Southeast Public Interest Organizations Comments at 19; NIPPC, CREA, REC, and OSEIA Comments at 52, 55; Union of Concerned Scientists Comments at 6. Take, for example, the Commission's approval of the Mid-Columbia market hub price as presumptively reflecting a utility's avoided cost for energy. *See* Final Rule, 172 FERC ¶ 61,041 at PP 180, 189. Notwithstanding explicit support for this approach from the regulated utility industry, the Washington Utilities and Transportation Commission which, when addressing Puget Sound Energy's plan to increase wholesale purchases from the Mid-Columbia market ''liquid hub'' to 1,600 MW, expressed a concern about the regulated utility's overreliance on such wholesale market pricing and directed them to pursue an alternative plan to eliminate this ''excessive risk.'' That is the exact type of tension conveyed in the record—i.e, that such competitive market prices may not accurately reflect a utility's avoided cost, as approved by regulators. *See* Washington UTC, *Acknowledgment Letter Attachment, Puget Sound Energy's 2017 Electric and Natural Gas Integrated Resource Plan,* Wash. UTC Docket Nos. UE–160918, UG–160919 (Revised June 19, 2018); *see* NIPPC, CREA, REC, and OSEIA Comments at 56.

[44] Final Rule, 172 FERC ¶ 61,041 at P 152.

[45] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, 117 FERC ¶ 61,078, at P 72 (2006), *order on reh'g,* Order No. 688–A, 119 FERC ¶ 61,305 (2007), *aff'd sub nom. Am. Forest & Paper Ass'n* v. *FERC,* 550 F.3d 1179 (D.C. Cir. 2008); *see* 16 U.S.C. § 824a–3(m).

[46] Final Rule, 172 FERC ¶ 61,041 at P 625.

[47] NOPR, 168 FERC ¶ 61,184 at P 126.

[48] Order No. 688–A, 119 FERC ¶ 61,305 at PP 96, 103.

[49] *E.g., N. States Power Co.,* 151 FERC ¶ 61,110, at P 34 (2015).

[50] Final Rule, 172 FERC ¶ 61,041 at P 629 (''Over the last 15 years, the RTO/ISO markets have matured, market participants have gained a better understanding of the mechanics of such markets and, as a result, we find that it is reasonable to presume that access to the RTO/ISO markets has improved and that it is appropriate to update the presumption for smaller production facilities.'').

an appropriate new threshold for that presumption.

23. Instead of any such evidence, the Final Rule notes that the Commission uses the 5 MW as a demarcating line for other rules applying to small resources. Specifically, it points to the fact that resources below 5 MW can use a ''fast-track'' interconnection process, whereas larger ones must use the large generator interconnection procedures.[51] But the fact that the Commission used 5 MW as the cut off in another context hardly shows that it is the right cut off to use in this context.

24. Lacking substantial evidence to support the 5 MW threshold, the Commission falls back on a deferential standard of review.[52] But while judicial review of agency policymaking is deferential, it is not toothless. The same cases on which the Commission relies require that, when an agency's policy reversal ''rests upon factual findings that contradict those which underlay its prior policy,'' the agency must ''provide a more detailed justification than what would suffice for a new policy created on a blank slate.'' [53] That is because reasoned decisionmaking requires that, when an agency changes course, it must provide ''a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.'' [54] For the foregoing reasons, the Commission has failed to produce any such explanation, making its change of course arbitrary and capricious.

III. Environmental Review Under the National Environmental Policy Act

25. In contrast to the Commission's crowing over the significance of its PURPA overhaul, the Final Rule describes the changes adopted as merely corrective and clarifying in nature when it comes to conducting an environmental review.[55] In particular, the Commission contends that ''the changes adopted in this final rule are required to ensure continued future compliance of the PURPA Regulations with PURPA, based on the changed circumstances found by the Commission in this final rule.'' [56] In other words, because the Commission believes that the changes adopted are necessary to conform with the statute, they are mere corrective changes, which, in turn, qualifies them for the categorical exemption from any environmental review under NEPA, or so the argument goes.

26. But by that logic, any Commission action needed to comply with our various statutory mandates—whether ''just and reasonable'' or the ''public interest''—would be deemed corrective in nature and, therefore, excluded from environmental review. The Commission, however, fails to point to any evidence suggesting that is what the Council on Environmental Quality contemplated when it allowed for categorical exemptions.

IV. The Way To Revise PURPA Is To Create More Competition, Not Less

27. It didn't have to be this way. When Congress reformed PURPA in the 2005 Energy Policy Act amendments, it indicated an unmistakable preference for using market competition as the off-ramp for utilities seeking relief from their PURPA obligations.[57] Those reforms directed the Commission to excuse utilities from those obligations where QFs had non-discriminatory access to RTO/ISO markets or other sufficiently competitive constructs.[58]

28. This record contains numerous comments explaining how the Commission could use those amendments as a way to ''modernize'' PURPA in a manner that both promotes *actual* competition and reflects Congress's unambiguous intent.[59] For example, in a white paper released prior to the NOPR, the National Association of Regulatory Utility Commissioners (NARUC) urged the Commission to give meaning to the 2005 amendments by establishing criteria by which a vertically integrated utility outside of an RTO or ISO could apply to terminate the must-purchase obligation if it conducts sufficiently competitive solicitations for energy and capacity.[60] Other groups, including representatives of QF interests, submitted additional comments on how an approach along those lines might work.[61] Several parties commented on those proposals.[62]

It is a shame that the Commission has elected to administratively gut its long-standing PURPA implementation regime, rather than pursuing reform rooted in PURPA section 210(m), such as the NARUC proposal. Pursuing an option along those lines could have produced a durable, consensus solution to the issues before us. I continue to believe that the way to modernize PURPA is to promote real competition, not to gut the provisions that the Commission has relied on for decades out of frustration that Congress has repeatedly failed to repeal the statute itself.

For these reasons, I respectfully dissent in part.

Richard Glick,

Commissioner.

[FR Doc. 2020–15902 Filed 9–1–20; 8:45 am]

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[51] *Id.* P 630.

[52] *Id.* P 637 (citing *FCC* v. *Fox Television,* 556 U.S. 502, 515 (2009), for the proposition that an agency ''need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.'').

[53] *Fox Television,* 556 U.S. at 515; Advanced Energy Economy Comments at 6.

[54] *Fox Television,* 556 U.S. at 516; Advanced Energy Economy Comments at 6–7.

[55] Under the National Environmental Policy Act (NEPA), the Commission must consider whether its action associated with rulemakings will have a significant impact on the environment. *See* 42 U.S.C. 4321 *et seq.*

[56] Final Rule, 172 FERC ¶ 61,041 at P 722.

[57] 16 U.S.C. § 824a–3(m).

[58] *See* Order No. 688, 117 FERC ¶ 61,078 at P 8.

[59] *See* Advanced Energy Economy Comments at 13; Industrial Energy Consumers Comments at 13–14; EPSA Comments at 16.

[60] National Association of Regulatory Utility Commissioners Supplemental Comments, Docket No. AD16–16–00, Attach. A, at 8 (Oct. 17, 2018); *id.* (proposing the Commission's *Edgar-Allegheny* criteria as a basis for evaluating whether a proposal was adequately competitive).

[61] *See, e.g.,* SEIA Supplemental Comments, Docket No. AD16–16–000 (Aug. 28, 2019).

[62] *See, e.g.,* Advanced Energy Economy Comments at 12; APPA Comments at 29; Colorado Independent Energy Comments at 7; ELCON Comments at 19; Public Interest Organizations Comments at 90; SEIA Comments at 24; Xcel Comments at 11.

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Part III

Department of Education

34 CFR Parts 600, 602 and 668

Distance Education and Innovation; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 600, 602 and 668

[Docket ID ED–2018–OPE–0076]

RIN 1840–AD38

Distance Education and Innovation

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the general, establishing eligibility, maintaining eligibility, and losing eligibility sections of the Institutional Eligibility regulations issued under the Higher Education Act of 1965, as amended (HEA), related to distance education and innovation. In addition, the Secretary amends the Student Assistance General Provisions regulations issued under the HEA.

DATES: *Effective date:* These regulations are effective July 1, 2021.

Implementation date: For the implementation dates of the included regulatory provisions, see the *Implementation Date of These Regulations* section of this document.

FOR FURTHER INFORMATION CONTACT: For information on these Distance Education and Innovation regulations, please contact Greg Martin at (202) 453–7535 or by email at *gregory.martin@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action: Through this regulatory action, the Department of Education (Department or we) amends the general, establishing eligibility, maintaining eligibility, and losing eligibility sections of the Institutional Eligibility regulations issued under the Higher Education Act of 1965, as amended (HEA), related to distance education and innovation. In addition, the Secretary amends the Student Assistance General Provisions regulations issued under the HEA. A more detailed summary can be found in the *Summary of the Major Provisions of This Regulatory Action* section.

Summary of the Major Provisions of This Regulatory Action

These regulations—

- Clarify that when calculating the number of correspondence students, a student is considered ''enrolled in correspondence courses'' if correspondence courses constitute 50 percent or more of the courses in which the student enrolled during an award year;
- Limit the requirement for the Secretary's approval to an institution's first direct assessment program at each credential level;
- Require institutions to report to the Secretary when they add a second or subsequent direct assessment program or establish a written arrangement for an ineligible institution or organization to provide more than 25 percent, but no more than 50 percent, of a program;
- Require prompt Department action on any application an institution submits to the Secretary seeking a determination that it qualifies as an eligible institution and on any reapplications for a determination that the institution continues to meet the requirements to be an eligible institution for HEA programs;
- Allow students enrolled in eligible foreign institutions to complete up to 25 percent of an eligible program at an eligible institution in the United States; and clarify that, notwithstanding this provision, an eligible foreign institution may permit a Direct Loan borrower to perform research in the United States for not more than one academic year if the research is conducted during the dissertation phase of a doctoral program;
- Clarify the conditions under which a participating foreign institution may enter into a written arrangement with an entity that does not participate in the title IV, HEA programs;
- Provide flexibility to institutions to modify their curricula at the recommendations of industry advisory boards and without relying on a traditional faculty-led decision-making process;
- Provide flexibility to institutions when conducting clock-to-credit hour conversions to eliminate confusion about the inclusion of homework time in the clock-hour determination.
- Clarify the eligibility requirements for a direct assessment program;
- Clarify, in consideration of the challenges to institutions posed by minimum program length standards associated with occupational licensing requirements, which vary from State to State, that an institution may demonstrate a reasonable relationship between the length of a program, as defined in 20 U.S.C. 1001(b)(1), and the entry-level requirements of the occupation for which that program prepares students;
- Clarify that a student is not considered to have withdrawn for purposes of determining the amount of title IV grant or loan assistance that the student earned if the student completes all the requirements for graduation for a non-term program or a subscription-based program, if the student completes one or more modules that comprise 49 percent or more of the number of days in the payment period, or if the institution obtains written confirmation that the student will resume attendance in a subscription-based or non-term program;
- Remove provisions pertaining to the use and calculation of the Net Present Value of institutional loans for the calculation of the 90/10 ratio for proprietary institutions, because the provisions are no longer applicable;
- Clarify the satisfactory academic progress requirements for non-term credit or clock programs, term-based programs that are not a subscription-based program, and subscription-based programs;
- Clarify that the Secretary will rely on the requirements established by an institution's accrediting agency or State authorizing agency to evaluate an institution's appeal of a final audit or program review determination that includes a finding about the institution's classification of a course or program as distance education, or the institution's assignment of credit hours;
- Clarify that the Secretary may deny an institution's certification or recertification application to participate in the title IV, HEA programs if an institution is not financially responsible or does not submit its audits in a timely manner; and
- Clarify that an institution is not financially responsible if a person who exercises substantial ownership or control over an institution also exercised substantial ownership or control over another institution that closed without executing a viable teach-out plan or agreement.

Costs and Benefits

As further detailed in the *Regulatory Impact Analysis,* the benefits of the regulations include—

(1) Updating and clarifying definitions of key terms related to distance education, correspondence courses, direct assessment, and competency-based programs to support the continued development of these innovative educational methods;

(2) Identifying a disbursement process for a subscription model for competency-based education so schools know how their students can access title IV aid for them, removing one potential barrier to growth of such programs; and

(3) Eliminating references to outdated technologies and making the regulations

flexible enough to accommodate further technological advancements.

Institutions that choose to offer these programs will benefit from the clarifications of terms and processes involved in establishing and administering direct assessment programs and reduced barriers to entry. While those currently offering such programs or competency-based courses will be best positioned to offer new programs in the near-term, we expect additional institutions to take advantage of the opportunities to offer new programs. While it is more a function of continued evolution in the postsecondary market, removing the barriers to entry will increase competition and some institutions could face a cost associated with losing students to those that offer appealing new programs.

The emphasis on flexibility, workforce development, and innovative educational approaches will be beneficial to students. Students, especially non-traditional students that find the existing competency-based or distance education programs to be appealing for various reasons, can benefit from flexible pacing and different models for assessing progress. Additionally, while competency-based models are a relatively new segment of the postsecondary market, some evidence suggests that the self-pacing model and other efforts by institutions to accommodate other scheduling demands students have, and to recognize knowledge and skills gained elsewhere, may allow students to graduate with lower debt.[1] However, it is not clear how students will respond, and whether more traditional students will also be attracted to competency based programs as more institutions develop them.

These regulations involve a significant amount of monetary transfers among the Federal Government, students, and institutions through increased Pell Grants and Federal student loans. The Department assumes students in the existing baseline who switch from one program to another will receive similar amounts of Federal aid, thus these changes will not have a significant budget impact. We estimate that new students attracted to new competency-based or other programs developed, in part, because of the clarity created by these regulations will have a net Federal budget impact over the 2020–2029 loan cohorts of $[-237] million in outlays in the primary estimate scenario and an increase in Pell Grant outlays of $1,021 million over 10 years, for a total net impact of $784 million. The Department provides additional detail related to budget estimates in the *Regulatory Impact Analysis* section and provides burden estimates in the *Paperwork Reduction Act* section.

Implementation Date of These Regulations: Section 482(c) of the HEA requires that we publish regulations affecting programs under title IV of the HEA in final form by November 1, prior to the start of the award year (July 1) to which they apply. However, that section also permits the Secretary to designate any regulation as one that an entity subject to the regulations may choose to implement earlier and the conditions for early implementation.

The Secretary is exercising her authority under section 482(c) of the HEA to designate the regulatory changes to regulations at title 34, parts 600, 602, and 668 of the Code of Federal Regulations included in this document for early implementation beginning on September 2, 2020, at the discretion of each institution, or each agency, as appropriate. The Department will implement the regulations as soon as possible after the implementation date and will publish a separate notice announcing the timing of the implementation. Otherwise, the final regulations included in this document are effective July 1, 2021.

Analysis of Comments and Changes

We developed these regulations through negotiated rulemaking. Section 492 of the HEA requires that, before publishing any proposed regulations to implement programs under title IV of the HEA, the Secretary must obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations, the Secretary must conduct a negotiated rulemaking process to develop the proposed regulations. The negotiated rulemaking committee reached consensus on the proposed regulations that we published on April 2, 2020. The Secretary invited comments on the proposed regulations by May 4, 2020, and 238 parties submitted comments. An analysis of the comments and of the changes in the regulations since publication of the notice of proposed rulemaking (NPRM)[2] follows.

We group major issues according to subject, with appropriate sections of the regulations referenced in parentheses. We discuss other substantive issues under the sections of the regulations to which they pertain. Generally, we do not address minor changes, technical changes, non-substantive changes, recommended changes that the law does not authorize the Secretary to make, or comments pertaining to operational processes. We also do not typically address comments pertaining to issues that were not within the scope of the NPRM.

General Support

Comments: Many commenters expressed support for the regulations and urged the Department not to modify them in a way that would weaken student protections. These commenters, including several students, expressed that they supported the regulation as a means of both reducing barriers to innovation and achieving greater responsiveness to workforce needs. Stating that the Department's regulations have not kept up with changing technologies, many commenters underscored the importance of these regulations considering the sudden move to distance education due to COVID–19.

Several students supporting the rule also urged instructors, institutions, accrediting agencies, or the Federal Government to do more to keep up with changing technologies, suggesting that the lessons learned during the pandemic would pay dividends in terms of better and more responsive academic programs after it is over. Several commenters said the regulations would reduce administrative burden, complement the changes made in the accreditation final rule,[3] and properly balance support for innovation with protections for students and/or taxpayers.

A few commenters also—

(1) praised the move to a focus on competencies and skills, rather than seat time;

(2) suggested the regulation would have the benefit of reducing costs for students;

(3) acknowledged that distance education does not necessarily make a course high- or low-quality but suggested that outdated technology and teaching methods can be to blame for lower outcomes;

(4) asserted the rule would protect students from bad actors, especially during the pandemic, and noted approvingly that even the American Bar Association, which is typically resistant to distance education, has been forced by the pandemic to embrace distance learning, along with other flexibilities; and

[1] *www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/.*

[2] 85 FR 18638.

[3] 84 FR 58834.

(5) suggested more innovative learning methods could close educational disparities and, by extension, wealth disparities, which could lead to more American innovation, including patents and other ideas that could benefit humanity.

However, one commenter expressed that while many will see the benefits of distance education after the pandemic is over, that commenter cautioned that some programs would not be appropriate to conduct fully online and that flexibility should remain for blended learning along with research to evaluate efficacy.

Other commenters supported the rule, generally noting that they— (1) appreciated the safeguards to ensure regular interaction, which would reduce the need for instructors to assign ''largely pointless work'' to satisfy the standard; (2) praised the clarity of the regulations, particularly the definitions; and (3) suggested the regulations will benefit the education system by allowing programs to be more specifically tailored to each student's individual needs.

One commenter said the rule would expand access to high-quality, affordable education options to a broader segment of students and that the proposals were generally fair to students, incentivized rather than punished innovation, focused quality assurance on outcomes, simplified eligibility requirements, and protected student and taxpayer investments.

One commenter supported the Department's effort to realign the roles and responsibilities of the regulatory triad in postsecondary education: The Federal Government, State authorizing agencies, and accrediting agencies.

Another commenter noted that institutions have been slow to adopt competency-based education (CBE) programs, often due to Federal regulations, and further suggested these programs could particularly benefit veterans and military-connected students and hoped institutions would develop new CBE programs because of these regulations.

Discussion: The Department thanks these commenters for their support for these regulations, including the greater clarity provided in a number of definitions. We appreciate hearing from student commenters who shared their perspectives, especially as they relate to the impact of the COVID–19 pandemic on their educational experience, and we appreciate their efforts to embrace innovation, and the optimism they expressed that these regulations will help them and students to follow. The Department agrees with many commenters that it is best to allow institutions to better serve students utilizing the latest technology and to do so now, given the challenges many students and institutions are facing.

The Department agrees that the proposed rule appropriately balances the need for innovation with strong protections for students and taxpayers. We also agree with the commenter who suggested that some disciplines may require at least some in-person instruction and noted that instructors, institutions, and accrediting agencies are in the best position to determine whether distance, blended, or ground-based instruction is most appropriate. The Department agrees that additional research could help it make even more informed decisions in the future. We also agree that veterans, military-connected students, and many other students can benefit from CBE programs and that more students will benefit from these programs because of these regulations.

Changes: None.

Comments: One commenter praised the negotiation process, calling it open, engaging, thorough, and fair, resulting in regulations that provide better clarity and protections for students. The commenter stated that the subcommittee, which made a complete set of recommendations to the main committee, engaged in active and informed interaction.

One commenter supported the Department's effort to select negotiators representing diverse perspectives. The commenter expressed gratitude for the significant time and effort negotiators spent on this rulemaking. This commenter and several others also praised the work of the negotiators and the Department in reaching consensus.

One commenter supported the consensus agreement and the proposed rule for clarifying and reaffirming the appropriate role of accrediting agencies in ensuring the integrity of distance education programs. The commenter also asked that the Department not include additional provisions that were not negotiated.

Discussion: We appreciate the support from commenters and agree that one benefit of these regulations is to ensure clarity of the role of accrediting agencies in matters related to distance education. We note that the Administrative Procedure Act (APA) does not permit us to include additional provisions that were not subject to the rulemaking effort.

Changes: None.

Comments: Many commenters urged the Department to maintain consensus language in the final rule and not make changes that would weaken protections for students.

Discussion: We appreciate these commenters' suggestion and agree that the final rule should maintain the consensus language to the greatest extent practicable. The Department is leaving most of the consensus language in the proposed rule unchanged. As discussed elsewhere, the Department is making some changes at the request of commenters, including to permit the use of asynchronous clock hours offered through distance education and subscription-based disbursement for programs not offered through direct assessment programs. As discussed in this document, the Department believes the benefits of these changes outweigh any risks. However, the Department believes the final rule will maintain the important protections for students presented in the NPRM.

Changes: None.

Comments: Several commenters acknowledged that the COVID–19 pandemic necessitates some flexibility in the short-term but greater oversight in the long-term regarding distance education.

Discussion: The Department believes, as detailed elsewhere, that the regulations appropriately consider both protections for consumers and taxpayers as well as the need for innovation. While we did not know during rulemaking sessions that a pandemic was in our future, these regulations address the needs of both institutions and students in response to COVID–19 and serve as additional evidence that the rulemaking effort resulted in a needed and meaningful modernization of our prior regulations. The Department also believes that there need not be a tradeoff between consumer protection and innovation.

Changes: None.

Comments: Several commenters supported many of the provisions of the proposed rule while suggesting that the lack of safeguards generally, or with regard to distance education in particular, may have downsides that necessitate strong consumer protections to protect students and some groups of students in particular (including veterans and military-connected students, low-income students, students of color, and those lacking academic preparation).

Additionally, several commenters suggested that proprietary institutions would be especially likely to treat students unfairly.

Discussion: The Department agrees that students should select programs that align well with their prior academic preparation, their learning style, and their lifestyle. Additionally, we believe that all educational programs must continue to have proper oversight by the Department, States, and accrediting agencies. While protections for all students are important, the benefits of a program should not be denied to some students simply because the program is not the right choice for others. The Department notes that the growth of adaptive learning and artificial intelligence tools in recent years have allowed institutions to provide more personalized academic supports, at scale, that may be even better than what would be available in a traditional classroom, particularly in traditional large lecture courses. These technologies may facilitate more regular and effective faculty-student interaction than a traditional classroom format enables.

The Department believes the enforcement of provisions protecting students is vital and should occur without regard to the tax status of the institution in question unless Congress directs the Department otherwise. The Department takes all allegations of harm to students seriously and does not condone improper conduct by any type of institution whether public, private non-profit, or proprietary.

Changes: None.

Comments: One commenter urged the Department to avoid provisions that would create unintended consequences for osteopathic clinical education programs, including students completing out-of-State clinical rotations. The commenter further requested that the Department avoid new financial and administrative burdens during the COVID–19 pandemic.

Discussion: The Department considered clinical education programs in this rulemaking as well as the accreditation rulemaking, which covered issues related to State authorization of distance education and are effective July 1, 2020. These distance education and innovation regulations become effective July 1, 2021, allowing institutions and others adequate time to plan for their implementation. Early implementation is optional. We do not anticipate that these regulations will create unique burdens on osteopathic clinical education programs, which may elect to not integrate or expand distance learning opportunities within those programs. The Department sought to reduce financial and regulatory burden overall during this rulemaking. The Regulatory Impact Analysis and Paperwork Reduction Act sections of this final rule contain additional information about cost and burden.

Changes: None.

General Opposition

Comments: Several commenters expressed opposition to the final regulations because of concerns over whether they would weaken existing regulatory requirements on distance education programs. Other commenters opposed the final regulations because they worried about the potential negative impacts on colleges, universities, and the learning environments of all students. One of these commenters suggested that the cumulative effect of the proposed rule would allow for drastic and unnecessary changes in the name of efficiency and innovation, while sacrificing students' learning and protection in the process, leading to further damage to students and taxpayers. Many of these commenters expressed similar concerns that the proposed changes would expose students and taxpayer-funded Federal aid dollars to undue risk.

Discussion: We thank the commenters for expressing their concerns, and we have considered their objections. We do not share their apprehension about the predicted consequences of these final regulations. In fact, we believe that this final rule properly balances the need to protect student interests and guard taxpayer dollars, while also providing innovators the tools to deliver high-quality, distance education for students in the 21st century. We do not believe these goals must necessarily come at the expense of one another.

Changes: None.

Comments: Some commenters stated that the Department should rescind the proposed regulations and redraft new regulations that protect educational quality, the interests of students and taxpayers, and the general higher education community.

Another commenter agreed that the proposed regulations should be rescinded, in part, because the Department did not conduct reasoned rulemaking as required by the APA. This commenter suggested that some negotiators did not understand the rules and that the Department ''stacked the deck'' with an unmanageable agenda, created negotiating committees stacked heavily in favor of industry, and starved the committee of any real data or information to inform the rulemaking. Further, the commenter stated that the Department ''bullied'' negotiators who ''dared to oppose the Department's proposals and threatened others with promises of worse regulations if they refused to accede.'' The commenter concluded that the result was an ''illegitimate'' vote of consensus. The same commenter added that the Department reneged on its historic consensus and changed the final regulations without sufficient factual justification. The commenter stated that the Department relied on ''little more than anecdotes, industry proposals, and ideology'' in its original proposals. The commenter also added that the Distance Education subcommittee should have more fully included student and taxpayer voices and interests and that the Department failed to follow its own agreed to protocols by not providing a preamble to members to review and comment on prior to publication. Similarly, a different commenter remarked that student veterans were not sufficiently represented, and more similar individuals should have been added to the negotiating committees.

Another commenter argued that the livestreaming was not open to the public and that the consensus vote on the regulations could not be considered either valid or indicative of general support from any of the communities around the negotiation table. Further, the commenter stated that the data provided to the negotiators was disjointed and insufficient and that the Department should incorporate additional reporting requirements for distance education purposes, specifically reporting about the distance education status of students who take Federal loans.

A group of commenters objected to the rulemaking process, stating that the Department appointed negotiators who appeared to have been selected, not for their subject-matter expertise, but for their ties to the for-profit college industry.

Discussion: As we stated in the final regulations on student assistance general provisions, the Secretary's recognition of accrediting agencies, and the Secretary's recognition procedures for State agencies published on November 1, 2019, we disagree with the commenters who said that the Department's rulemaking process was flawed.[4] It is not uncommon for the Department to address multiple topics with a single negotiated rulemaking committee, nor was this the first time that the Department utilized non-voting subcommittees to delve into a specific topic and provide recommendations to the main committee. The subcommittee's recommendations were not binding on the members of the main committee, who were free to discuss the issues in as much detail as they required to come to a consensus agreement. The Department notes that we added an

[4] *See:* 84 FR 58836.

additional negotiator, and an additional negotiating session at the request of negotiators, to represent all relevant constituencies and in hope of reaching consensus.

The Department disagrees with the commenter that our efforts to achieve consensus were inappropriate. Contrary to the commenter's assertions, the Department compromised countless times, moved away from its initial proposals, and accepted negotiators' request for substantially more time to negotiate.

Regarding the makeup of the subcommittee, the process of negotiated rulemaking ensures that we consider a broad range of interests in the development of regulations. Specifically, negotiated rulemaking is designed to enhance the rulemaking process through the involvement of all parties significantly affected by the topics for which we will develop the regulations.

Accordingly, section 492(b)(1) of the HEA, 20 U.S.C. 1098a(b)(1), requires that the Department choose negotiators from groups representing many different constituencies. The Department selected individuals with demonstrated expertise or experience in the relevant subjects under negotiation, reflecting the diversity of higher education interests and stakeholder groups, large and small, national, State, and local. In addition, the Department selected negotiators with the goal of providing adequate representation for the affected parties while keeping the size of the committee manageable. At the request of negotiators, the Department agreed to add a representative of State Higher Education Executive Officers on the main committee. In addition, a representative of the New York Attorney General was added as a member to the subcommittee.

Students and consumer protection advocates were represented by non-Federal negotiators on the full committee and the subcommittee—student veterans were well-represented on the full committee—with primary and alternate representatives for each of these constituencies. Moreover, the Department conducted three public hearings before the negotiated rulemaking began and provided time for public comment on each of the 12 days that the main committee convened.

We disagree with the commenters who stated that the Department failed to provide data or evidence, or stated that the data was disjointed or insufficient, to support the need for the proposed regulatory changes during negotiated rulemaking. The Department was unable to fulfill several data requests made by negotiators because the information was not available, but we do not believe the absence of those data prevented negotiators from considering reasoned proposals.

We appreciate the commenter's proposal to add reporting requirements to the final regulations, but we do not adopt their proposal. The Department is comfortable with the current regime of reporting requirements for distance education and does not wish to create new burden on institutions that rely on or integrate distance education technology in their education programs.

We acknowledge that there were temporary connectivity issues with the livestreaming of the distance education subcommittee. While we regret the interruption, the Department worked quickly to restore the connection to ensure that interested parties could view the discussion. The sessions were also recorded and can be viewed on the Department's YouTube channel.[5] The proceedings of the main committee can be viewed at *edstream.ed.gov.*

We based the proposed regulatory changes on many factors, including public feedback, research outlined in greater detail in the NPRM, and emerging trends in postsecondary education. Specifically, the Department developed a list of proposed regulatory provisions based on advice and recommendations submitted by individuals and organizations as testimony in a series of three public hearings in September of 2018, as well as written comments submitted directly to the Department.

Changes: None.

Comments: One commenter provided statistics showing the types of institutions that are active in the online education industry and on the growing expansion of online education. This commenter concluded that growth has not correlated with increased access to minority and non-traditional students or more quality programs. The commenter also referenced lawsuits against online education providers and outlined arguments against distance education.

Discussion: We appreciate the information provided by the commenter, as well as the outline of the arguments against distance education. We note, however, that institutions from all sectors-regardless of whether they provide online or in-person classroom instruction-have been the subject of lawsuits and borrower defense claims. We reaffirm that legal action and the borrower defense process remain available to all students, notwithstanding these distance education regulations.[6]

The Department acknowledges the commenter's reference to litigation against online education providers, but those legal actions do not direct the Department's regulatory work. We also acknowledge the arguments against distance education, but the Department does not advocate for one type of education delivery system over any other. The Department supports education innovation that is rigorous, meets students' needs, and assists students in achieving their educational goals. These final regulations assist in removing unnecessary barriers to that innovation, while also assuring that online programs remain academically rigorous, well-planned, and appropriate.

Changes: None.

Comments: One commenter remarked that the Department has led taxpayers to believe that changes to the distance education regulations will allow students to ''fast-track their education and save money'' and that the taxpayer will eventually pay the bill. The commenter also wrote that CBE and career technology training is the ''adult version of Common Core.''

Another commenter stated the proposed regulations are intended to create tax breaks and ease burdens on wealthy taxpayers.

Discussion: The Department is confused by the commenter who suggested that the intended purpose of the final rule was to create tax breaks and ease the burden on wealthy taxpayers. The Department is not empowered to create tax breaks.

We are similarly confused by the commenter who stated that CBE and career technology training is the ''adult version of Common Core.'' The Department is not attempting to dictate academic content or establish national content standards, so we are unclear on any similarity to a set of elementary and secondary English language arts and mathematics standards. While some students may be able to complete their program more quickly, the Department disagrees that this will result in some sort of ''balance'' that must be covered by taxpayers. The Department also never stated that the final rule would allow students to ''fast-track'' their education. We believe that students should be able to access educational services that are appropriate to their needs, provide them with high-quality training and education, and meet the requirements of the HEA, as amended.

Changes: None.

[5] U.S. Department of Education YouTube page, *www.youtube.com/user/usedgov/videos.*

[6] 84 FR 49788.

Comments: One commenter stated that any weakening of the protections included in the consensus language would present a serious risk to all students, especially Latino students, who, according to the commenter, are overrepresented at institutions that, on average, produce worse outcomes for students. Another commenter similarly remarked that non-traditional students would be negatively impacted by the final regulations.

Discussion: We appreciate the commenters' submissions and share their desire for all students—men, women, minorities, under-represented populations, and non-traditional populations—to have access to high-quality education services.

The Department rejects the notion that student protections are weakened in the proposed rule or that any such weakening disproportionately impacts one student population over another. As we stated in the Program Integrity: Gainful Employment final regulations, the Department believes that more must be done to improve outcomes for high-risk students, and more options must be made available to students for whom college—and, especially, the traditional college experience—is not the best or preferred option.[7] We believe that high-quality distance education programs, like the ones envisioned by the members of the subcommittee, can and do meet students' unique needs and expand educational opportunities to students previously underserved.

Changes: None.

Comments: A group of commenters stated that the Department is attempting to use its deregulatory agenda to override congressional intent to ensure program quality and to protect students, taxpayers, and the integrity of the Federal financial aid programs. The commenters also suggest that the Department abused its rulemaking authority by rolling back legislative protections that guard the integrity of the student financial aid system. The commenters argued that the Department's actions further jeopardize students' opportunities to access a higher education system that promotes economic mobility. Finally, the commenters concluded that the Department's agenda is proof of its intent to disregard its obligation to responsibly administer Federal Student Aid (FSA) programs.

Discussion: The Department thanks the commenters for their submission. We share their concern for protecting students, taxpayers, and the integrity of Federal financial aid programs. The consensus language reflects that concern. The Department notes that it is not within our regulatory authority to roll back legislative protections; our regulations—and these final regulations specifically—must fall within the parameters authorized by statute.

We disagree with commenter's suggestion that the final regulations jeopardize opportunities to access higher education. This final rule promotes more high-quality, distance education opportunities for students who are not otherwise capable of attending traditional classroom-based courses. In fact, much of our work is animated by the desire to expand opportunities through education for economic mobility and advancement.

The Department takes its responsibility to administer the title IV programs seriously and strenuously seeks to guard taxpayers' dollars in the operation of those programs. We disagree with the commenters' suggestions otherwise.

Finally, legislators have the ability to further clarify their intent through future legislative action. We look forward to working with Congress on any such actions to promote educational opportunities for all students.

Changes: None.

Comments: One commenter wrote that the intent of the final regulations is to loosen the restrictions on institutions offering distance learning. The commenter stated that allowing schools to have more latitude over certain rules leaves room for schools to cut corners to save money at the expense of quality. The commenter added that the Department's contention that the reduction in regulation will increase the number of programs offered by institutions is exactly what predatory, for-profit, and fraudulent institutions want and that it will inevitably make it easier for such institutions to access financial aid funds at the cost of the students and taxpayers. Finally, the commenter said that loosening restrictions would allow a school to recycle pre-recorded lectures, give the student a test, and issue unwarranted degrees if the student passes. The commenter was concerned that such an outcome would greatly impact instructors' financial well-being and the quality of the workforce.

Discussion: The intent of the final regulations is not to loosen restrictions on any type of institution. The Department will continue to hold all education providers accountable. The Department does not condone the behavior of those who wrongfully cut corners to save money, take advantage of students, misrepresent the selectivity of their online programs, engage in pay-to-play admissions schemes, engage in predatory advertisement or enrollment activities, or fraudulently misrepresent their educational programs—and likely student outcomes. We will take necessary actions to hold institutions accountable, regardless of their tax status or organizational structure.

The Department appreciates the commenters concerns and addresses the point regarding the use of recycled or pre-recorded lectures in the appropriate sections below. However, we note that such a concern is not limited to distance learning modalities.

Changes: None.

Comments: Many commenters asked the Department to rescind the proposed rule or, alternatively, delay its implementation, to maintain existing rules protecting the role of faculty and student interaction and restricting outsourcing. This would allow Congress and the public to better assess the needs of students and institutions. One of these commenters wrote that the Department has a responsibility to avoid making changes to distance education that would open the door to instruction without interaction between students and faculty, leaving students entirely reliant on software, apps, games, and prerecorded video. This commenter also wrote that the proposed rules would "undermine meaningful instruction by replacing it with standardized exams." The commenter concluded that further deregulation in the distance education environment did not make sense and that it would be dangerous to students and faculty who are trying to design high-quality programs to weaken the consensus language by expanding CBE programs.

Discussion: The Department disagrees with the commenter's suggestion. We see no compelling reason, nor has one been provided through the public comment process, to rescind or delay the final regulations. We also note that reauthorization of the HEA is many years overdue, and statute currently references technologies that are sorely outdated. Therefore, we cannot rely solely on Congress to respond to the need for higher education to adapt and evolve to serve the needs of students.

While we understand that some may oppose the growth of distance education, largely because of concerns about what this means to the job prospects of current and future educators, those concerns are misplaced. The role of the instructor is critical in high-quality distance education, as explained in the appropriate section below, and these regulations reaffirm the importance of

[7] 84 FR 31433.

regular and substantive interaction as a key element that distinguishes between distance learning and correspondence education.

We do not agree that the proposed rule would undermine meaningful instruction by replacing it with standardized exams and are confident that these final regulations do the opposite.

Changes: None.

Comments: One commenter suggested that the Department should only allow some types of programs to offer distance education courses. The commenter advocated for a rigid classification, reviewed by the Department, of subject matter areas that would be eligible for remote classes. The commenter stated that the basis for such a proposal is that some careers, such as nursing and teaching, require real world experiences and that the value that professors bring to their students is not the same in an online program.

Discussion: The Department thanks the commenter for this proposal, but we do not adopt this change. While we recognize that the experiences of online learning and traditional classroom learning can be very different, the Department believes that high-quality learning is possible in both environments. We do not wish to forestall students interested in nursing and teaching to be kept out of those fields because they are not able to attend traditional, in-person classes. In many instances, distance learning opportunities are limited to students who are already working in fields such as teaching or nursing, and who do not need additional hands-on experiences. In many instances, distance learning enables practicing professionals to complete post-graduate certificates or graduate degrees. Moreover, for many occupations, accrediting agencies and State licensing boards restrict the use of distance learning within certain programs.

As we have seen during the COVID–19 pandemic, some accrediting agencies and State licensing boards are beginning to recognize the opportunities presented by distance learning and are permitting certain portions of programs to be provided through distance modalities. We will continue to rely on accrediting agencies and State licensing boards to determine when and if distance learning opportunities meet the education and training needs of students in particular fields.

Changes: None.

Comments: Many commenters referenced COVID–19 in their submissions to the Department and remarked upon the expanded prevalence of distance education.

One commenter suggested that the proposed rule should be deliberated and commented on after the pandemic is over because the ‘‘last thing on American's [sic] minds'' is the accreditation of online schools.

Many commenters concluded that a 30-day comment period during a pandemic was not sufficient to thoroughly review the proposed rules. These commenters requested that the Department delay the implementation of the proposed rules.

A group of commenters stated that, at this pivotal moment and informed by institutions' experiences during the pandemic, any weakening of strong protections for students and taxpayers would open the door for predatory actors to repeat past abuses, putting the most vulnerable students at even greater risk.

One commenter stated that the Department cannot, in good faith, move forward with any of the issues in the final regulations without first grappling with the massive changes that the COVID–19 crisis will bring to online education.

A group of commenters proposed that the Department reopen the rulemaking process or postpone the enactment of the final regulations to allow for additional comments. Many of these commenters noted potential difficulty in responding to the NPRM because of COVID–19. One commenter suggested that military and veterans' communities should be allotted extra time to provide comments. Another commenter noted the need for the Department to put the needs of our nation's college students before the needs of ‘‘distance education opportunists.''

Discussion: While we acknowledge that the NPRM may not have been top-of-mind for most Americans during the COVID–19 pandemic, the Department is confident that the 30-day public comment period was an adequate time period for interested parties to submit comments. Because we reached consensus during negotiated rulemaking, the proposed regulatory language was available to the public at the conclusion of the final negotiating session approximately one full year before the comment period began, which afforded interested parties additional time to begin formulating their comments.

Prior to issuing the proposed regulations, the Department conducted three public hearings and four negotiated rulemaking sessions, where stakeholders and members of the public had an opportunity to weigh in on the development of much of the language reflected in the proposed regulations.

In addition, the 30-day public comment period was necessary to allow us to meet the HEA's master calendar requirements. Under those requirements, the Department must publish final regulations by November 1, 2020, for them to be effective on July 1, 2021. Delaying the effective date of these regulations would unnecessarily delay the realization of the benefits associated with these changes.

Changes: None.

Correspondence Courses: Definition and Limitations (§§ 600.2 and 600.7)

Comments: Two commenters expressed support for the proposed definition of the term ‘‘correspondence course.'' One of those commenters specifically supported the elimination of the reference to self-pacing in the previous definition of ‘‘correspondence course'' and indicated that the proposed definition makes it clearer that self-paced programs are not necessarily correspondence programs. One commenter also expressed support for the clarification regarding the definition of a ‘‘correspondence student'' in proposed § 600.7(b)(2), indicating that the specificity in the new definition would support new and innovative academic models.

Discussion: The Department thanks the commenters for their support.

Changes: None.

Comments: Several commenters opposed the Department's proposed changes to the definition of ‘‘correspondence course,'' arguing that the changes would make the distinction between distance education and correspondence courses less clear. These commenters stressed the importance of maintaining that distinction given the more limited amount of support by qualified instructors in correspondence courses and past abuses associated with correspondence study. Another commenter indicated that the existing definition of ‘‘correspondence course'' already adequately distinguished correspondence education from distance education and did not need to be changed.

Discussion: We agree with the commenter about the importance of support by qualified instructors, especially given the emphasis of that concept in the statutory definition of ‘‘distance education,'' which requires ‘‘regular and substantive interaction'' between students and instructors. We also agree that it is important for the regulatory definitions of distance education and correspondence courses to be sufficiently distinct, both to implement the statutory distinction between the terms and to ensure that institutions are able to design programs in a way that maintains compliance and avoids audit or program review findings with respect to their online programs. However, we disagree that the proposed changes will blur the distinction between the two terms.

The most significant change made to the definition of ''correspondence course'' in these regulations is the removal of the concept of self-pacing, which is not vital to the distinction between correspondence courses and distance education. The HEA also does not mention the concept of self-pacing, nor does it express that such a condition would require a course to be treated as offered through correspondence education rather than through distance education. We believe that the aspects of the definition of ''correspondence course'' that have been maintained in the definition—for example, that interaction in such a course is limited, not regular and substantive, and primarily initiated by the student—are more than adequate to preserve the important regulatory distinction between distance education and correspondence courses.

Changes: None.

Comments: One commenter objected to the proposed definition of ''correspondence student'' under proposed § 600.7(b)(2), asserting that the definition weakens the distinction between distance education and correspondence courses and could result in a larger number of participating institutions and students engaging in correspondence study.

Discussion: We disagree that the proposed changes to § 600.7(b)(2) will weaken the distinction between distance education and correspondence courses or result in a greater number of institutions or students engaging in correspondence study. The only impact of the changes is to clarify how to calculate the number of correspondence students for the purpose of determining whether an institution has exceeded the statutory limitation on the number of correspondence students that may be enrolled at an eligible institution during an award year. The other relevant statutory and regulatory restrictions on correspondence study that discourage institutions from offering correspondence programs—for example, the institutional eligibility limitations, the restriction to half-time enrollment status for purposes of calculating Pell Grant disbursement amounts, and the limitations on the components of cost of attendance for students enrolled solely in correspondence study—would remain unchanged.

Changes: None.

Definition of Academic Engagement (§ 600.2)

Comments: Many commenters supported the Department's proposed definition of ''academic engagement.'' Several commenters noted that by moving key concepts on attendance and academic activities from the Return of title IV funds (R2T4) regulations (under § 668.22) to a new definition of ''academic engagement'' in § 600.2, the Department emphasizes the importance of active student participation in other parts of the regulations. One commenter also noted that the definition would expand academic quality and accountability. Two commenters specifically stressed their support of the Department's acknowledgement within the definition that student academic engagement can take on different forms, including interactive online courses and computer instruction.

Two commenters specifically expressed support for the Department's inclusion of § 600.2(2)(iv), ''Participating in an interactive tutorial, webinar, or other interactive computer-assisted instruction,'' in the definition. The commenters indicated that they believe this inclusion will help clarify the role adaptive learning and other technologies can play in providing academic engagement.

Discussion: The Department thanks the commenters for their support.

Changes: None.

Comments: Several commenters requested that the Department include new categories of activities under the definition of ''academic engagement.'' Two commenters asked that the Department add a category for education offered through virtual and augmented reality because those modalities are becoming more commonly used in higher education.

One commenter suggested that the Department include as a category under ''academic engagement'' instruction through computer-mediated adaptive instruction that alters the learning experience for each student based on that student's needs. Another commenter requested that the Department clarify that instructor interaction does not have to occur exclusively with a human instructor.

Discussion: As the Department discussed in the preamble to the NPRM (85 FR 18638–18702), we consider ''other interactive computer-assisted instruction'' to include the use of artificial intelligence or other adaptive learning tools where the student is receiving feedback from technology-mediated instruction. Computer-assisted instruction would also include instruction through virtual or augmented reality, or any other form of instruction in which a student actively participates in a computer-based or computer-mediated learning environment, with or without the presence of a human instructor. An explicit goal of this rulemaking has been to reduce the need for updates to regulation when new technologies are developed, and so this definition is also inclusive of technologies that are in their infancy or not yet invented as long as they meet the regulation's other requirements. Therefore, because the types of learning described by the commenters (and others) are already accommodated in the proposed definition of ''academic engagement,'' we do not believe it is necessary to add additional categories.

Changes: None.

Comments: One commenter expressed concern that the proposed definition of ''academic engagement'' would require more than simply actively logging into a website. The commenter indicated that this could cause undue burden for students who were unable to academically engage during normal hours or afford the technologies required by institutions to demonstrate academic engagement as defined.

Another commenter voiced a concern that paragraph (3)(iv) of the proposed definition, which states that academic engagement does not include participating in academic counseling or advisement, could discourage instructors from taking the time to speak with students about their academic future or professional goals. The commenter mentioned that depending on the nature of the course, it may be difficult at times for instructors to differentiate between interacting with students about ''academic matters,'' which qualify as academic engagement, and ''academic counseling and advisement,'' which does not qualify. The commenter requested that the Department remove the exclusion of academic counseling or advisement from the definition of academic engagement.

Discussion: We disagree that the definition of ''academic engagement'' causes undue burden for students. Many institutions previously believed that, under the Department's prior regulations, students were required to not only log in, but engage in an activity weekly for which the institution maintains documentation to prove that the student was engaged every couple of days. This was identified as a burdensome requirement that significantly exceeds requirements for ground-based instruction, and that often requires students enrolled in distance education to make time for what is otherwise viewed as ''busy work.'' The new regulation clarifies that engagement must be meaningful in order to be used as the basis for complying with the Department's related requirements (such as identifying a student's withdrawal date), but does not require, for example, students to post a non-substantive blog post each week simply to ''check the box'' on documenting participation.

The definition does not require a student to log in or participate in a course or learning environment at a particular time, nor does it require or incentivize institutions to demand the use of expensive technologies to demonstrate academic engagement. The definition does rely on the concept of active participation by a student in his or her learning, which the Department believes is a necessary requirement for academic engagement. This concept of active participation—which cannot be demonstrated merely by documenting that a student has logged into an online system—is also vital to other regulatory requirements, including for purposes of determining a student's withdrawal date under the R2T4 regulations.

For similar reasons, we also decline to remove the exclusion of academic counseling and advisement from the definition of ''academic engagement.'' While the Department views advisory activities related to a student's academic or career trajectory as an important component of many postsecondary programs, such advising by itself does not demonstrate that a student is participating or engaged in his or her academic program. Negotiators agreed that to the extent a qualified instructor is providing advising relevant to a specific course—for example, explaining where a student can find answers to content-related questions, or recommending a particular approach to a writing assignment for the course—academic engagement is taking place. However, general academic or technical advising that is provided outside of a specific course, and that is often provided by someone who does not qualify as an instructor for the course in which the student must be academically engaged—for example, guidance regarding which classes the student plans to take in the future, or technical support with instructional technology—does not constitute academic engagement.

Changes: None.

Comments: Several commenters asked the Department to clarify its position regarding asynchronous academic engagement. The commenters indicated that while the Department specifically mentions synchronous instruction in the definition, it does not mention asynchronous instruction even though asynchronous instruction is referenced elsewhere, both in the ''distance education'' definition in § 600.2 and as part of the new ''week of instruction'' definition in § 668.3. One commenter specifically suggested including ''or asynchronous'' after ''synchronous'' in paragraph (2)(i) of the definition to clarify that asynchronous attendance and participation in the classroom is included when documenting academic engagement in an online program. Another commenter asserted that though certain asynchronous activities, such as engagement in interactive forms of computer-assisted instruction, might be read into the listed activities in paragraph (2)(iv) of the definition, the omission of a direct reference to asynchronous instruction makes it difficult to have confidence in such an interpretation.

Discussion: The Department's intent was not to exclude asynchronous participation in learning activities from the definition of academic engagement. Asynchronous academic engagement could occur under any of the categories described in the definition except for the category described under paragraph (2)(i) that describes attendance at a synchronous lecture, recitation, or field or laboratory activity. For example, a student can work on an academic assignment—described under paragraph (2)(ii) of the definition—at the time of his or her choosing, and submission of that assignment is an asynchronous learning activity that does not require real-time interaction with an instructor. Similarly, a student could demonstrate academic engagement under paragraph (2)(iv), ''participating in an interactive tutorial, webinar, or other interactive computer-assisted instruction,'' by engaging in a presentation through a virtual or augmented reality system or by participating in an online learning activity that uses artificial intelligence or adaptive learning. We do not believe that it is necessary to add the word ''asynchronous'' to the definition given the incorporation of this concept in each of these activities. We also decline to remove the word ''synchronous'' from paragraph (2)(i), since in that context it is used to describe a particular type of learning activity that is performed in real time with an instructor.

Changes: None.

Definition of Additional Location (§ 600.2)

Comments: One commenter requested clarification about the addition of a definition of ''additional location.''

Discussion: We did not seek comment on the ''additional location'' definition in the NPRM that we address in this final rule. Instead, we sought comments on that definition in an NPRM published in the **Federal Register** on June 12, 2019 (84 FR 27404). That NPRM included Accreditation-related definitions, including the definition of ''additional location.'' We published a final rule that included the definition of ''additional location'' in the **Federal Register** on November 1, 2019 (84 FR 58834) in which we addressed comments we received related to the definition.

Changes: None.

Definition of a Clock Hour (§ 600.2)

Comments: Numerous commenters voiced disagreement with the provisions in the Department's proposed definition of the term ''clock hour'' that require each clock hour in a distance education program to include synchronous instruction where students have an opportunity to interact with instructors and asked the Department to reconsider this requirement.

Several commenters indicated that the proposed clock hour definition regarding distance education was too restrictive and should conform to the Department's definition of ''distance education,'' which allows for ''regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.'' The commenters asked the Department to reconsider whether clock hours could be earned through asynchronous instruction, noting that several educational platforms are already capable of monitoring a student's participation and clocking the student out if active engagement ceases.

One commenter noted the Department's reluctance to support asynchronous distance education (ADE) instruction within the clock hour definition was most likely due to the concern as to whether a clock hour student's required ''seat time''—50 minutes in a 60-minute period—could be validated. The commenter indicated that current technology already provides effective tools which, if properly incorporated into an asynchronous distance education platform, marry effective program instruction with effective ''seat time'' validation. As explained by the commenter, an electronic synchronous distance education platform would include such components as sign-in assurance, time monitoring through trackable digital media assets, automated sign-off for inactivity, live student to student and student to instructor activities and automated Q & A, and testing processes. Based on this information, the commenter requested that the Department modify its proposed definition of a ''clock hour'' to permit instruction provided via electronic synchronous distance education.

One commenter stressed that permitting the development of asynchronous instruction in clock hour programs allows for the kind of instructional flexibility needed for career and technical education providers to use new methods of simulated, technology-mediated instruction without constraint or fear of compliance findings.

Several commenters voiced a strong desire to afford the same flexibilities to students enrolled in clock hour distance education courses as students enrolled in credit hour distance education programs. To that end, one commenter indicated that program structure (clock hours or credit hours) is often based on institutional or State governance and has no relationship to the quality or content of a program. The commenters asserted that students enrolled in clock hour programs should not be penalized merely due to institutional structure.

Another commenter stated that limiting clock hour distance education coursework to synchronous online classes would limit the convenience and flexibility to students of access to course content at any time or place. Several commenters expressed concerns that limiting distance education clock hour eligibility to synchronous activities could limit innovation and discourage institutions from creating more flexible and accessible learning experiences which could reduce potential barriers to access and completion of postsecondary programs and promote a more diverse student population.

Several commenters stressed that the Department authorizes postsecondary institutions to offer eligible postsecondary programs in a distance learning format as approved by the institution's accrediting agency and that the exact same standards, quality assurance, integrity and accountability measures used to approve traditional on-campus programs are also applied to the distance education programs approved by the accrediting bodies.

Several more commenters indicated that current technology in higher education attendance monitoring provides systems that monitor participation, proctor exams, verify attendance and provide tools for students to interact with instructors at the time and place of their choosing. The commenters further explained that online content is most often used to supplement in-person training or lab work and that asynchronous instruction can now be monitored by a school through many educational platforms, students can be clocked out for inactivity, and instructors and students have a variety of ways to interact with each other and review various course materials. Many commenters expressed a belief that current technology available to students and educators allow for the same objectives to be met in an asynchronous format, while allowing for more flexibility to overcome challenges related to geography, learning preferences, work or family obligations, disabilities, or resources. One commenter suggested asynchronous learning could include the recording of classes to be viewed within a specified time with periodic class meetings to answer questions.

Several commenters urged the Department to allow asynchronous instruction via distance education if approved by State and accrediting agencies as long as an institution could clearly demonstrate instructor engagement with the student during each clock hour through a variety of means, which could include technology such as adaptive learning and artificial intelligence.

Two commenters indicated that the synchronous format described in the proposed definition is too limiting and would not be broad enough to allow students to engage in certain types of projects or assignments such as reviewing written or recorded lectures outside of regular classroom hours. Another commenter stated that the critical variable is not coordinated schedules or designated time, but a learning environment with diverse and engaging learning activities and faculty involvement.

Two commenters supported the inclusion of distance education into the Department's clock hour definition, arguing that distance learning technology has sufficiently advanced to permit institutions to conduct remotely synchronous instruction with students and to monitor the exact amount of time that students spend participating in these learning sessions. However, the commenters urged the Department to provide more clarification and greater flexibility under paragraph (3) of the clock hour definition which states that an institution must be capable of monitoring a student's attendance in 50 out of 60 minutes for each clock hour. Specifically, the commenters requested that the Department clarify that the new clock hour definition not require an institution to have live instructor involvement with a student each hour, so long as the institution can monitor a student's participation during 50 minutes of each hour and the institution can otherwise demonstrate academic engagement (per the Department's definition) by utilizing suitable technology as demonstrated to the appropriate State and accrediting agency. The commenters stressed that requiring ''face-to-face'' contact each hour or at least one live touch by an instructor per clock hour for synchronous or asynchronous instruction would ignore the direction that the Department's Proposed Rule is heading to expand recognition of the capabilities of technological advances to monitor student academic engagement and impose an undue hardship on students who need maximum scheduling flexibility in completing clock hours by means of distance education.

One commenter objected to the proposed clock hour definition and suggested the definition be reworded to account for students who may have relocated to a different time zone from their institution, and therefore might not be able to attend a class session in real time or interact with the instructor during the normal period of attendance. The commenter indicated that they currently attend a class in a different time zone and often have to watch recordings of the class and do not want these types of situations to be excluded from being counted towards a student's academic progress.

One commenter requested that the Department clarify if it indeed intended to limit distance education clock-hour eligibility to only synchronous learning experiences but instead grant more flexibility to correspondence courses. The commenter was concerned that, given the limitations on correspondence students and courses applied to correspondence education, institutions would prefer to designate courses as distance education rather than correspondence whenever appropriate.

One commenter urged the Department to extend the temporary flexibilities for online instruction for clock hour programs due to the current coronavirus crisis as outlined in the Department's guidance for COVID–19. The commenter noted that the Department's temporary flexibility allows schools to offer synchronous or asynchronous online clock hour programs as long as the school can demonstrate student academic engagement through various online learning platforms and systems or based on school data or the instructor's own knowledge. The commenter indicated that extending these flexibilities would allow institutions to determine on a local basis how to transition back to on-ground education and clarify that clock hour schools are permitted to offer hybrid programs—partially on-ground and partially online—through this period to provide maximum flexibility to meet the health and safety needs of employees and students.

Several commenters specifically requested that the Department modify paragraph (1)(iv) of the proposed clock hour definition to include both attendance in a synchronous or asynchronous class for distance education coursework, while one commenter asked the Department to include ''participation through asynchronous academic engagement'' or similar language to the distance education eligibility criteria in paragraph (1)(iv) of the clock hour definition.

In addition, several commenters asked the Department to consider modifying paragraph (1)(iv) to read, ''In distance education, 50 to 60 minutes in a 60-minute period of attendance in a 'computer-assisted' class, lecture, or recitation where there is opportunity for direct interaction between the instructor and students'', while other commenters simply requested that the word ''synchronous'' be removed from paragraph (1)(iv). The commenters explained that removing the word synchronous from the definition would allow institutions who wish to offer clock hour programs synchronously or asynchronously, or a combination of both, the flexibility and opportunity to prepare the twenty-first century workforce in engaging and innovative ways.

Discussion: We are persuaded by the comments that preventing institutions from offering instruction by asynchronous means is unnecessarily restrictive and counter to the purposes of this rulemaking. The emergence of the COVID–19 pandemic has illustrated the need for institutional and student flexibility with regard to the time and place that coursework is completed, and a number of licensing agencies are also creating new flexibilities for the use of asynchronous learning in clock hour programs. Asynchronous learning allows students to design their own learning schedules around the demands of work and family that often interfere with class activities offered only at prescribed times. This flexibility can also greatly benefit students with health concerns for whom participation is contingent upon treatment schedules and feeling well enough to perform required tasks. The individual pacing made possible by asynchronous learning allows for a more tailored educational experience that promotes mastery of subject matter over attendance in scheduled activities. Moreover, the availability of asynchronous learning allows for mixed model learning reflective of non-title IV eligible programming with theory learned asynchronously and specific practical tasks through synchronous instruction.

The Department does not wish to impede technological innovations at institutions that can help students overcome barriers to access and completion.

The existence of the ''regular and substantive interaction'' requirement related to clock hours offered through distance education and the requirement that clock hours meet the requirements of an institution's accrediting agency and State provide the safeguards that ensure that students have access to quality instruction and instructor support. Given these baseline requirements, it is not necessary to require students to interact with instructors synchronously to earn clock hours.

We also believe that commenters have made a strong case that, given current technology, clock hours completed asynchronously can be adequately supervised and monitored, provided the institution maintains the appropriate technological resources and internal controls. We disagree with commenters who indicated that learning technology is not yet capable of monitoring student engagement in this manner, especially since the Department has already reviewed and approved clock hour programs that used online learning platforms that are capable of the required monitoring.

The Department remains concerned about the possibility that clock hours offered asynchronously could be used as a means to complete unsupervised homework assignments rather than coursework that otherwise would have occurred in the classroom, which is prohibited under the Department's longstanding policy for clock-hour programs. Our position is that the requirement for supervision of a clock hour in an asynchronous learning environment is met when the institution is capable of documenting the specific form of academic engagement associated with the activity—for example, asynchronous participation in an interactive tutorial or webinar online or a learning activity involving adaptive learning or artificial intelligence—and the institution has technological resources and policies and procedures that are sufficient to monitor and document the time each student spends performing that activity. If either of these conditions are not met, an institution would not be permitted to include time spent on an online activity toward completion of a clock hour for purposes of the title IV, HEA programs.

We also agree with the commenters who argued that clock hours offered asynchronously should involve academic engagement, as defined elsewhere in these regulations, since that concept involves active participation in learning activities rather than passive consumption of knowledge or merely logging into an online system. An institution should establish, in accordance with its policies and those of its accrediting agency or State, what it considers to be academic engagement in a clock hour program in order to clearly demonstrate that students have spent the recorded time performing an activity.

Institutions are permitted to offer clock hour programs both through correspondence or distance education, and the Department declines to opine on which type of program is most appropriate or best suited to the needs of individual students. However, institutions offering clock hour programs using distance education continue to be subject to the general requirements in the definition of ''distance education,'' which requires regular and substantive interaction between students and instructors. In such programs, some, but not all, clock hours would need to involve substantive interaction between students and instructors.

Changes: We have modified paragraph (1)(iv) of the ''clock hour'' definition to express that a clock hour includes a synchronous or asynchronous class, lecture, or recitation where there is an opportunity for direct interaction between instructors and students. We also added a new subordinate paragraph to include, as part of the definition of a clock hour, 50 to 60 minutes of active participation in an asynchronous learning activity involving academic engagement in which a student interacts with technology that can monitor and document the amount of time that the student participates in the activity.

Comments: One commenter urged the Department to provide flexibility to institutions with distance education clock hour programs, whether taught in synchronous or asynchronous learning environments, such that when monitoring clock hours, the institutions be given the flexibility to assign clock hours based upon the assignments provided to students as long as there is adequate communication between the instructor and students. The commenter mentioned that providing the flexibility to monitor that instructors are providing relevant assignments equal to the number of clock hours for which a student is enrolled would be adequate since the quality of the educational program has been reviewed and monitored by the school's accrediting agency.

Two commenters indicated that monitoring each student's time spent on academic engagement would be challenging given the cost and availability of current technology. One of those commenters indicated that it is currently impossible to properly monitor and track a student's attendance in 50 out of 60 minutes for each clock hour via distance education due to a lack of institutional means and technological uniformity. In addition, the commenter expressed a concern that the notion that technology has sufficiently advanced to permit institutions to conduct remotely synchronous, face-to-face instruction with students and to monitor the exact amount of time students participate in learning sessions is flawed because it is based on the premise that both the instructors and students can obtain, operate, and monitor the required devices needed to properly conduct distance education learning. The commenter asserted that the Department would be best served by dropping the new clock hour definition and instead, focusing on ensuring that an adequate amount of work is being completed rather than mandating a set amount of time be spent on coursework.

Discussion: While we agree that it should be possible for a student to earn clock hours through participation in asynchronous online learning activities, we disagree that an institution can measure such clock hours without monitoring a student's actual participation in those activities. A clock hour is a period of 50 to 60 minutes in a 60-minute period spent receiving instruction or actively participating in a particular educational activity, and institutions are responsible for measuring the amount of time that students spend in such activities. The Department has never permitted institutions to award clock hours based on estimates of completed work and does not intend to do so for clock hour programs offered through distance education. We also disagree with the commenter that the technology needed to perform this monitoring does not exist or that it cannot be obtained by institutions and students. The Department has seen demonstrations of such technology by institutions that offer clock hour programs and was convinced that the technology was both viable and appropriate for use in monitoring clock hours completed asynchronously.

Changes: None.

Comments: One commenter asserted that the Department's proposed clock hour definition fell short of its stated goal in the NPRM ''to remove barriers that institutions face when trying to create and implement new and innovative ways of providing education to students.'' Specifically, the commenter suggested that the modern-day use of a calculation of seat time to measure student learning and progress is grounded on a false premise, especially considering today's online technologies, including artificial intelligence and adaptive learning tools. The commenter opined that since the definition of a ''clock hour'' is not defined in title IV, the Department should consider removing the definition of ''clock hour'' from § 600.2 and instead, rely on accrediting agencies, as the entities that set standards on academic quality, to provide academic oversight of institutions' policies relating to the measurement of student learning and progress.

Discussion: We disagree that the use of clock hours to measure a student's progress for purposes of the title IV, HEA programs prevents institutions from using innovative technology or instructional methods. We believe that it is vital for institutions to be able to award and disburse title IV, HEA assistance using clock hours as a measurement of student progress because that form of measurement still aligns with many Federal and State licensure requirements for a variety of professions. This alignment ensures that institutions that are already required to monitor and document a student's successful completion of clock hours for other purposes can use that monitoring to demonstrate that the student has made progress for purposes of the title IV, HEA programs rather than requiring such institutions to perform a cumbersome and potentially burdensome conversion of clock hours to credit hours or some other equivalent measure.

Changes: None.

Comments: One commenter expressed concern that the clock hour definition does not define student seat time precisely enough. The commenter pronounced that a vague seat time requirement may cause undue challenges for an institution with rigorous accrediting agencies at the regional and/or professional level.

Discussion: The Department does not establish academic requirements for educational programs, including clock hour programs. Under the Department of Education Organization Act, such requirements remain within the purview of accrediting agencies and States, which are free to set requirements they feel appropriate for what is considered successful completion of a clock hour in each program.[8] This longstanding approach to the oversight of academic requirements recognizes the autonomy of postsecondary institutions and the unique qualifications of their accrediting agencies and States to respond to issues of academic quality.

Changes: None.

Comments: One commenter urged the Department to maintain the requirements listed under paragraph (3) requiring programs to meet all clock hour limitations or criteria established by school accrediting agencies, States, and applicable licensure bodies. The commenter also expressed support for limiting clock hours via distance education to synchronous programs in the final rule because monitoring a student's completion of a clock hour in an asynchronous program would be virtually impossible.

The commenter stated that monitoring asynchronous learning would diverge too much from the proposed clock hour definition and the Department would most likely be unable to assess the minimum technology needed for institutions to adequately monitor asynchronous distance education learning.

Discussion: We do not believe that it would be impossible for an institution to maintain the appropriate technology and procedures to monitor and document clock hours earned based on completing asynchronous educational activities. However, we agree that it is important to ensure that institutions comply with any requirements set by accrediting agencies or State licensing or approval agencies regarding clock hours and intend to retain that component of the clock hour definition.

Changes: None.

Definition of Credit Hour (§ 600.2)

Comments: Numerous commenters expressed their overall support for the proposed changes to the definition of a

[8] See 20 U.S.C. 3403(b).

credit hour, with several of those commenters specifically asking that the Department make no changes to the consensus language agreed to by negotiators. Some of this support was qualified to varying degrees, ranging from observations that the credit hour is a less than ideal measure of student progress to a request on the part of two commenters concerned about the rule's enforceability that the Department restore the requirements in §§ 602.24(f) and 603.24(c) (84 FR 58931) requiring that accreditors and State agencies respectively, conduct review and evaluation of the reliability and accuracy of the institution's assignment of credit hours.

One commenter expressed opposition to the revised definition of ''credit hour'' based on concerns that changing the definition of ''credit hour'' to focus on student learning time may pose new risks to students and their privacy. The commenter offered that if recording of individual learning time becomes desirable initially for credit hour validation, it may become desirable for individual student measurement, and that the potential consequences of this should be available for public review.

Another commenter asserted that the Department should maintain the definition of ''credit hour'' in the NPRM but that the Department made proposals to change the definition without any evidentiary basis or support, rendering them legally insufficient under the APA. The commenter asserted that by failing to present evidence during the negotiated rulemaking that would justify a change, and by failing to suggest in the NPRM that the Department has support to justify those original proposals now, the Department has no choice but to maintain the consensus definitions included in the NPRM.

Concerned that the proposed definition of ''credit hour'' does not adequately account for transfer credits, one commenter offered revisions to the amendatory text in the NPRM that would change the characterization of a credit hour as, ''an amount of student work'' to ''work by a student with average, but appropriate, preparation . . .'' and include recognition and consideration of the importance and widespread usage of credit transfer among institutions. The commenter also suggested that the Department address a perceived disparity between workload expectations of students in on-campus courses versus those offered through distance education. The commenter proposed to stipulate the equivalent amount of work as required in paragraph (1)(i) of the definition of ''credit hour'' for other academic activities as established by the institution be consistent, by institution and course, between requirements for on-campus and on-line monitoring of student work.

Discussion: We appreciate the general support for our proposal to broaden the definition of ''credit hour'' in a way that focuses on student learning rather than seat time and is flexible enough to account for innovations in the delivery models used by institutions. Even among those commenters whose support was tempered with reservations over the proposed definition of a ''credit hour'' either adhering too closely to the current definition or broadening it too much, there was strong agreement that no changes should be made to the consensus language in the NPRM.

In response to those commenters who expressed support for the proposed changes to the definition of ''credit hour'' but asked that the Department restore the requirements in current §§ 602.24(f) and 603.24(c), as previously explained in the preamble to the November 1, 2019 final rule on State Authorization and Accreditation (84 FR 58875), we continue to believe the agency review requirements are unnecessarily prescriptive and administratively burdensome without significantly improving accountability or protection for students or taxpayers. However, we note that the ''credit hour'' definition in both current and proposed § 600.2 requires that the amount of student work determined by an institution to comprise a credit hour be approved by the institution's accrediting agency or State approval agency. Moreover, nothing precludes an accrediting agency or State authorizing agency from examining or questioning an institution's credit hour policies either as part of a routine evaluation of that institution's academic programs or as the result of specific concerns.

We disagree with the commenter who opposed the changes to the definition of ''credit hour'' proposed in the NPRM on the basis that an increased focus on student learning time may pose new risks to students and their privacy. The definition of ''credit hour'' as proposed in the NPRM does not place an increased emphasis on learning time. Time-based requirements relative to classroom instruction and other academic activities included in the proposed definition of ''credit hour'' are those found in the current definition. Additional language in the proposed definition clarifies that, in determining the amount of work associated with a credit hour, an institution may consider a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels. This new language actually deemphasizes the strict measure of learning time.

Although the Department takes seriously any identified risk to student privacy, the commenter was not specific as to what those risks are. Finally, with respect to the potential consequences of these proposed rules being available for public review, we believe the comment period following publication of the NPRM in the **Federal Register** provided such an opportunity.

We further disagree with the commenter who asserted that the Department made proposals to change the definition of ''credit hour'' without any evidentiary basis or support, rendering them legally insufficient under the APA, or that it failed to present evidence during the negotiated rulemaking that would justify changing the definition of ''credit hour.'' In preparation for the subcommittee meetings on distance learning and innovation, the Department produced several position papers outlining its reasons and justifications for all proposed rule changes under consideration by that subcommittee, including those related to the definition of a credit hour. The proposed definition was discussed at length in the subcommittee and again at the negotiating table. A detailed, written discussion of the Department's reasons for proposing these changes is contained in the April 2, 2020 NPRM on pages 18646 and 18647. However, we appreciate the commenter's overall support for the consensus language.

In response to the commenter who expressed concern that the proposed definition of ''credit hour'' does not account for transfer hours, we note that credit hours, as they pertain to the title IV, HEA programs, are a measure of student workload necessary to determine enrollment status and award amounts. Credit hours that an institution accepts on transfer have no effect on making these determinations and are, therefore, not integral to the definition of a credit hour for title IV purposes. The commenter identified several problems with respect to transfer hours, including the disparity among institutions in how transfer hours are considered and accepted.

While we agree on the need to address challenges regarding transfer of credit, we do not believe that this definition is the appropriate place to do so or that the revisions to the proposed definition of ''credit hour'' suggested by the commenter would change the way transfer hours are treated by institutions. With regard to any disparities that may exist between what is expected of students taking classes offered through distance education and what is expected of students enrolled in classes offered on campus, we do not agree with the commenter that these can be addressed by revising the proposed definition of ''credit hour.'' Institutions themselves set the academic standards for their programs. The definition of ''credit hour'' merely establishes a reasonable measure of student workload. We believe that the amendatory text, agreed to by negotiators, permitting an institution, in determining the amount of work associated with a credit hour, to take into account a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels, accommodates a variety of modalities, including distance education.

Changes: None.

Definition of Distance Education

Comments: Numerous commenters expressed their support for the Department's proposed definition of ''distance education.'' Many commenters thanked the Department for providing greater clarity and specificity to the definition. One commenter highlighted several recent audits by the Department's Office of Inspector General (OIG) focusing on the requirements for regular and substantive interaction and pointed to the large amount of proposed liabilities in those audits as a reason that the definition of ''distance education'' needed to be clarified. Another commenter asserted that the changes modernize the definition and permits more flexibility for postsecondary institutions to offer educational programs.

Several commenters were appreciative of the Department's efforts to eliminate references to outdated technology such as CD–ROMs. Other commenters indicated that the definition holds institutions accountable for providing students in distance education programs with communication and engagement with qualified instructors on a predictable and regular basis.

Many commenters supported the addition of the concept of ''qualified instructors'' who meet the instructional requirements of an institution's accrediting agency. One commenter stated that the proposed definition would provide institutions with a single, clear definition of ''instructor'' for financial aid purposes, that could help prevent confusion during audits about which staff members can be classified as instructors. One commenter also expressed support for the Department's use of the plural ''instructors'' rather than ''the instructor'' because it would enable more people to teach as a team and provide more individualized attention to students.

Several commenters supported the Department's proposed requirements for substantive interaction, indicating that the definition supports a variety of activities needed for teaching and learning. One commenter indicated that defining and clarifying what constitutes ''substantive interaction'' between students and faculty would give institutions the ability to innovate without fear of the loss of Federal student aid eligibility. Another commenter indicated that the requirements for substantive interaction are appropriately adaptable because they allow accrediting agencies to approve different types of instructional activities. One other commenter was supportive of the consensus language relating to substantive interactions, noting that while the Department's original proposal had defined substantive interaction as an interaction that simply related to course material under discussion, negotiators opposed this language because it did not specifically address teaching and learning in the way that the consensus language does.

Several commenters also supported the Department's requirements for regular interaction. One commenter indicated that the flexibility of the definition was important given variability across a wide range of program types and topics and helped limit administrative burden. Another commenter supported the ability for institutions to determine the number of substantive interactions that are appropriate based on the length and amount of content associated with a course. One commenter expressed strong support for requiring both predictable opportunities for interaction and the prompt and proactive monitoring of student engagement, indicating that the requirements would result in more affordable and accessible pathways for students while ensuring high-quality instruction.

Discussion: The Department thanks the commenters for their support.

Changes: None.

Comments: Many commenters urged the Department to maintain the regulatory language agreed upon in consensus with non-Federal negotiators for regular and substantive interaction and the requirements for instructors in distance education programs. Several commenters pointed out that the consensus agreement for the proposed definition of ''distance education'' reflected a thoroughly discussed compromise among negotiators.

Several commenters contended that it is imperative to clearly distinguish between distance education and correspondence courses and ensure that quality standards exist for distance education programs, especially given the history of abuses related to correspondence courses. The commenters asserted that diluting the proposed definition could result in online programs becoming eligible for Federal student aid even when the programs do not offer the same quality of education or degree of connection between students and qualified instructors. One of those commenters urged the Department not to revert to its original proposal to allow accrediting agencies alone to articulate requirements for regular and substantive interaction and instructors with minimal Federal guidelines. One commenter asserted that the Department's original proposals for changing the definition, later rejected in the consensus language, would have undermined the requirements for regular and substantive interaction and for the qualifications for an instructor and urged the Department not to return to those proposals.

Other commenters pointed out that the requirements for regular and substantive interaction exist in law because of past abuses in correspondence programs, particularly of veterans seeking to use educational benefits. One of these commenters noted that after passage of the 1944 Servicemen's Readjustment Act of 1944 (commonly known as the ''GI Bill'') hundreds of thousands of servicemen used their education benefits under that law to enroll in correspondence courses, but only approximately 10.7 percent of those veterans completed their programs. That commenter also pointed out that Congress acted in the early 1990s to address similar types of abuses in correspondence courses related to the title IV, HEA programs. Another commenter noted that the OIG has repeatedly raised concerns about distance education and has characterized it as an area that poses significant risk to the integrity of the FSA programs.

One commenter referred to research that shows that Latino students enrolled in online education have lower academic and attainment outcomes than in face-to-face courses and that interviews with such students highlight the absence of a meaningful student-instructor relationship as a contributing factor to those poor outcomes. Another commenter referenced research that suggests faculty-student interaction plays a key role in a quality online education and that underprepared and disadvantaged students tend to underperform and, on average, experience poor outcomes in such programs. That commenter also referenced research that suggests online students desire greater interaction with their instructors and that, in general, online education has not improved affordability, frequently costs more, and does not produce a positive return on investment. One commenter asserted that if the requirement for regular and substantive interaction is weakened, there is a risk that inequities will increase between those students who have access to substantive interaction with instructors and those who do not. That commenter expressed that this is an even more critical issue now that institutions are moving online because of the COVID–19 emergency.

Discussion: We agree that it is important for the regulations to clearly distinguish between the definitions of ''distance education'' and ''correspondence courses'' and believe that the proposed definitions accomplish that goal. Whereas the definition of a correspondence course describes interaction between students and instructors in such the course as ''limited . . . not regular and substantive, and . . . primarily initiated by the student,'' the definition of distance education requires regular and substantive interaction between students and instructors and clearly explains the requirements for each component of that definition. We also agree that it is important to adhere to the agreed-upon language of the members of the subcommittee and full committee, who were able to reach agreement on the definition of the term despite strong initial differences of opinion on the matter. We agree with the commenters who referenced the importance of regular and substantive interaction between students and instructors, particularly for students who are underprepared, and believe that the requirements for such interaction expressed in the definition strike the appropriate balance between assuring interaction with qualified instructors and allowing institutions the flexibility to offer programs using innovative, student-oriented pedagogical techniques.

Changes: None.

Comments: Several commenters opined on whether the Department should incorporate the concept of an ''instructional team'' into the definition of ''distance education.''

One of these commenters described the use of instructional teams as a practice that occurs in on-campus settings across various fields of study and that provides exceptional opportunity to students by allowing them to interact with several experts in a given course. Another commenter argued that explicitly addressing the concept of instructional teams in the definition would acknowledge the reality that distance education is an instructional team endeavor that does not rely upon arbitrary distinctions between an instructor and someone involved in facilitating the delivery of course content who is not considered an instructor.

One commenter argued that team-based instructional models could be complicated if substantive interactions could only be provided by individuals that met an accrediting agency's requirements for instruction and noted that some types of interactions described under paragraph (3) of the definition, including assessing or providing feedback on a student's coursework, could be provided by assessment specialists who do not meet the definition's requirements for a qualified instructor.

Conversely, one commenter objected to the Department's proposal to use the term ''instructors'' rather than ''the instructor,'' arguing that doing so would allow quasi-professionals to teach more advanced subject matter as part of a team. The commenter asserted that this situation could result in such instructors only tangentially monitoring student discussion rather than substantively engaging with students.

Discussion: The Department does not object to the use of instructional teams, regardless of the modality of the coursework. Indeed, we support innovative educational models that provide additional support, both academic and otherwise, to support student success. However, we believe that the current regulatory language accommodates the use of instructional teams and no change is necessary in order further encourage their use.

Regardless of the composition of an instructional team, the Department expects that such a team would include qualified individuals with subject matter expertise who are expected to instruct, guide, or otherwise respond to questions from students about the subject matter of a course or competency. Such individuals, assuming they meet accrediting agency requirements for instruction, are the staff members whose substantive interaction with students can fulfill the requirements of the ''distance education'' definition for regular and substantive interaction between students and instructors. Note that accrediting agencies can choose to designate individuals as instructors who do not meet the traditional criteria for faculty, and many already do in instances, for example, where workforce experience may be more important to teaching and learning than an advanced degree. Accreditors are also permitted to designate an individual as an ''instructor'' meeting its requirements only in specific situations, for example, where a less-experienced individual is teaching in a team setting with an experienced instructor of record having responsibility for the course in general. Given this degree of flexibility, we believe that the regulation as written provides ample opportunity for distance education to occur with the use of instructional teams, but only when such use conforms with the requirements of an instruction's accrediting agency.

Changes: None

Comments: Several commenters expressed concern with the Department's proposal to replace the list of technologies in the definition of ''distance education'' with the phrase ''other media.''

Two commenters indicated that the word ''media'' was not specific enough to limit the types of modalities that could be used in distance education. One of those commenters recommended that the Department add the phrase ''and other types of media'' after listing each type of technology. The other commenter recommended that the Department continue to add new media types to the definition rather than removing the existing types that were listed.

One commenter suggested that the Department eliminate the list of technologies that could be used to offer a program through distance education unless we plan to update the appropriate formats on a regular basis (for example, annually).

Another commenter expressed concern that replacing references to types of media with the phrase ''other media'' could cause institutional officials to interpret the phrase as the use of one type of media.

Discussion: We appreciate the commenters' suggestions, but we do not plan to update the list of acceptable technologies at this time. The HEA currently prescribes the types of technologies that may be used for distance education, and in this rulemaking the Department is not making changes to the statutory requirement, but is instead simplifying this list in the regulations by referring to ''other media'' rather than including all of the types of media that may be used to deliver distance education.

Changes: None.

Comments: One commenter suggested that the Department define ''instruction'' rather than ''instructor'' and use the definition of the former to inform requirements for the latter.

Discussion: The Department chose to clarify the requirements for an instructor for purposes of the definition of ''distance education'' because the term is specifically used in statute with reference to distance education. Moreover, we believe that it is beyond our purview to define the term ''instruction'' given its broad application in postsecondary education and the restrictions on the Department's oversight of academic quality in the Department of Education Organization Act.

Changes: None.

Comments: One commenter expressed concern about the variability between accrediting agencies regarding their requirements for an instructor in the context of the definition of ''distance education.'' The commenter stated that each accrediting agency should have a strong definition of a quality instructor that includes requirements for qualifications to teach in the relevant competencies. Two commenters also recommended that in cases where students have multiple instructors, the students should be informed of which instructor is the instructor of record.

Discussion: We believe that accrediting agencies are the appropriate arbiters of academic quality for postsecondary education, including regarding the appropriate requirements for instructors. The Department is prohibited from creating regulations or other requirements regarding the academic quality of educational programs under the Department of Education Organization Act. Furthermore, while it is true that there may be variation among accrediting agencies regarding requirements for instructors, we believe this is appropriate given the different types of qualifications that may be needed depending on the types of programs and degree levels offered.

Changes: None.

Comments: Several commenters sought clarification regarding the Department's requirements for ''regular interaction.''

One commenter indicated that interactions in asynchronous courses may not be predictable and asked the Department to clarify by providing a specific length of time that it considered to be ''regular'' for purposes of this definition.

Another commenter asked how institutions would monitor a student's engagement in distance education, particularly when an interaction occurs during a videoconference where the instructor is working to develop the student's understanding of a particular topic while also attempting to monitor the student's engagement.

One commenter expressed concern that the regulations only require the opportunity for interactions with instructors when needed. The commenter indicated that this lack of mandatory proactive instruction, when combined with a lack of emphasis on faculty involvement, could lead to confusion about the distinction between distance education and correspondence courses. The commenter recommended that the Department delete the words ''the opportunity'' from paragraph (5)(i) of the definition and delete ''when needed'' from paragraph (5)(ii) in order to require proactive substantive interaction for every student.

Several commenters noted that the regulations describing ''regular interaction'' included a requirement for the interaction to be ''regular,'' which the commenters felt was redundant. Three of those commenters recommended that the Department replace the phrase ''regular and predictable basis'' with the phrase ''scheduled and predictable basis.''

Discussion: Given the variety of distance education programs, coursework, instructional modalities, and course schedules, we do not believe it is practical to offer a specific timeframe for regular interaction. The Distance Learning and Innovation subcommittee strongly disagreed with that approach when it was presented, arguing that establishing such a timeframe would either be overly prescriptive or excessively complex. Similarly, an institution cannot be expected to ensure perfect attendance by students at each opportunity for interaction with an instructor, which is why the Department, the subcommittee, and the negotiating committee agreed to frame the requirement as an ''opportunity'' for interaction rather than a required interaction. This approach has the added benefit of allowing institutions to demonstrate compliance with the requirements at the program design level without documenting each and every interaction between students and instructors.

The requirements for regular interaction include monitoring a student's ''academic engagement and success'' with respect to a course or competency. This requirement is not intended to mandate that instructors personally monitor each student's engagement throughout each class session while also instructing, facilitating discussion, or responding to questions from students. Instead, the requirement is intended to ensure that instructors are generally monitoring whether a student is engaged and successful throughout a given course or competency and takes appropriate action as needed. Such monitoring could include evaluating a student's level of participation in synchronous class sessions, but it could also involve monitoring the student's activity on course websites or materials; considering the quality of the student's assignments or responses to questions about course materials; evaluating the level of the student's understanding of course materials during conversations with instructors or performance on exams; or other forms of monitoring the student's engagement and success in the course or competency.

We agree with the commenters that the word ''scheduled'' is more descriptive and provides greater clarity than the word ''regular'' for purposes of describing ''regular interaction.'' Furthermore, the Department believes that the word ''scheduled'' more clearly reflects the intent of the Distance Learning and Innovation subcommittee and the full negotiating committee to ensure that students are provided scheduled opportunities to interact with instructors for which the students can prepare in advance.

Changes: We have replaced the phrase ''predictable and regular basis'' with the phrase ''predictable and scheduled basis'' in paragraph (5)(i) of the definition.

Comments: One commenter explained that there are two types of distance education models that higher education has developed—synchronous and asynchronous—and that the asynchronous model better reflects the realities of working adults, differing levels of preparation, and the importance of assessment. The commenter pointed out that many new students in higher education are ''non-traditional'' and include a large number of veterans and students with families. The commenter asserted that these students have schedules that they cannot control and are better served by asynchronous courses that support their needs for flexibility, while the institution ensures that each student is evaluated based on the student's demonstration of mastery of the competency or course. The commenter recommended that the requirements for regular interaction point to interactions that are appropriate to the course modality and consistent with student success.

Discussion: We agree with the commenter that distance education may, in many cases, have the capability to address the needs of non-traditional students better than traditional classroom courses. However, we disagree that the regulatory definition needs to include a reference to the appropriateness of interactions with respect to course modality and student success for institutions to offer programs that are sufficiently flexible. Though the definition of ''distance education'' establishes certain requirements for interaction in online programs, the Department defers to institutions and their accrediting agencies regarding whether a program's design involves interactions that are appropriate and tailored to the needs of students.

Changes: None.

Comments: A few commenters asked questions about the relationship between the Department's final regulations and the COVID–19 pandemic.

One commenter asked the Department how its proposed definition of distance education would prepare institutions for future pandemics and whether institutions should be required to implement distance education training programs so that they are prepared to shift to an online modality if and when a pandemic prevents in-person instruction once again. The commenter asserted that new options for learning modalities would not prompt an increase in the number of students enrolling in distance education courses and asked how the Department's proposal would reduce barriers to access for students given those trends.

Another commenter pointed out that the Department's recent guidance for distance education related to the COVID–19 pandemic were inconsistent with the regulatory requirements for distance education in the proposed rule.

Discussion: Many institutions with limited distance education offerings at the time of the initial COVID–19 outbreak were unprepared for the impacts of the pandemic and did not have adequate resources or the expertise to quickly shift to an online learning modality. Though many institutions were able to shift to an entirely new modality, many were still faced with a complicated and confusing regulatory framework for distance education that they had never encountered before. The Department's hope is that clarifying and expanding the definition of ''distance education'' will offer a degree of certainty to institutions both familiar and unfamiliar with online learning and will make it easier for institutions to shift to an online modality in the event of a pandemic in the future.

The Department's recent COVID–19 distance education guidance for institutions related to COVID–19 was intended to be temporary and was necessary to address the urgent need to shift instructional operations online very quickly. The Department has established a specific timeframe for that guidance and will expect institutions to again comply with regulatory and statutory requirements when the waivers and flexibility related to COVID–19 expire.

Changes: None.

Comments: Many commenters asked questions about the Department's requirements for ''substantive interaction'' under the definition of ''distance education.''

A few commenters asked the Department to clarify whether substantive interaction was required to occur regularly at the ''instructor level'' or the ''course-competency level.'' Two of those commenters expressed concern that if the definition were applied at the instructor level and not the course-competency level, it could exclude some aspects of an ''unbundled'' instructional model. One commenter offered the example of assessment experts whose skills and expertise are tailored toward developing and scoring assessment, as well as providing students with feedback, but who might not be considered to be ''faculty.'' That commenter argued that the Department should indicate that its intent was for substantive interaction to occur at the course/competency level.

Several commenters asked the Department to explain the interaction between the regulations requiring at least two types of substantive interactions and the requirements for such interactions to be ''regular.'' One commenter asked whether both types of substantive interaction were required throughout a semester, or whether an institution could engage in one or the other activities at any time to meet the requirements. A separate commenter asked whether the two forms of substantive interaction needed to be alternated on a regular basis or whether both forms of interaction were required in the same class session. That commenter recommended that the Department either clarify this point or strike the requirement for more than one form of substantive interaction, asserting that it could cause implementation challenges. Another commenter requested that the Department remove the requirement for at least two types of substantive interaction because it was unclear how often each type of interaction needed to occur and such ambiguity could cause considerable confusion for institutions attempting to implement the requirements.

One commenter asked how instructors would calculate the time that they spend on substantive interaction when one of the categories of such interaction includes responding to questions about the content of a class.

Discussion: The Department's requirements for regular and substantive interaction between instructors and students occurs at the course or competency level. The Department's intent with this definition is to ensure that, for a given unit of study (for example, a class such as English 101 or a competency such as the ability to perform statistical analysis) a student has ample opportunity to substantively interact with an instructor and the instructor (or instructors) monitor the student's engagement and performance, and provide scheduled opportunities for interaction with the student as needed on the basis of that monitoring. Additionally, the regulations must apply at the course or competency level because they are designed to distinguish distance education from correspondence courses for purposes of exempting distance education from the limitations on the percentage of correspondence courses that an institution may offer. Applying the regulatory requirements for distance education at the instructional unit level ensures that any online course or competency that is misclassified as distance education can be included in the calculation of the percentage of correspondence courses that the institution offers for purposes of the institutional eligibility requirements under 34 CFR 600.7.

The Department also applies the requirement for a substantive interaction to include at least two types of activities listed in the definition at the course or competency level. The definition of ''distance education'' lists several different types of interaction that can fulfill the requirements for ''substantive interaction,'' including direct instruction, assessment, responding to questions about the course materials, facilitating a group discussion regarding the course content, or other instructional activities approved by the institution's accrediting agency. The definition requires an institution to perform at least two of those activities, and since we apply the regulation at the course or competency level, we also require an institution to perform at least two of those activities over the period of time that the student completes the course or competency. We believe that requiring a specific timeframe, sequence, or frequency that the activities need to occur within that timeframe would be impractical and would extend beyond our purview under the Department of Education Organization Act.

The Department does not expect an institution to measure or document the exact amount of time that it or its students spend on any particular type of substantive interaction. An institution is expected to maintain academic policies or procedures that create expectations for faculty to substantively interact with students on a predictable and scheduled basis and to monitor each student's engagement and success and follow up with the student as needed.

Changes: None.

Comments: One commenter recommended that the Department add language requiring that institutions using distance education ensure the accessibility of the learning materials and remain compliant with Section 508 of the Rehabilitation Act. The commenter argued that technology can be a limiting factor for individuals with disabilities if the systems used are not accessible.

The commenter also asked the Department to add a requirement for instructors to be ''flexible and work with the student to determine the most appropriate communication mode to maximize the student's ability to participate.'' The commenter indicated that because some students struggled with communication technology, instructors should customize their online programs to ensure that students are being evaluated for their knowledge of content rather than their ability to access technology.

Discussion: The Department does not believe it is appropriate to regulate the Rehabilitation Act using the definition of ''distance education,'' which is derived from the HEA. That said, we strongly support the intent of the Rehabilitation Act and expect every institution with a distance education program to adhere to that law's statutory and regulatory requirements.

Changes: None.

Comments: Many commenters requested that the Department replace the ''and'' between paragraphs (5)(i) and (ii) of the definition with ''or'' in order to allow an institution to fulfill the requirement by taking either of the actions in paragraph (5)—providing the opportunity for substantive interactions with the student on a predictable and regular basis or monitoring the student's academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging with the student—as opposed to requiring the institution to take both of those actions. One of these commenters argued that the proposed regulations would require institutions to adhere to a time-bound model that may not be appropriate for the institution's instructional modality or its students. Two other commenters indicated that the intent of the Distance Learning and Innovation subcommittee was to allow institutions to choose the type of ''regular'' interaction that best suited the academic program and recognized that some institutions have sophisticated technologies that monitor student engagement and success and alert instructors when students are not engaged or are struggling with material. These and other commenters also cautioned that requiring both components of the definition could result in a requirement that institutions adhere to a strict, time-bound schedule, which is counter to the format in many competency-based education programs. Many commenters also argued that many institutions lack the technology or resources needed to monitor a student's engagement and success. Another commenter indicated that the ''and'' would limit the variety of instructional approaches that could be available to institutions if one or the other action fulfilled the requirement. One commenter also noted that reverting to ''or'' between those paragraphs would recognize the importance of a team approach to instruction and co-curricular activities. Several commenters argued that reverting to ''or'' would set expectations for distance education, including monitoring each student's engagement, beyond what is expected or required for on-campus instruction. Several commenters also asserted that the change to ''and'' could push institutions to adopt learning analytics tools to track student progress, which could increase the cost of educating students and introduce privacy or other ethical concerns. One commenter pointed out that requiring institutions to implement both components of the requirements for regular interaction could prevent them from adjusting quickly to market demands and emerging technology. Finally, one commenter pointed out that the Department's OIG would rely upon the new regulatory definition of ''distance education'' when assessing an institution's compliance, suggesting that additional flexibility in the definition was therefore preferable.

Discussion: As one commenter noted, the Distance Learning and Innovation subcommittee's recommendation was to allow an institution to fulfill the requirement for regular interaction by either maintaining predictable and scheduled opportunities for interaction or by maintaining a system for evaluating a student's engagement and progress and ensuring that an instructor followed up when appropriate. The subcommittee's intent was to allow institutions with self-paced programs to use other techniques other than scheduling planned interactions, which in the past had led to perfunctory mandatory phone calls or class sessions that did not provide great benefit to students.

Despite the subcommittee's concerns about requiring predictable opportunities for interaction, the full negotiating committee decided that it was important for both conditions to be met. The committee believed that the proposed definition, requiring both predictable interactions and student monitoring, offered sufficient flexibility regarding the number and frequency of scheduled interactions based upon the length and intensity of the student's coursework. In a self-paced course or competency in which a student approaches the coursework at his or her own pace, the institution is not required to schedule, for example, weekly opportunities for interaction. Instead, the institution may decide that the appropriate timeframe for scheduled opportunities for interactions is bi-weekly or monthly, or a different frequency. Furthermore, by not requiring mandated interactions, the definition does not impose a bureaucratic requirement for a scheduled course session, but instead simply ensures that students are aware that there will be planned occasions that they will be able to interact with an instructor about course content.

Similar concerns were also raised by commenters about requiring more traditional class-based online programs to maintain a system for monitoring student engagement and interacting with the students on that basis. We disagree with several commenters that institutions would need to purchase expensive software to track and monitor each student's online activities to determine whether the student was sufficiently engaged. While such software would meet the requirement if it were part of a system for monitoring and interacting with students when the need arose, it is not a required element for regular and substantive interaction.

The Department's expectation is that instructors take a proactive approach to determining when students need assistance and then offering that assistance, and this could be done either using sophisticated systems for monitoring student activity or more traditional person-to-person evaluation or through the use of tests and quizzes. The required ''monitoring'' could consist of evaluating each student's performance in regular online class sessions or in regular assignments that have been turned in. This type of monitoring is common to nearly all postsecondary programs and has been performed since before the internet existed.

Given all of these factors and the level of importance accorded by the negotiating committee to the use of ''and'' between paragraphs (5)(i) and (ii) of the definition, we decline to revert to the word ''or'' between those paragraphs.

Changes: None.

Comments: One commenter proposed that the Department should provide an outline of the new definition of ''distance education'' to offer clarity to government officials and citizens about the changes to the definition.

Discussion: We thank the commenter for this suggestion and agree that an outline could make the changes clearer. We plan to publish a clear description of each of the changes to the definition of ''distance education'' in the FSA Handbook after the changes become effective.

Changes: None.

Comments: Several commenters asked the Department to clarify whether interactions that were initiated by a student would meet the requirements for regular and substantive interaction between students and instructors. One of those commenters sought clarification regarding whether the Department intends to require evidence of instructor-initiated interaction, student-initiated interaction, or both.

Discussion: The Department does not consider substantive interactions initiated by students to meet the requirements for regular interaction in the definition of ''distance education.'' An institution meets the requirement for regular interaction between students and instructors by, in part, providing the opportunity for substantive interactions with the student on a scheduled and predictable basis commensurate with the length of time and the amount of content in the course or competency. This requirement could be met if instructors made themselves available at a specific scheduled time and through a specific modality (*e.g.,* an online chat or videoconference) for students to interact about the course material, regardless of whether the students chose to make use of this opportunity or interact with the instructor at the scheduled time. However, if an institution does not offer such opportunities for interaction on a regular and scheduled basis in an online program and instead relies solely upon students to initiate interactions with instructors, it would not meet the requirements for regular and substantive interaction between students and instructors and the online program would be considered to be taught using correspondence courses.

Changes: None.

Comments: Several commenters asked how the Department would oversee various aspects of the definition of distance education. One commenter asked how the Department would assess whether an institution's instructional activities were approved by the institution's or program's accrediting agency in audits or program reviews. The commenter also asked whether accrediting agencies would be required to create a list of approved instructional activities or whether the Department would allow agencies to have more ambiguous standards that are applied on a case-by-case basis, which could result in most or all institutions meeting the requirements. Another commenter asked what oversight mechanisms the Department would use to verify the amount of substantive interaction reported by institutions.

Discussion: The Department's oversight of the requirements for regular and substantive interaction between students and instructors will focus on five critical factors that differentiate distance education from correspondence courses. The Department will seek to determine whether—

- The institution's online instruction is delivered through an appropriate form of media;
- The instructors with whom students regularly and substantively interact meet the requirements of the institution's accrediting agency for instruction in the subject matter;
- Instructors engage in at least two forms of substantive interaction meeting the regulatory requirements for the course or competency;
- The institution has established scheduled and predictable opportunities for substantive interaction between students and instructors and create expectations for instructors to monitor each student's engagement and substantively engage with students on the basis of that monitoring; and
- Instructors are responsive to students' requests for instructional support.

The Department will evaluate whether an instructor meets an accrediting agency's requirements by reviewing the agency's written standards and any communication between the agency and the institution regarding the agency's requirements or whether the instructors in question met such requirements. If the Department is unable to determine whether the instructor meets the agency's requirements by reviewing such written materials, it may contact the agency to seek a determination on the matter.

The Department does not require an institution to monitor or document every interaction between an instructor and a student to demonstrate that it has fulfilled the requirements for regular and substantive interaction. However, we encourage institutions to consider whether they have adequate means of monitoring online programs to ensure that they continue to meet all the conditions of the definition. In overseeing the requirements for regular and substantive interaction with instructors, the Department will determine whether an institution has established sufficient internal controls to demonstrate that it has established (1) appropriate academic policies and procedures for its instructors to implement these provisions; and (2) a system for monitoring or periodically evaluating its online programs to ensure that its instructors continue to observe such policies over time.

Comments: One commenter, arguing that direct instruction was at the core of higher education, recommended that the Department require ''substantive interaction'' to include direct instruction in addition to two other elements.

Discussion: The required elements for substantive interaction were determined in consensus with the negotiating committee, and the Department does not believe it would be appropriate to diverge from that agreement to narrow the types of program offerings that would meet the Department's definition of ''distance education.'' Furthermore, we do not believe it is advisable to require regular direct instruction in all distance education programs given the proliferation of promising new educational models that do not rely on regularly scheduled instructional sessions. The Department wishes to remind the commenter that in the case of in-person classroom-based instruction, most schools are not required to take attendance. It the case of credit hour programs, it is the job of the institution to provide the opportunity and it is the job of the student to take it.

Changes: None.

Comments: One commenter expressed dissatisfaction with the Department's proposed definitions of ''correspondence course'' and ''distance education,'' stating that the requirement for ''constant communication'' initiated by the instructor in distance education was unfair and would hinder students who need flexibility with respect to the time and place that they interact with their instructors.

Discussion: The proposed definition of ''distance education'' does not require constant communication between students and instructors and in fact only requires scheduled opportunities for interaction with qualified instructors and a system for monitoring student engagement and success. We believe these requirements are reasonable and will permit substantial flexibility for institutions to create new educational models that place the student, rather than the instructor or the institution, at the center of the learning exercise.

Changes: None.

Comments: Several commenters emphasized the importance of improving the quality of information and oversight related to distance education.

One commenter said that while some information exists about distance education in the Integrated Postsecondary Education Data System (IPEDS), the data are not current and include only the number of students enrolled in distance education courses and completing distance education programs. The commenter also indicated that the National Center for Education Statistics (NCES) sample surveys collect some information about engagement with distance education, but because those surveys are based on samples and are not conducted annually, their usefulness in answering policy and research questions is limited. The commenter argued that the Department should improve timely data collection about distance education given the significant number of students who enroll in that format, the uncertainty about future reliance on distance education options, and the importance of evaluating regulations related to distance education. The commenter suggested adding a field for the distance education status of enrolled title IV recipients in the National Student Loan Data System (NSLDS). Another commenter suggested that the Department require institutions to establish a new location with the Department for exclusively online students. That commenter also reiterated a proposal that had been proposed by one of the non-Federal negotiators during negotiated rulemaking: That the Department require institutions to report, for students who are enrolled in programs in which at least one course can be completed online, whether each recipient of title IV, HEA assistance is enrolled exclusively online, exclusively as a brick-and-mortar student, or as a hybrid student in both online and brick-and-mortar instruction. One commenter called for a demonstration program for competency-based education authorized by Congress that would test replacements for the credit hour and allow institutions to reasonably experiment with different models of interaction with students, but argued that in lieu of such a program no changes should be made to the consensus regulations.

Discussion: We agree with the commenters who suggested that additional data regarding the use of distance education would be helpful; however, we do not believe that collecting such data through the National Student Loan Data system is the appropriate vehicle for that data collection to occur. We will consider the feasibility of the other suggestions offered by commenters for collecting data related to students who are enrolled in distance education. The Department does not have the authority without action by Congress to develop a demonstration program with waivers that exceed the Department's authority under the Experimental Sites Initiative.

Changes: None.

Comments: One commenter recommended that the Department eliminate the regulatory definition of ''regular and substantive interaction'' for distance education entirely, arguing that there is no reason to impose additional requirements beyond what is in the statute given advances in technology that permit detailed monitoring of a student's online activities. The commenter suggested that the Department is not obligated to define ''regular and substantive interaction'' in a way that would prevent many on-ground courses from meeting those requirements. The commenter further advised that the Department's definition of ''academic engagement'' was sufficient to eliminate any confusion that had arisen about distance education because it is widely understood that ''regular and substantive interaction'' is a descriptive term for ''academic engagement.'' Finally, the commenter noted that the Department is not required to follow or defer to its prior sub-regulatory guidance, in particular Dear Colleague Letter GEN–14–23, which provides additional explanation regarding the meaning of ''regular and substantive interaction'' with respect to distance education.

Discussion: We disagree that the statutory requirements for ''regular and substantive interaction'' for a distance education program are sufficiently clear that a regulatory definition is not needed. For more than a decade since the statutory definition of ''distance education'' was first created, institutions have expressed confusion about the practical meaning of the term and have argued that the ambiguity of what constitutes regular and substantive interaction have hampered innovation as a result of fears of non-compliance and audit or program review findings. Moreover, the concept of ''regular and substantive interaction'' is an important differentiating factor between distance education and correspondence courses, which, if improperly understood, could result in institutional ineligibility for an institution that suddenly becomes aware that it has been offering more than half of its courses or enrolling more than half of its students through correspondence courses. We also disagree that the definition, as currently written, would be impossible to meet if it were offered in a classroom setting, since scheduling class sessions and performing ongoing monitoring of each student's performance and engagement in class are traditional teaching functions that do not require the use of sophisticated software systems.

We also disagree that the definition of ''academic engagement'' necessarily includes regular and substantive interaction between students and instructors and can be used in lieu of a description of those requirements in the regulations. While substantive interaction with an instructor related to a student's coursework is certainly a form of academic engagement, it is not synonymous with the broader concept of academic engagement.

Finally, the Department agrees that it is not required by law to continue to abide by the guidance in Dear Colleague Letter GEN–14–23, and plans to retract and revise aspects of that guidance as well as guidance in Dear Colleague Letter GEN–13–10, related to the application process for direct assessment programs, that will no longer apply upon the implementation of these regulations.

Changes: None.

Comments: One commenter recommended that the Department include the concept of ''co-curricular'' education in the definition of distance education, in particular with regard to the requirements for substantive interaction. The commenter proposed that the definition be revised to express that distance education could be either curricular or co-curricular.

The commenter asserted that such revisions would recognize the importance of co-curricular activities, which the commenter defined as activities associated with and complementary of the curriculum. The commenter argued that, for many students who enroll in distance education programs, particularly adult learners, co-curricular learning plays a critical role in enhancing the student experience and helping to ensure student persistence and success and that such learning has also played a similar role in ground-based programs.

Discussion: The Department agrees with the commenter that co-curricular activities—which are generally aligned with and designed to complement the academic curriculum—are useful and often vital components of a postsecondary program that support student persistence and success. Because of the close ties between academic coursework and co-curricular activities, we believe that there may be occasions in which such activities are designated by an institution's accrediting agency as types of substantive interaction under paragraph (4)(v) of the definition of ''distance education.'' If an accrediting agency designates a co-curricular activity as a type of substantive interaction, interactions involving that activity would meet the requirements of the definition. However, we believe that including the concept of co-curricular activities in the definition would increase the scope of activities more broadly than intended by the negotiating committee, and therefore decline to add the suggested language to the text of the definition.

Changes: None.

Comments: Two commenters offered conflicting opinions on whether the Department should emphasize the concept of ''faculty'' rather than ''instructors'' in the definition of ''distance education''.

One commenter argued that the current requirements for instructors left too much discretion to institutions and accrediting agencies. The commenter recommended that the Department should emphasize to accrediting agencies that faculty should be the primary ''instructors'' in postsecondary education, regardless of modality. The commenter was supportive of innovation and the use of artificial intelligence or other innovative technologies but indicated that innovation could occur in the context of faculty interaction with students. The commenter expressed concern that the requirements for distance education in the proposed definition would not be the same as those for other modalities.

Another commenter expressed the opposite view, arguing that the Department's OIG had raised concerns about replacing the word ''instructor'' with the word ''faculty'' in the ''Promoting Real Opportunity, Success, and Prosperity through Education Reform Act'' (PROSPER Act), which was introduced in 2017. The commenter noted that the OIG believed that using the word ''faculty'' in the statutory definition of ''distance education'' would allow a school to qualify for full participation in the FSA programs based on email contact between students and faculty on matters unrelated to the subject matter of a program.

Discussion: Though we do not agree with the level of concern that was raised by the Department's OIG regarding the use of the word ''faculty,'' or that the use of that word in lieu of ''instructor'' would substantially undermine the definition of ''distance education,'' we believe that the word ''instructor'' is more appropriate in this context. Given the use of the word ''instructor'' in the statutory definition of ''distance education,'' we believe that it is appropriate to focus on a staff member's instructional function, rather than that person's faculty role, when making a determination about whether the staff person can fulfill the requirement for regular and substantive interaction with students. The function of instruction and the role of faculty are not necessarily synonymous; for example, many institutions hire research faculty that do not have teaching responsibilities.

Changes: None.

Comments: One commenter indicated that the proposed requirements for substantive interaction did not appear to require any direct instruction or group discussion. The commenter asked whether it would be possible for an institution to fulfill the requirements for substantive interaction without human engagement, *e.g.,* through assessment and responses to students' questions through software or other non-human means. The commenter recommended that the Department include requirements for ''engagement between students and instructors'' rather than merely a reference to ''engaging students'' to make it clear that interactions need to be with human beings to meet the requirements.

Discussion: Only individuals responsible for delivering course content and who meet the qualifications for instruction established by an institution's accrediting agency can fulfill the requirements for regular and substantive interaction with students. The Department does not prohibit other forms of substantive interaction that do not involve qualified instructors, but under the statutory definition such interaction cannot meet the requirements in the definition of ''distance education.'' Interactions with artificial intelligence, adaptive learning systems, or other forms of interactive computer-assisted instructional tools qualify as types of ''academic engagement,'' but in this limited context those forms of engagement do not meet the statutory requirements for regular and substantive interaction between students and instructors.

While we agree with the commenter about the importance of human interaction in this definition, we do not believe the commenter's proposed changes are necessary because the definition currently requires regular and substantive interaction between students and instructors; substantive interactions with machines or other forms of technology that do not involve instructor would therefore not qualify.

Changes: None.

Comments: One commenter asked the Department to reconsider the need for the specific language regarding distance education in an accrediting agency's scope of recognition and, in doing so, recognize that distance education is a more global term regarding instructional delivery provided which can include online delivery of instruction and internships and field experiences, such as clinical rotations.

Discussion: While the Department recognizes that the term ''distance education'' is used to describe a wide variety of activities in higher education, the HEA requires a distance education program to be evaluated and approved by an accrediting agency with approval of distance education in the scope of its recognition by the Secretary.

Changes: None

Definition of Juvenile Justice Facility (§ 668.2)

Comment: One commenter supported the new definition of a juvenile justice facility to ensure that an otherwise eligible student is not prohibited from receiving a Federal Pell Grant solely because of confinement in such a facility.

Discussion: We appreciate the support from the commenter. The Department has received questions in the past about whether these facilities are correctional institutions and whether students in the facilities are eligible for Federal Pell Grants. Neither the HEA nor our regulations previously defined the term ''juvenile justice facility.'' Therefore, we proposed to define this term in the regulations to codify sub-regulatory guidance published on December 8, 2014 (Dear Colleague Letter GEN 14–21). We also sought to clarify the term as referenced in the Department's regulations and materials, including in the definition of ''incarcerated student.'' Accordingly, we aimed to clarify that students in juvenile justice facilities may receive a Federal Pell Grant if they are otherwise eligible.

Changes: None.

Comment: One commenter provided both support and opposition to the definition of ''juvenile justice facility.'' The commenter stated that the HEA does not allow those who are incarcerated in a Federal or State prison to receive a Federal Pell Grant and quoted the statutory language. This commenter then noted that our proposed HEA change would define ''juvenile justice facility'' as being included among the list of correctional facilities in the definition of ''incarcerated student'' for the purposes of Pell Grant availability. The commenter favored extending Pell Grants to students in juvenile justice facilities but opposed including juvenile justice facilities under the correctional institutions in the ''incarcerated student'' definition. The commenter believed that the Department's proposed definition caused confusion about what constitutes an incarcerated student by including juvenile justice facilities within the ''incarcerated student'' definition. Finally, this commenter also noted that the Department did not include any evidence or studies from appropriate prison education experts on how this change would clarify the availability of Pell Grants to students in juvenile justice facilities.

Discussion: We proposed this new definition to clarify that a person incarcerated in a juvenile justice facility is not considered to be incarcerated in a Federal or State penal institution, regardless of who operates or has jurisdiction over the facility. This definition clarifies that students incarcerated in a juvenile justice facility continue to be eligible for Federal Pell Grants. We believe the commenter was mistaken. These regulations do not change or contravene the HEA. Additionally, the Department is unaware of available research on the interpretation of this term and is merely codifying current practice.

Changes: None.

Definition of Incarcerated Student (§ 668.2)

Comments: A couple of commenters expressed support for the revised definition of an incarcerated student. One commenter supported the emphasis on access to Federal Pell Grants while in a juvenile justice facility, noting the importance of funding to complete postsecondary education coursework and potentially obtain an academic credential. The commenter believed this change would not only help those in juvenile justice facilities, but society as a whole because education increases the likelihood of positive outcomes when students are released and reduces the likelihood those students will reoffend. Another commenter who supported the proposed change suggested that adding the term ''juvenile justice facility'' to the incarcerated student definition might imply that the Department is barring access to Federal Pell Grants to students serving in such a facility.

Discussion: We appreciate the commenters' support for the revised ''incarcerated student'' definition. We do not agree that the revised definition implies a prohibition on eligibility for a Federal Pell Grant for those in a juvenile justice facility. In fact, we amended the definition of incarcerated student to clarify that those held in a juvenile justice facility are not considered to be incarcerated to ensure that these students continue to be eligible for Federal Pell Grants.

Changes: None.

Comment: One commenter indicated that some criminal juvenile activity and related records may be confidential and pointed out that individuals may be in a juvenile facility voluntarily or without a court requirement. The commenter suggested that privacy concerns call for the Department to reconsider adding ''juvenile justice facility'' to the incarcerated student definition. This commenter further noted that the Free Application for Federal Student Aid (FAFSA) does not include a question about incarceration and assumed that the Department would seek such information. The commenter asserted that continuing to exclude the phrase would simplify the regulation and avoid excluding necessary exceptions.

Discussion: The changes to the definition of ''incarcerated student'' do not substantively change our current practice. We revised this definition for clarity and to ensure access to Federal Pell Grants for those in a ''juvenile justice facility.'' We do not believe this revised definition requires access to confidential records or poses a privacy risk, nor are we aware of any needed exceptions to the regulatory definition. As we will not exclude those in a ''juvenile justice facility'' from receiving the Federal Pell Grant, this change would not require an additional FAFSA question or the need for other information.

Changes: None.

Direct Assessment Programs (§§ 600.10 and 668.10)

Comments: Numerous commenters supported the proposed changes intended to simplify and clarify regulations for direct assessment programs. Commonly expressed among those writing in support, was the belief that the proposed changes strike an appropriate balance between supporting innovation, along with reducing the administrative burden on institutions, and ensuring a level of oversight necessary to promote program integrity.

Discussion: We appreciate the commenters' support for these proposed changes.

Changes: None.

Comments: Several commenters expressed opposition to the proposed changes in § 600.10 requiring an institution to seek and obtain the Department's approval of a direct assessment program only when the institution adds such a program for the first time, and when the institution offers the first direct assessment program at each level of offering (*e.g.,* a first direct assessment master's degree program or bachelor's degree program) than what the Secretary had previously approved. Overwhelmingly, these commenters asserted that, in proposing not to require institutions to obtain approval for all direct assessment programs, the Department is acting contrary to the intent of Congress as expressed in section 481(b)(4) of the HEA and exceeding its statutory authority. In the opinion of the commenters, this will result in diminished oversight protection, which currently ensures that new direct assessment programs receive adequate scrutiny and that each new eligible direct assessment program is approved by the Secretary. One commenter further suggested the Department was attempting to ''rewrite statute through regulation,'' with another commenter offering that, ''The Department does not have the authority to grant the Secretary discretion to approve some direct assessment programs and not others,'' while another commenter expressed the opinion that in proposing these changes, the Department has acted without supporting evidence or basis in law.

Conveying disagreement with the Department's position, expressed in the NPRM, that once an institution demonstrates it can capably administer a direct assessment program, there is little risk that the same institution would not properly administer other direct assessment programs, a few commenters noted that programs of all types at the same institution, within the same credential level, can vary in quality and value, making it crucial for the Department maintain its oversight responsibilities consistent with its statutory obligations. One of those commenters also took issue with the Department's reasoning that, it ''will review the institution's processes related to title IV aid administration but will not evaluate the academic content or academic quality of programs, except to confirm that an accrediting agency has specifically approved each program,'' arguing that the Department's accreditation regulations, published in November 2019, weaken the accreditor's review and allow an accreditor's senior staff, rather than the accreditor's appointed board of commissioners, to review, approve, and monitor substantive changes to direct assessment programs.

The same commenter offered that the Department failed to consider its OIG audits of accreditors of competency-based education programs that demonstrated why accreditors cannot be solely responsible for the evaluation and oversight of direct assessment programs. In the opinion of the commenter, the Department further failed to consider the OIG audits during the negotiated rulemaking or ask for public comment on how the audit findings may demonstrate whether accreditors' senior staff alone will be able to adequately assess the administration and effectiveness of direct assessment programs without the Department's review, as mandated by statute. Finally, referencing case law (*Connecticut Light & Power Co.* v. *Nuclear Reg. Comm.*, 673 F.2d 525, 528 (D.C. Cir. 1982)), the commenter suggested that, the Department has failed to provide an accurate picture of the reasoning that has led to the proposed rule, resulting in interested parties being unable to comment meaningfully upon the agency's proposals. The commenter additionally cited *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir.1973) for the proposition that, ''It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that, [in] critical degree, is known only to the agency.''

A few commenters, in addition to asserting that the Department has a statutory obligation to approve each new direct assessment program, expressed the belief that direct assessment programs have access to a separate financing model from other types of credit-hour or clock-hour-based programs. This supports (in the opinion of the commenters) heightened oversight of direct assessment programs, achieved through requiring institutions to obtain Department approval for each such program.

One commenter maintained that the current regulations for determining direct assessment program eligibility should be unaltered because direct assessment programs are exempt from limitations on written arrangements. The commenter explained that, per § 668.10(e), direct assessment programs are exempt from the restriction that limits the percentage of learning resources that are provided by other entities, making the risks of inadequate oversight associated with such programs greater than they might otherwise be. In the commenter's opinion, under the Department's proposed regulations an institution that has already received approval for a direct assessment program at a given credential level would be able to stand up subsequent direct assessment programs at the same credential level where up to 100 percent of those programs is offered by outside entities without review from the Department regarding the program's eligibility.

Discussion: We disagree with the commenters who assert that the Department did not have adequate legal authority to require the Department's approval of a direct assessment program only when the institution adds such a program for the first time, and when the institution offers the first direct assessment program at each level of offering than what was previously approved. Section 481(b)(4) of the HEA states that ''In the case of a program being determined eligible for the first time . . . such determination shall be made by the Secretary before such program is considered to be an eligible program.'' While Congress clearly intended for the Department to undertake an evaluation and approval of an institution's offering of direct assessment, whether or not the requirement applies on a program-by-program basis is not prescribed and, therefore, left to the Department.

We also disagree that requiring the Department's approval only for the first direct assessment program that an institution offers (or the first such program at a new level of offering) will result in diminished oversight or undermine the integrity of the title IV, HEA programs. As we indicated in the preamble to the NPRM, the Department does not evaluate academic content or academic quality of programs, but instead focuses its review of a direct assessment program on the institution's title IV aid administration in such programs. Institutions typically use information provided by the Department in response to their initial approvals to inform subsequent applications for direct assessment programs. Thus, multiple evaluations of direct assessment at the same institution often results in the institution providing nearly the same information for each subsequent program, and results in an approval process that yields little value to students, the institution, or taxpayers. Moreover, the Department's regulations under § 668.10(a)(5) will still require an institution's accrediting agency to review and approve each direct assessment program and an institution's credit or clock hour equivalency methodology and institutions will be required to report new direct assessment programs to the Department in accordance with new § 600.21(a)(12), which will provide the Department with an opportunity to ensure that such programs have been appropriately reviewed and approved by an institution's accrediting agency.

The commenter who asserted that the Department did not consider the findings of its OIG when proposing the changes to the direct assessment programs is incorrect. In developing proposed regulations relating to direct assessment programs, we considered the findings in several of the Inspector General's audits [9] over the past decade relating to direct assessment programs. In those audits, the Inspector General made a number of recommendations that have already been adopted by the Department's Office of Postsecondary Education and FSA, including ensuring that School Participation Division managers are fully informed of issues raised during the review of direct assessment program applications,

[9] ''Direct Assessment Programs: Processes for Identifying Risks and Evaluating Applications for Title IV Eligibility Need Strengthening to Better Mitigate Risks Posed to the Title IV Programs,'' published September 30, 2014; ''The Higher Learning Commission Could Improve Its Evaluation of Competency-Based Education Programs to Help the Department Ensure the Programs Are Properly Classified for Title IV Purposes,'' published September 30, 2015; and ''The Western Association of Schools and Colleges Senior College and University Commission Could Improve Its Evaluation of Competency-Based Education Programs to Help the Department Ensure Programs Are Properly Classified for Title IV Purposes,'' published August 2, 2016.

monitoring and evaluating accrediting agency approvals of direct assessment programs, and referring concerns about accrediting agency reviews of direct assessment programs to the Office of Postsecondary Education's Accreditation Group. The Department also included a new provision in these regulations, in consensus with negotiators, to require institutions to address how they avoid paying title IV, HEA program funds for credit that might be given students on the basis of prior learning or life experience in their direct assessment applications. We agree with the OIG that payment of title IV aid for credit earned through prior learning remains an ongoing risk that requires ongoing oversight and mitigation. We recognize that institutions offering direct assessment programs may use financing models that differ from credit hour versions of the same program; however, we believe that the risks associated with these models can be addressed in the institution's first direct assessment application and in requirements for institutions to report subsequent direct assessment programs to the Department. Furthermore, many competency-based programs, including direct assessment programs, use subscription-based financing models that are specifically addressed by the Department's proposed completion-based approach to disbursement of title IV, HEA program funds in subscription-based programs. The Department plans to continue monitoring use of the subscription-based disbursement system to determine whether additional changes are needed in the future.

Finally, the commenter who indicated that direct assessment programs are exempt from the restriction on the percentage of learning resources that are provided by other entities is correct, but we disagree that this exemption should prevent the Department from making the changes to the regulations agreed upon by the negotiating committee. The commenter argues that the Department will have no oversight over subsequent direct assessment programs added by an institution after its initial application, but that is inaccurate. Institutions will still be required to submit materials related to their direct assessment programs through the Department's reporting process under § 600.21(a)(12). This reporting requirement will permit the Department to continue to monitor the types of direct assessment programs that are offered by an institution after its initial application and take action if it determines that there are irregularities with a particular program or programs.

Changes: None.

Comments: One commenter objected to the use of the word ''abilities'' in the definition of ''direct assessment,'' arguing that using the word ''abilities'' in this context poses new risks to students and their privacy. The commenter explained that abilities might include psychological information that is confidential and governed by healthcare information protection laws. Citing the need to legally protect psychological abilities data in ways that might differ from the information protection protocols applicable to other education data, the commenter suggested that the potential consequences be provided for public review and comment before the Department moves to make the change final.

Discussion: Nothing in the Department's regulations would permit an institution to violate applicable privacy laws, including healthcare laws, with respect to a student's psychological or cognitive abilities. The word ''abilities'' in these regulations refers only to the things that a student must demonstrate that he or she can do related to the competencies required in a direct assessment program.

Changes: None.

Comments: A few commenters, one of whom asserted that the NPRM failed to discuss reasonable alternatives, offered modifications they urged the Department to consider. One of these proposed the creation of a two-tier application process. The first tier would include all new programs and apply all of the application elements in the evaluation; the second tier would include additional programs offered at the same credential level, requiring only descriptions of the program under consideration and an explanation of how learning objectives are set and evaluated, without the necessity for the institution to provide information on the methodology for determining an equivalent number of credit or clock hours. Another suggested modification to what was proposed in the NPRM was that the Department require accreditors to utilize the Competency-Based Network (C–BEN) Quality Framework for Competency-Based Educational Programs in evaluating direct assessment programs so that both students and policymakers can be confident the program has been designed to meet quality standards. A further recommendation was the inclusion of additional language in the regulation which would require institutions to notify the Department and seek approval for substantively changed processes or policies within the approved direct assessment model for the institution.

Discussion: We thank the commenter for the suggestion regarding a two-tier process for the Department's approval of direct assessment programs. Though we decline to adopt the suggestion, the process for the Department's evaluation of an institution's first and subsequent direct assessment programs will proceed in a similar fashion. An institution's first application for direct assessment, or its first application at a new level of offering, will undergo the Department's full approval process and the institution will not be permitted to disburse title IV, HEA program funds until it has received the Department's approval. Subsequent programs at the same level(s) of offering will be reported to the Department under new § 600.21(a)(12), and this reporting process will require the institution to submit to the Department a description of the program and evidence that its accrediting agency has approved the program and the institution's methodology for determining credit or clock hour equivalency for the program.

We also appreciate the commenter's suggestion regarding a requirement for an institution to notify the Department and seek approval for changed processes or policies for the institutions direct assessment offerings. Though we believe that it would be too burdensome to implement this suggestion any time such a change occurred, the Department will evaluate such changes, and all regulatory requirements for an institution's direct assessment programs, during an institution's application for recertification.

There was no discussion during negotiated rulemaking regarding a requirement for accrediting agencies to the use of C–BEN's Quality Framework for Competency-Based Educational Programs [10] (Quality Framework) when approving new direct assessment programs, and we do not feel it is appropriate to introduce new requirements for accrediting agencies at this stage given that the Department has already published its final rule on accreditation. Additionally, though the Quality Framework includes helpful principles for the design and implementation of high-quality competency-based programs and we encourage institutions to consider these principles when planning to offer competency-based education programs, the principles may not be appropriate for all accrediting agencies in all

[10] *www.cbenetwork.org/wp-content/uploads/2018/09/Quality-Framework-for-Competency-Based-Education-Programs-Updated.pdf.*

circumstances and imposing them on all accrediting agencies could undermine the autonomy of those entities and their oversight of academic quality, which is protected by the HEA. Therefore, we decline at this time to include a requirement for accrediting agencies to use the standards described in the Quality Framework when approving competency-based education programs, including direct assessment programs.

Changes: None.

Comments: A few commenters indicated concerns over the proposed requirement for an institution to establish a methodology to reasonably equate each module in the direct assessment program to either credit or clock hours. Expressing disappointment at the Department's continued reliance on clock or credit-hour equivalencies, one of those commenters stressed the very nature of direct assessment programs in utilizing direct assessment of student learning or recognizing the direct assessment of student learning by others in lieu of credit or clock hours as the measure of student learning, and offered that the Department's focus on equating each module in the direct assessment program to either credit or clock hours is inconsistent with the HEA, which merely requires that any such assessment is consistent with the accreditation of the institution or program utilizing the results of the assessment (20 U.S.C. 1088(b)(4)). The same commenter further asserted that requiring institutions to craft, implement, and explain methodologies for creating credit or clock hour equivalences is administratively burdensome and shifts the program's focus away from student learning in favor of seat time.

Another commenter suggested that the use of the term ''module'' in § 668.10(a)(3) as the period measure of learning in direct assessment programs is confusing since it is already used in § 668.22, and in the NPRM further limited to describe courses in standard and nonstandard-term programs in relation to the return to title IV funds. In order to avoid this confusion the commenter recommended that the Department remove the term ''module'' in the direct assessment context and instead require in § 668.10(a)(3) that ''An institution must establish a methodology to reasonably equate each of its stated measures of learning in the direct assessment program to either credit hours or clock hours . . .'' (85 FR 18698). This change, the commenter argues, would not alter the substance and meaning of the amendments in any way.

Discussion: We disagree with the commenters who asserted that it is not necessary for the Department to require an institution to clearly describe its methodology for developing credit or clock hour equivalencies for its direct assessment programs. This requirement is vital to the integrity of the title IV, HEA programs because the requirements for calculating awards and disbursement amounts under those programs is still performed using credit or clock hours. Though we acknowledge that the credit hour is an outdated method of measuring a student's workload based on seat time and that developing an equivalency system involves administrative burden, there is currently no widely-accepted alternative ''currency'' for learning and workload.[11] Without such an alternative, the Department will continue to use credit or clock hour equivalencies in order to ensure that an institution's choice of a unit of measurement for a direct assessment program does not result in an unfair or inflated determination of a student's eligibility for title IV, HEA funds. Such a ''currency'' is also important in enabling students to transfer credits between institutions.

The Department encourages institutions and accrediting agencies to consider options for measures of student learning and workload that do not rely on credit hours but can be widely accepted and understood by practitioners and adopted by accrediting agencies. If the use of such a measure becomes prevalent in postsecondary education, the Department will consider allowing institutions to rely upon that measure for competency rather than requiring an equivalency to credit or clock hours.

Though we agree with the commenter who indicated that it was possible that the use of the term ''module'' in this section could be conflated with the different usage of the term in the R2T4 regulations under § 668.22, we decline to make a change in this case. We believe that replacing the word ''module'' would require the use of another term that may result in a substantively different approach in the direct assessment regulations. Because we did not discuss such an approach with the negotiating committee, nor include discussion of the issue in the NPRM, we decline to make the change at this time. Additionally, we do not believe that any confusion regarding the word ''module'' will undermine the requirements in either § 668.10 or § 668.22 because of the different context for the usage of the word in each section.

[11] *www.luminafoundation.org/files/resources/cracking-the-credit-hour.pdf.*

Changes: None.

Comments: One commenter offered that, while the proposed regulation states that title IV, HEA funds cannot be utilized for the portion of the direct assessment program that the student is awarded based on prior learning, it does not define what activities comprise prior learning. In the opinion of the commenter, this leaves the proposed regulation open to a variety of interpretations and may result in miscommunication and confusion between the Department and institutions. The commenter proposes that ''prior learning'' and ''prior learning assessment'' be defined as follows:

- Prior Learning—Learning obtained outside of an academic context (experiential, personal, professional, workplace, etc.) that has not been officially awarded as academic credit.
- Prior Learning Assessment—is the process that evaluates and recognizes prior learning and awards the appropriate level of academic credit based on established institutional/organizational standards. Assessment of prior learning may occur before and during (concurrently) credit bearing (title IV eligible) course and programs.

Discussion: We thank the commenter for the suggestions regarding how to define prior learning in the context of the direct assessment regulations. When the term ''prior learning'' is used in these regulations, it means learning that occurred prior to the student's enrollment at the institution or in a context other than the curriculum in which the student is enrolled (for example, the student's workplace or another academic institution). Prior learning includes learning associated with the transfer of credit from a prior institution, since the credits earned through transfer cannot be included in a student's enrollment status for purposes of calculating eligibility for title IV, HEA assistance. We agree with the commenter's definition of ''prior learning assessment,'' which means a process for evaluating and recognizing prior learning and awarding the appropriate level of academic credit based on established institutional/organizational standards. We also agree that assessment of prior learning may occur prior to and during a student's enrollment at the institution.

Changes: None.

Comments: One commenter suggested that competency-based education, as a less mature field, may not be ready for expansion. However, the commenter indicated that it is important to make data available that might help researchers, practitioners, and others understand the field better and provide research and information that help future efforts by the Department or Congress to enable innovation while protecting students and taxpayers. The commenter offered several suggestions for the Department to collect and share data about direct assessment programs that have been approved directly by the Department, including publication of a list of institutions that have been approved for direct assessment and collecting information about tuition, retention rates, and completion rates for each direct assessment program. The commenter also suggested disaggregating and identifying these programs on the College Scorecard. The commenter recommended against requiring the collection or sharing of data related to course-based competency-based education programs that do not require Department approval given the potential for increased burden.

Discussion: We thank the commenter for their suggestions regarding how to improve data on direct assessment programs and institutional accountability. We believe that the commenter's suggestion of publishing a list of approved direct assessment programs and the institutions that offer them is reasonable and we will evaluate whether it is possible to post a public list of such programs. However, because the number of direct assessment programs remains small, we do not believe that we should collect data for such programs exceeding what is collected for other types of programs, nor do we currently intend to provide data on the College Scorecard specifically related to direct assessment programs. We will consider doing so in the future if the number of direct assessment programs increases substantially.

We agree with the commenter that additional data is not needed for course-based competency-based programs. Because there is no consistent statutory definition of a competency-based program that does not use direct assessment, the Department does not feel that it is practical or useful to attempt to collect data about such programs, since the data would reflect a wide range of programs, many of which have in common only the competency-based learning modality.

Changes: None.

New Program Approval (§ 600.20)

Comments: Many commenters supported the removal of § 600.20(d)(1)(ii)(B), which provides that an institution that is submitting a notice in accordance with § 600.20(d)(1)(ii)(A) is not required to obtain approval to offer the additional program unless notified by the Secretary at least 30 days before the first day of class that the program must be approved. The commenters stated that these current regulations create an unnecessary burden, make it more difficult to quickly respond to the needs of employers, and duplicate the oversight of programs by State authorizing agencies and accrediting agencies. The commenters also supported the addition of provisions requiring that the Department take prompt action on any materially complete application under § 600.20(a) or (b). Two commenters also noted that it is very difficult for institutions to be expected to wait until 30 days prior to the start of the program to advertise or enroll students in the program. One commenter also underscored the benefits of reduced redundancy while supporting the effort to minimize the impact of delays by the Department in the program approval process.

Discussion: The Department agrees with the commenters. Removing § 600.20(d)(1)(ii)(B) will ease the process of approving new programs and allow institutions to offer new programs in a timely manner to meet both student demand and workforce needs. The Department agrees that the current provision creates significant uncertainty about whether an institution will be allowed to offer a program until the program has nearly begun, without a tangible benefit in terms of oversight. It is not reasonable to expect institutions to either enroll students in a program that may not be allowed to operate or expect students to wait to enroll in these programs until 30 days prior to the start of the program. The Department seeks to conduct proper oversight in a timely manner without undue impact to institutions or students. As many commenters noted, this oversight role may also be duplicative of what is overseen by accrediting agencies and State authorizing agencies.

Changes: None.

Comments: One commenter encouraged the Department to consider streamlining the proposed regulations and processes for institutions on provisional status. The commenter suggested the Department either modify the regulations or use its discretion to streamline approvals for institutions with a strong record of compliance and stability. The commenter emphasized that the COVID–19 crisis may force an increasing number of institutions to be placed on provisional status and that such institutions may need quick assistance starting new and innovative programs.

Discussion: The Department thanks the commenter for the suggestion. The Department has already proposed important regulatory flexibilities without jeopardizing proper oversight. Further regulatory changes would risk violating the consensus agreement and weakening important oversight of program reviews. The Department currently considers the past record of an institution in these reviews but agrees that some administrative processes could be improved to provide more timely responses, better communication, and more consistent decisions. The Department has already evaluated what it would take to make such improvements and hopes to implement them soon but declines to make further regulatory changes as the commenters suggest. The Department also thanks the commenters for the suggestion on streamlining processes in regard to COVID–19, but we believe the impacts COVID–19 has on schools will not necessarily result in a larger number of institutions that are placed on provisional status.

Changes: None.

Comments: Several commenters disagreed with the Department's contention that the changes in § 600.20 restore functions related to program quality to accrediting agencies and State authorizing agencies. Instead, these commenters say that the approval process relates to the requirements related to access to title IV aid. Therefore, the commenters say, institutions should be required to report their intent to establish new programs to protect students and taxpayer funds. The commenters also assert that the elimination of the list of elements the Secretary will consider when reviewing an application under this section was not part of the consensus language nor was it explained in the NPRM and therefore the change should be reverted to the consensus language in the final rule.

Discussion: The Department disagrees with the assertions made by the commenters. While they are correct that the provisions of § 600.20 broadly relate to the Department's oversight of access to title IV aid, the overwhelming majority of these provisions are left unchanged. Institutions continue to be required to notify the Secretary of their intent to offer an additional educational program. The proposed regulations simply require the Department to act promptly and remove restrictions that unnecessarily prevent an institution from quickly developing new programs in response to requests by students, employers, or others. It is to the benefit of both students and institutions that there be certainty well in advance that a planned program will be able to operate. The Department intended that the amendatory instructions in the NPRM would be consistent with the consensus language adopted during the negotiated rulemaking. The amendatory instructions that were published, however, contained errors, which the Department has corrected in this final rule. The description of the changes to § 600.20 in the preamble to the NPRM accurately reflected the consensus language.

Changes: None.

Comment: One commenter noted that the amendatory language appeared to contain drafting errors or changes that were not appropriately described, which differed from consensus language. The commenter urged the Department to reopen the NPRM for additional comment. The commenter noted that the proposed amendatory language would delete current § 600.20(d)(1)(ii)(E), a change that they would oppose on the basis that the elements in that section are important for any approvals the Secretary may consider. The commenter urged the Department to maintain current § 600.20(d)(1)(ii)(E) (which is redesignated as § 600.20(d)(1)(ii)(D)) and revise the reference in that section to paragraph (d)(1)(ii)(B), which was deleted in the consensus language, to instead refer to paragraph (d)(1)(ii)(C), which relates to the Secretary's approval of an additional educational program.

Discussion: The Department appreciates the commenter's close review of the proposed amendatory language. We did not intend to deviate from the consensus language of § 600.20 and identified and discussed each of the intended revisions in the preamble to the NPRM. We agree that the proposed amendatory language contained errors, especially related to the revised numbering of paragraphs in § 600.20(d)(1) and believe that the commenter's suggested revisions are reasonable.

Changes: We have revised the amendatory language to reflect the consensus language, and also revised the reference in redesignated paragraph (d)(1)(ii)(D) to refer to paragraph (d)(1)(ii)(C).

Subscription Period Disbursement (§§ 668.2 and 668.164)

Comments: Many commenters supported the Department's definition of a subscription-based program model within § 668.2. Two commenters indicated that the subscription-based model addresses the unique nature of competency-based and other self-paced programs of study and further encourages institutions of higher education to innovate by creating learning modalities that allow students to learn at their own pace while remaining eligible for title IV, HEA program assistance. Another commenter opined that the proposed subscription-based system supports postsecondary access and affordability for working adults. One commenter stated that the proposed subscription-based model balances flexible timelines for students with completion requirements that maintain the integrity of the title IV, HEA programs. Another commenter was supportive of the changes in timeframes associated with disbursements for subscription-based programs and indicated appreciation for the ability for institutions to offer early disbursements in such programs, asserting that the model's completion requirements would be essential to encouraging and supporting students to complete their programs on time. Another commenter supported the changes because it would permit self-paced coursework to ''float'' beyond the end of a term until a student masters the learning objectives for that coursework. Several commenters expressed support for proposed definition of a ''full-time student'' under § 668.2 as it relates to subscription-based programs; one of those commenters indicated that it made sense to prevent a student from receiving a disbursement based on retaken coursework in a subscription-based program, and another stated that to do otherwise would be nonsensical.

Discussion: The Department thanks the commenters for their support.

Changes: None.

Comments: Two commenters, while supportive of the Department's proposed regulations regarding subscription-based programs, urged the Department to rely more heavily on data and evidence to oversee such programs. One of those commenters noted that the Department has not yet produced any findings from its CBE Experiment and asked the Department to produce the statutorily-mandated reports detailing the findings of its experiments.[12] This commenter also encouraged the Department to improve the collection of data from participating institutions in the future so that CBE experiments will be more useful in the future. The other commenter emphasized the importance of focusing on student outcomes to evaluate institutions and their impacts on students and the nation's ability to develop the talent needed to address economic and social challenges. The commenter expressed that shifting to a more transparent, outcomes-focused accountability system depends on the ability of existing and new entities to access and use better data and emphasized the importance of equity and quality in any such system.

Discussion: We agree with commenters about the importance of using data and evidence in the Department's oversight of subscription-based programs, and that such information is an important component of an outcomes-based accountability framework. To those ends, the Department plans to monitor which programs use the subscription-based model and will evaluate student-level data, such as disbursement amounts, debt levels, and withdrawal rates for students who are enrolled in such programs. This evaluation will take the place of the Department's CBE Experiment, which will end on June 30, 2020. The Department will also publish a final report on the CBE Experiment that will offer more information to the public about the results of that experiment related to subscription-based programs.

Changes: None.

Comments: One commenter, while acknowledging appreciation for the Department's attempt to balance the subscription-based model's completion requirements with the likelihood that some students could struggle to make progress during a specific period, indicated concern that the lack of alignment between disbursements and payment periods could cause confusion amongst students, families, and (at least initially) institutions.

Discussion: We disagree that the subscription-based disbursement model is excessively complicated. Though the model does require an institution to carefully monitor a student's progress in order to ensure that he or she does not receive subsequent disbursements of title IV, HEA program assistance, each institution has the ability to clearly express to students the number of credits (or the equivalent) that must be completed by a given date in order to receive aid in the future. This facet of the subscription-based disbursement model has already been successfully implemented for many non-term programs under the existing disbursement system for such programs.

Changes: None.

Comments: Several commenters asked the Department to allow the subscription-based model to be used for programs that are not offered using direct assessment. One of those

[12] *experimentalsites.ed.gov/exp/approved.html.*

commenters asked that the Department extend the ability to use the subscription-based disbursement model to any self-paced postsecondary program, arguing that doing so would provide for greater innovation while still tying access to Federal aid with student achievement. The commenter suggested that such a change would likely increase interest among institutions and software vendors to support innovation by using the new model.

Two commenters expressed a related concern about institutions that had been participating in the Department's CBE Experiment and asked if such institutions offering credit-hour CBE programs would transition following the end of that experiment, which had allowed institutions to use a form of this model on a limited basis.

One commenter, while supportive of the Department's proposed regulations for subscription-based programs, urged the Department not to expand the definition or weaken the flexibilities provided by such programs. The commenter noted that subscription-based systems are not without risk to students, since in such programs students are effectively committed to a single price based on the number of courses they expected to complete at the start of the semester, and this means that students who do not complete their programs quickly could overpay for an education that the student does not benefit from. The commenter emphasized that because tuition in subscription-based programs will be largely financed with student debts, students who do poorly in subscription-based programs could be at risk.

Discussion: The Department agrees with commenters who argue that the subscription-based method for disbursing title IV, HEA program assistance should be extended to programs other than direct assessment programs. The Department had originally intended to limit the applicability of those provisions to direct assessment programs in order to ensure that the disbursement method was used only in programs offered by CBE. However, many CBE programs are not offered using direct assessment and would thus be prevented from using the subscription-based model.

Commenters also make a strong argument that limiting the applicability of the requirements to direct assessment programs would sharply limit the use of the model and would discourage software providers from creating technology that assists institutions in disbursing title IV, HEA funds using this method. This, in turn, would prevent the model from being effectively scaled at most institutions given the cost of incorporating the model into existing technology supporting the administration of title IV, HEA program funds.

Moreover, we did not intend to hamper or limit flexibility in disbursement of title IV, HEA assistance for institutions that had previously been participants in the Department's CBE Experiment, but recognize that many of those institutions measure student progress using credit hours rather than direct assessment, which would have precluded them from using the subscription-based disbursement model under the proposed rule. We believe that expanding the use of the subscription-based model to any institution using subscription pricing will permit institutions with CBE programs using such pricing to transition more easily into full regulatory compliance following the end of the CBE Experiment.

Finally, the Department believes that the subscription-based model includes safeguards for both students and taxpayers that limit the risk of expanding the use of the model more broadly. The model protects taxpayers by requiring students to complete courses or competencies before receiving subsequent disbursements of title IV, HEA program funds. The model also improves upon the existing non-term disbursement system for students by allowing students to switch between full-time and less-than-full-time versions of a program in order to limit the number of courses they are required to complete in order to receive subsequent disbursements of title IV, HEA program funds.

We share commenters' concerns that students in subscription-based programs could quickly accrue debt while falling behind in their coursework. This risk was specifically why we designed the model to require students to complete coursework before receiving subsequent disbursements of title IV, HEA program funds. Institutions and students will both have a strong incentive to act if a student finds a subscription-based program too challenging or fails to make progress. Faced with the possibility of a student losing access to aid, an institution may provide additional assistance or resources to the student or encourage the student to transfer into a version of the program at a reduced enrollment status better suited to the student's rate of progress. Similarly, the student may decide to seek additional support or transfer into a different program. In either case, the model's completion requirements prevent a student from taking on too much debt if the student is unable to complete coursework in the program.

Finally, use of the model would still be limited to institutions that charge students on a subscription basis, a practice which is rare and primarily used by competency-based programs. The Department will evaluate the effectiveness of, and monitor risks associated with, the model as it begins to be used more broadly and will make any changes necessary to protect students and the integrity of the title IV, HEA programs.

Changes: We have removed the words "direct assessment" from the first sentence in the definition of "subscription-based program."

Comments: One commenter requested a correction to the definition of a subscription-based program by adding "(or the equivalent)" following "credit hours" in the first sentence of the definition paragraph. The commenter contends this would align the first sentence to the third and last sentences of the same paragraph where the parenthetical already exists.

Discussion: We agree with the commenter that referring to the equivalent of credit hour in the specified location would improve the consistency of the definition.

Changes: We have added the words "(or the equivalent)" following the words "credit hours" in the first sentence of the definition of "subscription-based program."

Comments: One commenter expressed support for the Department's decision to provide a student with some control over the pace of learning in his or her subscription-based program by selecting a program version at a specific enrollment status. The commenter indicated that allowing a student to change to different program versions no more often than once per year supports student flexibility and results in a manageable level of administrative burden. Conversely, another commenter asserted that the Department had not provided sufficient justification for preventing students from switching between versions of a subscription-based program no more than once per academic year.

Discussion: The limitation on the number of times that a student is permitted to switch between versions of a subscription-based program was agreed upon by the Distance Learning and Innovation subcommittee as a condition for the Department to waive the requirement for an institution to evaluate a student's pace for satisfactory academic progress purposes in a subscription-based program. We believe that evaluating a student's pace is unnecessary if the program requires a particular rate of completion in order for the student to continue receiving title IV, HEA program assistance over time. This condition is met if the subscription-based program both requires the student to maintain a consistent enrollment status (*e.g.,* half-time or full-time) and the student does not regularly change that enrollment status, which in turn would adjust the number of credits the student was required to complete before receiving subsequent disbursements.

Allowing a student to frequently adjust enrollment status (*e.g.,* by switching between versions of the same program) would mean that, without requiring the institution to evaluate the student's pace toward completion of the program, the Department would have no mechanism for ensuring that the student completes his or her program in a timely manner. We believe that the greater flexibility associated with the ability to switch enrollment status would be offset by the substantially greater complexity associated with measuring a student's pace for satisfactory academic progress purposes. Therefore, the Department believes that not requiring pace evaluations, but limiting students to switching between versions of the same subscription-based program once per year, is the most appropriate way to ensure that the student maintains an appropriate pace (in the judgment of the institution) toward program completion.

Changes: None.

Comments: One commenter asked whether a student enrolled in a subscription-based program would be required to complete credits associated with a payment period that the student did not attend in order to receive subsequent disbursements of title IV, HEA program assistance.

Discussion: A student in a subscription-based program is not required to complete credit hours (or the equivalent) associated with a payment period the student did not attend. In a subscription-based program, the number of credit hours (or the equivalent) that a student is required to complete accrue only for payment periods in which the student attends at least one day. If an institution determines that a student did not attend a given payment period, the credit hours (or the equivalent) associated with that payment period would not accrue toward the student's future completion requirements.

Changes: None.

Comments: One commenter requested clarification regarding how a student would switch between versions of the same subscription-based program with different enrollment status requirements. The commenter inquired whether a student would be held accountable for incomplete credits associated with one enrollment level after changing to a different enrollment level and asked whether the Department would leave this to the discretion of institutional policy.

To illustrate the question, the commenter sought the Department's viewpoint on an example of a student making such a change. In the commenter's example, a full-time student has completed six subscription periods, each of which is associated with 12 credit hours. Thus, the student would be required to have completed at least 60 credit hours (12 credit hours multiplied by five terms, excluding the first one that the student attended) before receiving title IV, HEA assistance for a future payment period. However, at the end of the sixth payment period, the student has only completed 52 credit hours. At that time, the student switches to a half-time version of the same subscription-based program. The commenter asked whether the student would still need to complete eight more credit hours (more than the six hours associated with half-time enrollment status) before receiving another disbursement of title IV, HEA funds in the next payment period.

Discussion: In the situation described, the student would be required to complete eight more credit hours before receiving a disbursement at half-time enrollment status for the following payment period. Such a student would then be required to complete a further six credit hours (in addition to the eight credit hours needed to gain eligibility for the next disbursement) in order to receive the following disbursement of title IV, HEA program funds for the payment period after that.

Any time that a student begins attendance in a payment period in a subscription-based program, the student must complete the credit hours (or the equivalent) associated with that payment period (except for the first payment period that the student attends) before receiving title IV, HEA program funds for the following payment period. When a student transfers between versions of the same subscription-based program, the student must first complete the hours associated with the student's enrollment status in the previous version of the program. Because the completion requirement in a subscription-based program is based on the number of payment periods that a student has attended, a student in such a program may only change his or her enrollment status at the beginning of a payment period, and when doing so must complete all the hours accrued for that program before receiving a subsequent disbursement of title IV, HEA funds.

Note that a student who transfers from a subscription-based program to a non-term program, or a term-based program that does not use subscription periods, is not required to complete additional credit hours before receiving a disbursement in his or her new program. This includes cases in which the student transfers from a subscription-based version of a program to a version of the same program that does not use subscription periods.

Changes: None.

Comments: One commenter asked whether a student's Pell Grant enrollment status would need to be adjusted at the end of a subscription period to exclude any coursework for which the student did not begin attendance. The same commenter asked the Department to clarify whether a student could begin coursework used to establish the Pell Grant enrollment status after the subscription period for which the student was paid had ended.

Discussion: Normally, a student in a term-based program is required to attend each class that the institution uses to establish the student's Pell Grant enrollment status under the Pell Grant regulations under § 690.80(b)(2)(ii). Similar to a student enrolled in a nonterm program, a student in a subscription-based program is not required to attend all of the courses in a payment period that comprise the student's enrollment status. This is because the Department presumes that the student must attend a sufficient number of classes or demonstrate a sufficient number of competencies in order to earn the credit hours (or the equivalent) before receiving subsequent disbursements of title IV, HEA program funds.

Note that because a student in a subscription-based program is always treated as having the same enrollment status, there is also no need for an institution to establish a Pell Grant recalculation date under § 690.80(b)(2)(i).

Changes: None.

Comments: Two commenters asked the Department to clarify whether the use of the subscription-based disbursement model will be optional or required for an institution that offers a program that is billed by subscription period. Both commenters requested that an institution be given the option to use other disbursement methods—such as for standard term, nonstandard term, or nonterm programs—if the institution otherwise meets the requirements to use those alternative disbursement methods. One of those commenters asked that institutions be permitted to continue using their current method for delivering title IV, HEA program funds while developing student-friendly plans to convert from one model to another and allowing software vendors to design, develop, and test the complex new disbursement model. The commenter argued that such flexibility would provide options for institutions wishing to ''teach out'' students who were already receiving title IV, HEA program funds using one of the existing disbursement systems.

Another commenter interpreted the proposed definitions of the terms ''subscription-based program'' and ''full-time student'' to require institutions that use a subscription-based pricing model to also use the subscription-based model for disbursing title IV, HEA program funds. The commenter disagreed with this perceived approach, explaining that an institution could use subscription pricing in a program that otherwise meets the requirements to be treated as a traditional term-based program. The commenter recommended that the Department allow an institution the flexibility to choose the type of disbursement method that best suits it even if it uses a subscription pricing model.

Discussion: The Department views the use of the subscription-based model for disbursing title IV, HEA programs funds as entirely optional. All programs that meet the requirements for the subscription-based disbursement model would also be permitted to use the existing framework for disbursing funds in a non-term program. Additionally, if a subscription-based program also meets the requirements for a term-based program—for example, students are required to begin and end all courses or competencies within the term start and end dates—the institution can disburse funds using standard terms or non-standard terms (as applicable) instead of the subscription-based format.

When the final rule is effective, an institution that wishes to adopt the subscription-based format may ''teach out'' students who had previously been provided aid under the existing term-based or non-term disbursement systems. The institution would then be permitted to begin enrolling new cohorts of students using the subscription-based format. An institution could also choose to withdraw students from their term-based or non-term programs and enroll the students under the subscription-based model. Students who transfer from a term-based or non-term program into a subscription-based program will be treated like all other students who first enroll in subscription-based programs, *i.e.,* they will not be required to complete the credit hours (or the equivalent) associated with the first payment period of their enrollment in the program and will be required to complete the appropriate number of hours to receive subsequent disbursements thereafter. Note that students who transfer from one subscription-based program to another at the same institution, including transfers between versions of the same program, will not receive a ''free'' payment period when they transfer and must complete all the credit hours (or the equivalent) that have accrued in the prior program before receiving a disbursement in the program to which the student transferred.

Changes: None.

Comments: One commenter opposed the requirement for a student to complete a specific number of credit hours (or the equivalent) in order to receive subsequent disbursements of title IV, HEA program funds in a subscription-based program. The commenter also contended that institutions using innovative learning models rarely originate single-term loans, and that the requirement to make two equal disbursements of a single-term loan is difficult to understand and results in a frustrating student experience just prior to a student's completion of a program. The commenter recommended that the Department allow one disbursement of a single term loan for single term loans with loan periods exceeding four and a half months in a subscription-based program.

Discussion: We appreciate the comments and the recommendation but do not plan to change requirements under the Direct Loan regulations, because those regulations were not discussed during negotiated rulemaking, nor published for comment in the NPRM. Additionally, the completion requirements are integral to the subscription-based disbursement system and help to ensure that students are making adequate progress in their programs. The requirements were agreed upon by both the Distance Learning and Innovation subcommittee and the full negotiating committee, and we do not plan to eliminate those completion requirements for students in subscription-based programs.

Changes: None.

Definition of Weeks of Instructional Time (§ 668.3)

Comments: Commenters expressed overwhelming support for the Department's definition of a week of instructional time related to an academic year under § 668.3(a)(2)(ii) to include programs that use asynchronous coursework through distance education or correspondence. Several commenters acknowledged the Department's efforts to create a definition that accounts for innovative non-traditional programs that are offered asynchronously, reflecting the unique nature of distance education modalities. Several commenters also noted that while time continues to be an important factor in awarding and disbursing title IV, HEA program funds, the new definition was a step away from a rigid conception of time-based, scheduled instruction, and a positive step toward emphasizing learning over time. One commenter also indicated that the new definition would provide clarity and transparency regarding regulatory thresholds for a week of instructional time.

Discussion: The Department thanks the commenters for their support.

Changes: None.

Comments: One commenter indicated that changing the definition of ''a week of instructional time'' is not necessary, because accrediting agencies are responsible for the content of instruction.

Discussion: We agree that accrediting agencies have authority over instructional quality at postsecondary institutions. However, we do not believe that such authority precludes or obviates the need for changes to the definition of a week of instructional time.

Changes: None.

Written Arrangements at Domestic Institutions (§ 668.5)

Comments: A few commenters supported the proposed changes to written arrangements because they believe the changes will promote innovation and workforce responsiveness. One commenter said the changes will provide students with access to more high-quality programs. Another commenter said the changes will align the needs of graduates with those of employers and allow institutions to offer timely, relevant educational program offerings they may be unable to provide on their own, allowing them to better attract and retain students. One commenter supported the proposal, citing an improved ability for employers to engage with institutions to reduce skills gaps and personalize learning.

Discussion: The Department appreciates the support for the proposed changes.

Changes: None.

Comments: Many commenters supported the consensus language, including the requirement in both current regulation and the proposed regulation that an ineligible institution or organization may provide up to 25 percent of a program (or up to 50 percent with accrediting agency approval). Several of these commenters urged the Department not to go beyond the 25 percent and 50 percent limits because doing so could pose risks to students and taxpayers, and particularly disadvantaged groups of students, especially if an outside entity could provide more than half of a program. They stated in various ways that going above 50 percent would risk, or outright permit, institutions to lend their accreditation or title IV eligibility status to others. One of these commenters worried that the motivation for abuse could be more acute given potentially declining revenues during and after the COVID–19 pandemic if the Department went beyond 25 and 50 percent limits. These commenters cited discussion at negotiated rulemaking, including negotiators' rejection of proposals that would have allowed institutions to go beyond these limits. One of these commenters suggested that the current limit of 50 percent would allow for sufficient flexibility for institutions while ensuring they pass accountability measures.

Discussion: The Department appreciates the support for consensus language from these commenters and acknowledges concerns about written arrangements, especially if the 25 and 50 percent limits were lifted. This topic received extensive discussion during negotiated rulemaking, both from negotiators and subcommittee members. The Department agrees that using written arrangements for all or nearly all of a program could raise questions about which entity confers the credential. Anything beyond 75 percent may trigger restrictions from accrediting agencies who require the institution conferring the credential to deliver at least 25 percent of the program. While the consensus agreement would not allow institutions to go beyond 50 percent, the Department maintains that written arrangements beyond 50 percent theoretically could be used responsibly.

The Department disagrees with the implication from many commenters that written arrangements are somehow inherently dangerous for students or that the risk for abuse is greater for disadvantaged groups of students or considering the COVID–19 pandemic. Instead, the Department sees written arrangements as a tool that can provide more opportunity for students (especially for the groups or in the circumstances cited by commenters), because even the most well-resourced institutions may not be able to provide every conceivable course or instructional resource. In fact, many well-resourced institutions struggle to keep up with the latest practices of their students' future employers and written arrangements can help. Such tools can, of course, be misused and the Department encourages accrediting agencies to support written arrangements where they offer benefits to students, but be wary of them if they merely serve as a lifeline to institutions that could not otherwise meet the accrediting agency's requirements for fiscal and administrative capacity (or other standards) under § 602.16. However, we agree with commenters who noted that the proposed language, which streamlines approvals but maintains the 25 and 50 percent limits, was the product of an extensively discussed consensus agreement and, as a result, the Department declines to make changes.

Changes: None.

Comments: One commenter was generally supportive of the provisions in this section, but opposed the 50 percent cap and suggested at least moving it to 75 percent, believing the Department is not sufficiently promoting innovative workforce partnerships, especially given the COVID–19 pandemic's impact on the economy.

Discussion: As noted elsewhere in this section, the Department would have preferred greater flexibility for institutions to use written arrangements and believes such allowance could have been used responsibly. However, we agree with commenters who noted that the proposed language, which streamlines approvals but maintains the 25 and 50 percent limits, was the product of an extensively discussed consensus agreement and so the Department declines to make changes.

Changes: None.

Comments: One commenter supported the provisions of § 668.5(f) that clarify the ability of institutions utilizing written arrangements to modify their curriculum to meet workforce needs, but opposed the provisions that clarify the ability of institutions to make governance or decision-making changes as an alternative to faculty control or approval. This commenter argued that advisory boards should not have greater authority than faculty and that faculty expertise should be used to inform program design. Another commenter also opposed the latter provision citing their institution's shared governance model. One commenter suggested that faculty support must be a prerequisite to any academic or administrative change and believed that the Department is taking away the opportunity for faculty and staff to be involved in administrative changes.

Discussion: The Department agrees that faculty perform an important role in any institution, but strongly disagrees that faculty should have veto authority over virtually every academic or administrative decision. Institutions use written arrangements to benefit from outside expertise, to better align a program with workforce needs, or for other purposes. The Department thanks the commenter for supporting this goal but notes that alignment with workforce needs can be achieved in different ways, including ways that are recommended by expert advisory boards that may have more direct experience in the workforce and better understand contemporary needs. To achieve this goal, many institutions understandably wish to act quickly in such cases for the benefit of their students. Institutions may be hamstrung if they must ask permission from different parties. Institutions may use traditional governance models. However, the Department sought to clarify that institutions may determine the level of faculty input that should be provided on decisions relating to written arrangements. The Department disagrees with the commenter's suggestion that the proposed rule affirmatively takes away the opportunity for faculty and staff involvement in administrative changes due to the diversity of existing governance arrangements.

Changes: None.

Comments: Several commenters related their concern about written arrangements to concerns about the extent to which institutions utilize online program managers (OPM) or other similar third parties that assist institutions with various functions not related to the actual provision of academic instruction. One commenter stated that the exclusion of issues related to OPMs from this rulemaking has prevented proper oversight of distance education programs, but generally supported the addition of language to clarify how to calculate the percentage of a program that is part of a written arrangement. This commenter believed that agreements with OPMs covering issues such as course development, instructor training, and student recruitment should be treated as written arrangements because they are distinct from other types of agreements such as food service where the institution may not have expertise. The commenter opposed tuition-sharing arrangements as being a source of risk. One commenter expressed appreciation for the Department's mention in the NPRM that written arrangements do not apply to such third-party services. One commenter suggested the proposed rule could incorrectly be read to imply that a written arrangement would be required if an outside entity provides design or administration but not instruction. One commenter implored the Department not to ''gut the meaning of college.'' Other commenters raised concerns with OPMs or other arrangements such as the acquisition of a proprietary institution by a public institution that do not relate to the proposed rule.

Discussion: Although mentioned briefly in the NPRM, the Department wishes to expand upon its long-standing position that written arrangements do not generally apply to contracts with OPMs. Use of the word ''design'' or ''administration'' in § 668.5(g) may refer to one or more of the following—establishing the requirements for successful completion of the course; delivering instruction in the course; or assessing student learning. One example of this would be if an ineligible entity provides instructors and delivers instruction via a ground-based or online program separate from what the eligible institution would normally provide. This would not include, as the commenter worries some might infer, a course's ''platform or method of delivery, technical support, or student services.'' In fact, institutions frequently utilize employer advisory boards or other outside expertise to develop courses or use a variety of methods to recruit students without written arrangements. In addition, just as in elementary and secondary schools, outside providers are frequently used to provide training and professional development to instructors in postsecondary education. Requiring a written arrangement for these core functions could grind the basic functions of an institution to a halt. Instead, the Department believes § 668.5(h) is a non-exhaustive list of activities that do not require written arrangements, but many others from contracting for food service, or with OPMs, or facilitating ground-based instruction through upkeep to facilities—should be assumed to not require a written arrangement either, in accordance with longstanding practice. We further question one commenter's premise that written arrangements should only be for functions where the institution would not have expertise, such as food service. The diversity of institutional expertise is one reason the Department does not use such criteria to distinguish between agreements requiring written arrangements from those that do not. Instead, the regulations state that they are required if an ineligible entity provides ''part of the educational program,'' which means actual delivery of instruction using outside instructors and facilities. The Department assures one commenter that it is not changing and could not ''gut'' the meaning of college.

Changes: None.

Comments: Two commenters noted that a limited number of institutions were permitted to go above the 50 percent limit to partner with ineligible providers as part of the Department's Educational Quality through Innovative Partnerships (EQUIP) experiment. These commenters said that participants have struggled to meet Department benchmarks necessary to launch their programs and, as a result, data has been quite limited and so should not be used to justify changes to written arrangements. One commenter further suggested that some participants in the program engaged in practices that were harmful to students, noting one was cited by its State for deceptive advertising, and another precipitously closed. As a result, they asserted that not enough information is known about whether these types of programs can be successful.

Discussion: EQUIP was launched under the Department's Experimental Sites Initiative.[13] We acknowledge the limitations of the experiment.[14] The Department believes there were multiple design flaws in that experiment, many unrelated to flexibility for written arrangements. As the commenters acknowledge, most potential participants were unable to start-up their programs and begin utilizing the waivers. This was at least in part due to the experiment's requirements, written under the prior administration, were so burdensome and complex that many institutions expressing interest did not ultimately apply, and those that applied, have slowly dropped out at various stages in the years-long process of attempting to obtain approval for and launch these programs. Much of this complexity relates to burdensome reporting requirements, the requirement for a third-party quality assurance entity to oversee program outcomes (in addition to the accrediting agency), and other issues (some quite similar to suggestions made at the negotiating table and by commenters). While these mechanisms were designed to protect students, promote transparency, allow for a rigorous evaluation, and other laudable goals, the Department believes that they were ultimately too burdensome and costly to justify the potential benefits of participation, which may have ultimately denied students the opportunity to benefit from innovative programs that were potentially quite valuable. In short, the Department believes that the most significant lesson from EQUIP is that burden must be weighed against safeguards in order to support innovation while protecting students. This was one of the reasons that the Department undertook this rulemaking and made the changes to § 668.5 and other sections.

Changes: None.

Comments: Several commenters urged the Department to rescind changes made to § 602.22 in the accreditation rulemaking that allow senior staff of an accrediting agency to review several types of substantive change requests, including those relating to written arrangements, rather than requiring the agency's decision-making body to make the decision. One commenter also suggested removing a change that would require expedited approval by accrediting agencies of written arrangements, adding other reporting and data collection requirements, and closely reviewing written arrangements approved by accrediting agencies during recognition reviews. Another commenter suggested seeking data on the use of written arrangements from institutions and accrediting agencies.

Discussion: The changes to § 602.22 were made in a separate rulemaking effort and the Department declines to rescind the change it made months ago. However, the Department reminds these commenters, some of whom are strongly urging the Department to stick with the consensus agreement's limits of 25 and 50 percent in § 668.5(c), that the Department and others agreed that maintaining these limits would not impede innovation, as long as approvals by accrediting agencies could be streamlined and take less time. We continue to believe that the consensus language strikes the right balance between enabling innovation and protecting students and taxpayers. The Department will uphold the consensus language regarding the 25 and 50

[13] 80 FR 62047.

[14] *ed.gov/news/press-releases/expanding-pathways-success-after-high-school-us-department-education-approves-first-innovative-equip-experiment.*

percent limits in § 668.5(c), as well as regarding the efforts to streamline approvals in § 602.22 either. The Department believes that these changes reduce burden on accrediting agencies and streamline institutions' ability to respond to workforce needs, as outlined in greater detail in the Department's NPRM and final rule on accreditation.[15] As discussed during negotiated rulemaking, the Department declines to add further burdensome reporting requirements; however, according to § 668.43(a)(12), institutions are required to disclose written arrangements to students, which is an added requirement included in the Accreditation and State Authorization final rule to improve transparency.

Changes: None.

Comments: Several commenters responded to the question posed by the Department in the NPRM, which asked whether the requirement for non-accredited entities to demonstrate prior experience and effectiveness prior to engaging in a written arrangement would be too difficult to meet. These commenters suggested that it would be too difficult for most third-party providers to meet a requirement to ''demonstrate experience'' before being given the opportunity to do so. One commenter added that institutions are sufficiently motivated to ensure academic rigor when using written arrangements and thoroughly vet them before signing a contract. This commenter noted that the content provided by the ineligible provider must still meet standards for accreditation and said that new entrants often have the most advanced and desirable content. The commenter questioned what type of information would be sufficient to demonstrate experience if the provision remained. Another commenter added that the ''experience'' requirement would intrude into matters overseen by accrediting agencies. And one commenter believed the requirement was ambiguous while restraining innovation.

Discussion: The Department agrees with the commenters who uncovered serious flaws in a requirement to demonstrate prior experience and effectiveness. The Department does not change consensus language without a good reason, especially in a provision so vigorously debated during negotiations. However, after negotiations, the Department noted similarity between the experience requirement in § 668.5(c)(1)(i) and provisions removed in the accreditation regulations, especially those in § 602.12, which previously required accrediting agencies to demonstrate prior experience in a given area before the Department would allow an expansion of scope to conduct accreditation activities in those areas. We removed such provisions because they could have had an anticompetitive effect and created a sometimes-impossible standard requiring an entity to demonstrate experience doing something they are legally barred from doing. The Department was unable to find, and commenters did not suggest, a workable alternative that would have maintained the language while avoiding similar problems. The Department does not believe a viable alternative exists that would provide meaningful protection without having an anticompetitive effect, being overly burdensome, or being unenforceable. In addition, the Department believes the requirement that the provider be effective in meeting stated learning objectives is vague, likely unenforceable, may be deemed arbitrary and capricious, and may violate 20 U.S.C. 3403(b), which prohibits the Secretary from exercising authority over curriculum, administration, and personnel of educational institutions. The Department believes that commenters made a compelling case that the proposed provision could interfere into areas overseen by accrediting agencies.

Changes: The Department concurs with the commenters. We have deleted § 668.5(c)(1)(i) and renumbered the section accordingly.

Comments: One commenter supported the proposed removal of language that previously required the certificate or degree-granting institution to provide more than 50 percent of the educational program in a written arrangement between two or more eligible institutions owned or controlled by the same individual, partnership, or corporation.

One commenter opposed this change and stated that there may be differences in quality or the student experience between institutions sharing ownership, which could lead to students being misled about the nature of their education. The commenter suggested students may be required to take more courses online through one affiliated institution when they expected to be taking ground-based courses from the other. The commenter suggested the Department has provided insufficient evidence to support the change.

Discussion: The Department thanks the commenter for supporting removal of this restrictive provision. The Department maintains that there is value in maintaining flexibility to achieve synergies between two or more eligible institutions owned or controlled by the same individual, partnership, or corporation.

The COVID–19 pandemic highlights a worst-case scenario, where institutions had to quickly move students online and expand any remote learning infrastructure they had at their disposal. However, a local or national economic shift that quickly necessitates more training in one area and less in another may be a more common example. The Department notes that many accrediting agencies require at least 25 percent of the program to be delivered by the institution conferring the credential and defers to accrediting agencies in this area. The Department does not believe this provision, which applies to a very small subset of institutions and students, exposes those students to meaningful additional risk and notes that any misrepresentation or fraud of the kind the commenter fears may be addressed through existing enforcement means. As noted elsewhere, we not only maintained the requirement to disclose these arrangements to students in § 668.43(a)(12), but we actually strengthened those requirements in the accreditation final rule, which was developed though a consensus agreement as part of the same negotiated rulemaking as this regulation.[16]

Students may enroll in a program they choose. However, options are finite and may be unexpectedly limited, regardless of the use of a written arrangement. Unavailability of faculty or facilities, insufficient demand to offer a certain course during any given term, or other factors could limit students' options. In most cases, despite the commenter's assertions, the Department believes this provision is likely to increase (rather than decrease) available options to students. The risk of fraud is always present any time Federal funds are involved. The Department prefers strong enforcement of a limited number of important and straightforward safeguards rather than diverting resources to maintaining numerous low-risk restrictions that could deny benefits to students.

Changes: None.

Clock to Credit Hour Conversion (§ 668.8)

Comments: One commenter expressed support for the proposed changes to § 668.8(k), noting that the changes eliminate confusion about the inclusion of homework time in the clock-hour determination.

[15] 84 FR 27404 and 84 FR 58834, respectively.

[16] 84 FR 58834.

Another commenter asserted that compliance with these regulatory changes would, in addition to having negative financial effects, be potentially burdensome, and conflict with accreditor expectations. The commenter further offered that credit hours are more suitable than clock hours for evaluating satisfactory academic progress and the current regulation (§ 668.8(k) and (l)) is more reflective of the levels of learning at their institution. Finally, the commenter expressed concern over the effect the proposed changes might have on the institution's ability to provide the same levels of contact for online and in-person courses.

One commenter noted that the Department neglected in the NPRM to address the proposed change to § 668.8(k)(2)(ii), removing the requirement that an institution demonstrate students enroll in and graduate from degree programs and replacing it with a requirement that the institution demonstrate that at least one student was enrolled in the program during the current or most recently completed award year. The commenter asserted that the proposed rule would allow institutions to effectively invent a nonexistent program to use as a back-door way to avoid the conversion formula, thus compromising program integrity.

Discussion: The actual scope of what was proposed in the NPRM is essentially a revision to the conversion formula. The applicability of clock-to-credit-hour conversion is not expanded as a result of these changes. Under current regulations, any program that is at least two academic years in length and provides an associate or bachelor's degree (presumably the overwhelming majority of those programs offered at four-year public and private, degree-granting institutions) is not subject to clock-to-credit-hour conversion. This would not change under what was proposed in the NPRM. It should further be noted that there are no Department rules requiring the use of clock hours as opposed to credit hours in measuring students' progress.

We inadvertently omitted from the NPRM any discussion of proposed § 668.8(k)(2)(ii), which removes the requirement that an institution demonstrate students enroll in and graduate from degree programs and replaces it with a requirement that the institution demonstrate that at least one student was enrolled in the program during the current or most recently completed award year, and thank the commenter who brought this omission to our attention. This change was made at the request of negotiators who expressed the concern that programs with small numbers of students may not produce graduates in a given year, or even over a couple of years, raising the prospect of those programs being found in violation of § 668.8(k)(2)(ii). The change was included in amendatory text on which consensus was reached.

While appreciative of those negotiators' concerns, we are persuaded that removal of the requirement for institutions to demonstrate that students enroll in and graduate from the program would make it possible for an unscrupulous institution to stand-up nonexistent programs that do not actually graduate anyone, effectively circumventing the clock-to credit-hour conversion requirement.

With respect to degree programs with limited numbers of students, we note that current § 668.8(k)(2)(ii) makes no mention of the frequency with which students must be shown to graduate from the degree program that courses from the program that would otherwise be subject to clock-to-credit hour conversion are acceptable toward; and a year where no student graduates from the degree program is not, in and of itself, an indicator of noncompliance. Accordingly, we are revising § 668.8(k)(2)(ii) to clarify that an institution must be able to demonstrate that at least one student graduated from the program during the current award year or the two preceding award years. We continue to believe that the exception in § 668.8(k)(2) is appropriately limited to programs that consistently produce graduates. Even where an institution is not attempting to deliberately circumvent clock-to-credit-hour requirements, a circumstance where no student graduates from the degree-granting program over multiple years legitimately calls into question whether that program is truly meeting the requirements for the exception found in § 668.8(k)(2). Therefore, because the exemption requirement only applies when an institution offers a program that leads to a degree, and the shortest degree programs are generally no less than two years in length, the Department believes that a two-year look-back period would be sufficient to identify programs that could fulfill this requirement for an exemption from the clock-to-credit conversion requirements. If no student graduates from a program during the entire expected timeframe for completion of that program, it calls into question whether the transferability of credits into such a program is in fact useful to a student enrolled in a non-degree programs, which is the essence of the exemption in the first place.

Changes: We have revised § 668.8(k)(2)(ii) to clarify that in meeting the clock-to-credit hour exemption, an institution must demonstrate that at least one student graduated from the program during the current award year or the two preceding award years.

Certification Procedures (§ 668.13)

Comments: Several commenters stated their support for language providing that if the Secretary does not make a decision to grant or deny certification within 12 months of an institution's expiration date of its current period of participation, the Department will grant the institution an automatic recertification, which may be provisional. The commenters supported this change for the increased certainty and transparency it provides to institutions that would otherwise receive month-to-month extensions of their eligibility. The commenters also believed that such changes properly balance this increased certainty for institutions with Department oversight on behalf of students and taxpayers. One commenter added that the change will allow institutions to move forward with new programs in a timely and responsive manner.

Discussion: The Department thanks the commenters for their support and agrees that the changes provide for increased certainty and transparency while balancing the need to protect students and taxpayers.

Changes: None.

Comment: One commenter opposed automatic certification renewal when the Secretary does not decide to grant or deny within 12 months of an institution's expiration date. The commenter claimed that this change contradicts the HEA and circumvents the Secretary's obligations under the Act. The commenter asserted that this change would undo the Secretary's obligation under 20 U.S.C. 1099c(a) to evaluate the institution's legal authority to operate within a State, accreditation status, administrative capability, and financial responsibility. The commenter also claimed that the Department provided no evidence of the uncertainty experienced by institutions because of the current practice. The commenter suggested that there could be good reason for the Department to delay its review, including if it is investigating the institution. The commenter believed that, due to the lack of evidence or reasoning, the proposed change is both arbitrary and capricious and that the Department would violate the APA by making the proposed change. The commenter further stated that the Department failed to consider reasonable alternatives and that it has a legal obligation to do so. The commenter suggested that the Department instead seek additional funding for staff to review recertification applications to ensure a prompt review and decision. The commenter also proposed providing a shorter extension of, perhaps, three or six months while the Department continues its review.

Discussion: The Department appreciates the commenter's interest in this topic. Certification decisions can have major implications for institutions and students. We agree that more must be done at the administrative level to provide more timely responses and better communication. However, we believe those steps alone are insufficient. Further, we believe it is in the best interest of students and taxpayers for the Department to timely identify deficiencies and take appropriate action.

The Department appreciates the suggestion that the Department grant three- or six-month extensions instead of a month-to-month extension. However, institutions must make important budgetary and academic decisions annually. The Department believes those proposals would have the same drawbacks and present the same uncertainty to institutions as the status quo. An extension longer than one year would not give the Department sufficient oversight to revisit a decision in the short term if needed.

The Department disagrees that it has failed to provide a proper justification for this change and did not deviate from the consensus language on this topic. As discussed during negotiated rulemaking and as other commenters have noted, delaying decisions causes significant uncertainty. The Department believes that 12 months beyond the expiration date of the institution's current certification is more than sufficient time, especially since the institution is required to submit the application for recertification no less than 90 days prior to the expiration of its current certification. The Department's review usually begins more than a month before the expiration date, adding additional time to the process. If an investigation is underway, the Department has other options at its disposal. The Department can provisionally certify the institution for as little as one year or can deny the recertification if justified. If the Department must issue sanctions, it may do so at any time. This change does not reduce the Department's enforcement power. Instead, it encourages the Department to process applications promptly, which provides timely feedback for institutions, helps the Department to properly oversee institutions, and can allow speedier remedies if deficiencies are identified. As such, and contrary to the assertion made by this commenter, the certification renewal process outlined in § 668.13 is neither arbitrary and capricious nor would it constitute an impermissible abdication of the Secretary's responsibility to determine an institution's legal authority to operate within a State, its accreditation status, and its administrative capability and financial responsibility when determining the institution's eligibility to participate in title IV, HEA programs.

Changes: None.

Limitation on Number of Clock Hours Based on Minimum State Requirements (§ 668.14(b)(26))

Comments: Many commenters supported the proposed requirement that eligible short-term programs demonstrate reasonable program length. These commenters acknowledged the trade-off between setting proper safeguards to ensure program length is not inflated and ensuring students are able to meet States' occupational licensure requirements. The commenters believed that the Department struck a proper balance, which will promote worker mobility across State lines and reduce barriers to employment, especially in regional economies that cross State boundaries.

Several other commenters underscored that the negotiating committee compromised on the provisions related to program length and suggested that the provisions would protect students from fraud. One of these commenters noted the proposed rule provided balance and an acute positive impact on student veterans and military-connected students.

Several commenters said they preferred the proposed rule's provision over other options discussed during negotiated rulemaking, especially the Department's initial proposal allowing program length of 100 percent of the longest minimum requirement in any State. These commenters urged the Department to maintain the consensus agreement contained in the proposed rule.

One commenter praised the changes to this provision and the positive impact they will have on veterans and their spouses, who frequently move across State lines.

One commenter suggested that the proposed provision did not go far enough to prevent institutions from lengthening their programs in ways that do not benefit students, including if labor markets do not significantly overlap two States' borders. They cited past statements, including from the Department's OIG, of institutions that the commenters say falsified their program length. Instead, this commenter suggested that we allow institutions to lengthen their program based on an adjacent State's requirement only if the institution is within a metropolitan statistical area (MSA) that includes another State. The commenter also suggested an alternative, that the institution instead attest to, and demonstrate if asked, that it has enrolled a student who lived in that State within the preceding three years or that recent graduates are gainfully employed in that State.

One commenter supported the proposed rule in this area and cited a need for greater occupational licensure reciprocity across State lines.

Discussion: We appreciate the support from commenters on this issue and acknowledge that setting the right balance on this issue is difficult for reasons outlined in the NPRM, most notably that individuals often move from one State to another or live, work, and learn in different States at the same time.

The Department appreciates the concern from the commenter who suggested the proposed rule would not go far enough to prevent institutions from artificially increasing program length. We have serious concerns any time an institution, accrediting agency, or State takes steps to artificially limit access to a profession. The Department will continue to speak out against such policies and take steps where possible to prevent credential inflation and related barriers to opportunity. However, as outlined in the NPRM and supported by many commenters, the Department believes this language strikes a reasonable balance between supporting students who must qualify for State licensure and preventing abuse. If abuse rises to the level of falsification of documents, as the commenter suggests, we will use existing enforcement methods.

The Department thanks the commenter for the suggestion about tying requirements to out-of-State MSAs or past success at finding students employment in a neighboring State. However, we believe this would hamper mobility across State lines and impose burdens on institutions and the Department. The tie to MSAs would only benefit areas that are more heavily populated or where MSAs cross State lines (they frequently do not) so the proposal does not seem to be a viable alternative.[17]

We also do not agree that institutions should be required to demonstrate that their graduates have been successful at finding employment in another State when the institution's programs, under our current regulations, may be unable to meet the requirements of preparing individuals to be licensed in that State.

The Department appreciates the support of the commenter who noted that reciprocity for occupational licensure is a helpful, but incomplete, step States can take to lower barriers for individuals. Time-based requirements that may not be tied to employer needs can be harmful and deny opportunity to individuals looking to build a better life.

Changes: None.

Comments: A few commenters supported the proposed provision and asked that the Department define ''adjacent State'' to include States whose border is within 100 miles of the State in which the institution is located to allow for greater flexibility for regional economies.

Discussion: Although the Department appreciates the suggestion to define an ''adjacent State'' as one whose border is within 100 miles of the State in which the institution is located, such a change would not align with the consensus agreement or the definition of the word ''adjacent'' in this context, which means ''having a common endpoint or border.'' [18] The Department wishes to maximize opportunity and minimize barriers and appreciates hearing from institutions with students that may benefit from this provision. However, many States have ''statutory language allowing reciprocity or endorsement agreements for licenses'' including for cosmetology and, as already mentioned, States have opportunities to lower the barriers they have erected in these areas.[19] As many commenters have noted, the consensus agreement in this area involved genuine compromise and balancing of competing priorities. While a small number of students may be willing to travel up to 100 miles and cross two State borders to work or learn, the Department does not believe this benefit is outweighed by the risk of institutions using a significantly longer requirement two States away in order to lengthen their programs for all students.

Changes: None.

Comments: A few commenters requested that the Department use its authority to allow voluntary early implementation of this provision.

Discussion: The Department will allow voluntary early implementation on the entire rule, including this provision.

Changes: None.

Return of Title IV Funds (R2T4) (§ 668.22)

Comments: Numerous commenters expressed support for the proposed changes in the treatment of title IV funds when a student withdraws. One of those commenters stated that the changes regarding which students are considered withdrawn for R2T4 calculation are a welcome attempt to resolve technical problems in the current rules existing for students enrolled in self-paced instruction and in modules, whose treatment with respect to R2T4 sometimes does not reflect their actual level of coursework completion. Another commenter expressed appreciation for the Department's attention in considering the inequities that currently exist for students withdrawing from a program delivered in modules. Pointing out the unfairness of penalizing a student by requiring an R2T4 calculation and the potential return of funds solely because that student completed her program on a more aggressive timeline than originally anticipated, other commenters thanked the Department for removing the requirement to conduct an R2T4 calculation in cases where a student has completed graduation requirements.

Discussion: We appreciate the support of these commenters.

Changes: None.

Comments: Several commenters requested clarification on the proposed rule, which does not consider a student withdrawn from a program offered in modules if the student completes:

- One module that includes 50 percent or more of the number of days in the payment period,
- A combination of modules that when combined contain 50 percent or more of the number of days in the payment period, or
- Coursework equal to or greater than the coursework required for the institution's definition of a half-time student under § 668.2 for the payment period.

The commenters identified various ways in which application of the proposed rule as written might result in inequitable treatment of students who withdraw from programs taught in modules. One commenter offered the example of a 102-day term consisting of two modules, the first module 50 days in length and ending on a Friday and the second comprising the remaining 52 days and beginning the following Monday. Students who complete only the first module could be treated as withdrawn, because their first module included a scheduled break or did not include a weekend.

Another commenter provided the example of a program offered in standard semesters, each comprised of two, 8-week modules. Both modules of the fall semester, each 54 days in length, are separated by a weekend and there are no breaks of five or more days in the semester. The spring semester contains a spring break of nine days occurring between the first and second modules (each 54 days in length) of the semester. A student enrolls in five credits in the first module of the fall semester and six credits in the second module of that term, successfully completing the first module but opting not to return for the second module. With the break included, the fall semester is 110 days in length, 54 days, or 49 percent of which the student completed, meaning he or she would be considered withdrawn. Another student enrolls in the same pattern during the spring semester, again completing the first module of 54 days but not returning for the second module, also 54 days in length. However, with the spring break excluded from the number of the number of days in the semester, this student has completed 54 of 108 days or 50 percent of the spring semester and is not considered withdrawn. Both students completed the same five credits and 54 days in the payment period, but in the case of the first student the institution is required to perform the R2T4 calculation due to the break between the modules being less than five days (*i.e.,* a weekend).

Finally, one commenter explained that in a standard term program where the total days in the payment period is an odd number and the first of two modules offered over the semester is one day shorter than the second, a student enrolling in both modules but completing only the first module would complete only 49 percent of the payment period. The commenter offered that this could result in students, who for all intents and purposes completed a module lasting half of the term, being considered withdrawn for lack of one day.

To address these issues, commenters variously suggested counting only days of instruction (excluding both breaks and weekends) instead of calendar days, excluding scheduled breaks of less than 5 days between modules from the number of calendar days to address the issue of weekends between modules,

[17] *www2.census.gov/geo/maps/metroarea/us_wall/Sep2018/CBSA_WallMap_Sep2018.pdf.*

[18] *merriam-webster.com/dictionary/adjacent.*

[19] *ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx.*

and changing the minimum completion percentage from ''50 percent or more'' to ''49 percent or more.''

Discussion: We agree with the commenters that additional clarifications to the proposed changes in § 668.22 are necessary to avoid the potential unintended consequences identified above. As expressed in the preamble of the NPRM, the Department's intent in proposing modifications to the treatment of modules in the R2T4 was that a student would be considered to have completed the period if he or she completed coursework constituting at least half of the days in the period, not including the days in scheduled breaks. It is not our intent in these final rules that students who have otherwise met that standard be considered withdrawn due to minor differences in the number of days that constitute 50 percent of a term, resulting from weekends falling between modules, the absence of breaks of five days or more, or terms with uneven numbers of days etc. Accordingly, we are revising proposed § 668.22(a)(2)(ii)(A)(2)(i) and (ii) to reflect that a student who withdraws from a program offered in modules who completes one module that includes 49 percent or more of the number of days in a payment period or a combination of modules that when combined contain 49 percent or more of the number of days in the payment period, will not be considered withdrawn. This change will ensure that a day or two difference in the number of days in each module does not become the determining factor in whether a student is considered withdrawn. We are further revising § 668.22(a)(2)(ii)(A)(*2*)(*i*)and (*ii*) to exclude scheduled breaks of five or more consecutive days and all days between modules from the number of days in the payment period used to calculate whether the module(s) completed by the student comprise 49 percent of the payment period.

Changes: We have revised § 668.22(a)(2)(ii)(A)(*2*)(*i*) and (*ii*) to reflect that a student who completes all the requirements for graduation from his or her program before completing the days or hours in the period that he or she was scheduled to complete is not considered to have withdrawn from a program offered in modules if the student successfully completes one module that includes 49 percent or more of the number of days in the payment period, excluding scheduled breaks of five or more consecutive days and all days between modules or combination of modules that when combined contain 49 percent or more of the number of days in the payment period, excluding scheduled breaks of five or more consecutive days and all days between modules.

Comments: One commenter referenced the Department's proposal in the preamble of the NPRM to amend § 668.22(l)(6) to clarify that a program is ''offered in modules'' if the program uses a standard term or nonstandard-term academic calendar, is not a subscription-based program, and a course or courses in the program do not span the entire length of the payment period or period of enrollment. The preamble also stated that non-term programs would no longer be considered programs ''offered in modules'' in any circumstances. Specifically, the commenter requested the Department clarify whether a student who completes at least a half-time coursework in a subscription period before ceasing enrollment will be considered to have withdrawn from the payment period for purposes of R2T4.

Another commenter expressed overall support for the proposed changes to § 668.22(l)(6), clarifying that a program is ''offered in modules'' if the program uses a standard-term or nonstandard-term academic calendar, is not a subscription-based program, and a course or courses in the program do not span the entire length of the payment period or period of enrollment. However, the commenter noted that the change, while discussed in the preamble, is not included in the amendatory text of the NPRM. The same commenter offered that, given these changes, use of the term ''module'' in § 668.10(a)(3), relevant to direct assessment programs, is confusing and an alternative term should be found to replace it.

Discussion: We appreciate the commenter bringing the omission of proposed § 668.22(l)(6) from the preamble to our attention.

A student in a subscription-based or nonterm program is not considered to have completed a payment period if the student completed at least half-time coursework in that payment period because the Department does not consider a nonterm program or a subscription-based program to be ''offered in modules.'' The nature of such programs—which are not required to set limits on the timeframes for students to complete coursework—are not suited to the use of modules, which presume a clear start and end date for the coursework that a student is attempting during a payment period. Such a timeframe is crucial to the incorporation of modules into the Department's framework for the R2T4 calculations because the number of days in the modules that a student is scheduled to complete in a payment period or period of enrollment comprise the denominator of the calculation that determines the amount of title IV, HEA program funds that the student earns for the period.

During meetings of the Distance Learning and Innovation subcommittee, the Department specifically expressed its intent to make changes to § 668.22 that would exclude non-term and subscription-based programs from the types of programs that are considered ''offered in modules'' and eliminate regulations specific to subscription-based and nonterm programs that previously incorporated the concept of modules. As noted above, these changes are discussed in the preamble to the NPRM but are not reflected in the amendatory text. The Department therefore believes that it is necessary to make a change to § 668.22(l)(6) in order to fully implement its proposed approach, which was approved by both the Distance Learning and Innovation subcommittee and the full negotiated rulemaking committee.

Finally, regarding the reference to modules in § 668.10, we believe the term is used correctly in that section and does not prejudice the amendatory text in § 668.22(l)(6). Proposed § 668.10(a)(3) requires an institution to establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours. If it were the case that all direct assessment programs were subscription-based, this might be a source of confusion. However, many direct assessment programs are offered in terms using modules. We believe the clear statement in § 668.22(l)(6) that a program offered in modules is not considered to be a subscription-based program is sufficient to avoid any confusion between these two sections.

Changes: We have revised § 668.22(l)(6) to clarify that a program is ''offered in modules'' if the program uses a standard term or nonstandard-term academic calendar, is not a subscription-based program, and a course or courses in the program do not span the entire length of the payment period or period of enrollment. The amendatory text in the final rule includes § 668.22(l)(6) which was inadvertently omitted in the NPRM.

Comments: One commenter requested that the Department clarify whether a completed module is one the student successfully completed, or simply one the student attended all the way through, *i.e.,* the module end date is in the past, the student began attendance and did not withdraw or stop attending;

the module grade(s) could be earned failing grades or incompletes.

Discussion: As discussed in the NPRM, the Department proposed to revise its approach to the treatment of students who complete some, but not all, of the coursework they were scheduled to attend during a payment period to ensure more equitable treatment of such students while maintaining the integrity of the title IV, HEA programs. In achieving that balance, the Department believes it is reasonable to require that a student successfully complete the module(s) comprising 49 percent of the payment period or half-time enrollment. This standard will have the added benefit of reducing confusion for institutions that are not required to take attendance, since passing grades will necessarily be the determining factor in whether a student is treated as a completer rather than a withdrawal. Successful completion of a module requires the student receive at least one passing grade for that module. Successful completion of coursework equal to or greater than the coursework necessary for half-time enrollment requires that the student receive a passing grade in a sufficient number of credits to comprise half-time enrollment status (as defined by the institution under applicable regulations) for the payment period.

A student who completes a module but receives all incomplete grades, or a combination of course incompletes and failing grades is not considered to have successfully completed that module unless at least one course incomplete converts to a passing grade before the deadline by which the institution must otherwise perform an R2T4 calculation for that student. Likewise, a student receiving all course incompletes or a combination of course incompletes and failing grades is not considered to have successfully completed the number of credits necessary to establish half-time enrollment unless a number of course incompletes sufficient to comprise half-time enrollment convert to passing grades before the deadline by which the institution must otherwise perform an R2T4 calculation for that student.

Changes: We have revised the provisions of § 668.22(a)(2)(ii)(A)(*2*) to reflect that a student who is enrolled in a program offered in modules is not considered to have withdrawn if the student successfully completes one module that includes 49 percent or more of the number of days in the payment period, excluding scheduled breaks of five or more consecutive days, and all days between modules or combination of modules that when combined contain 49 percent or more of the number of days in the payment period, excluding scheduled breaks of five or more consecutive days and all days between modules.

Comments: One commenter noted that proposed § 668.22(a)(2)(i)(C) provides that for a student in a standard or nonstandard-term program, excluding a subscription-based program, the student is not scheduled to begin another course within a payment period or period of enrollment for more than 45 calendar days after the end of the module the student ceased attending, unless the student is on approved leave of absence, as defined in paragraph (d). However, § 668.22(a)(2)(i)(D), which provides that for a student in a non-term program or a subscription-based program, the student is unable to resume attendance within a payment period or period of enrollment for more than 60 calendar days after ceasing attendance, lacks a similar qualifier clarifying that a student who is unable to resume attendance within the prescribed period is not considered withdrawn if on an approved leave of absence.

Discussion: We appreciate the commenter bringing this unintentional discrepancy to our attention and clarify that no student on an approved leave of absence is ever considered to be withdrawn.

Changes: We have revised § 668.22(a)(2)(i)(D) to clarify that a student who is unable to resume attendance in a non-term or subscription-based program within a payment period or period of enrollment within 60 calendar days after ceasing enrollment is, nevertheless, not considered withdrawn if on an approved leave of absence.

Comments: One commenter asked the Department to consider whether, in view of the November 5, 2019 electronic announcement (EA) extending the maximum length of a semester to 21 weeks, proposed changes to § 668.22(a)(3)(ii) requiring students enrolled in programs offered in standard terms to confirm that they will enroll in another module within 45 days of ceasing enrollment to avoid being treated as withdrawn is still justified. The commenter observed that prior to the Department's revised policy for standard term length issued on November 5, 2019, it was uncommon for a module in a standard term program to begin more than 45 days following the end of a prior module. However, the new guidance that allows a standard term to be as long as 21 weeks, increases the likelihood that more than 45 days would elapse.

Discussion: While the commenter is correct in asserting that a standard term of 21 weeks, as permitted by the November 5, 2019 EA, increases the potential for a student to be scheduled to return to a course that begins more than 45 days after the end of the module the student ceased attending, we are not persuaded that this obviates the reasons for which the Department proposed the changes to § 668.22(a)(3)(ii). As explained in the preamble of the NPRM, the Department maintains the same concerns about long periods of non-attendance for standard term programs as it does for nonstandard-term and non-term programs and believes that students should be treated consistently in these situations. The increased likelihood for these extended periods of non-attendance to occur with longer standard terms, we believe, argues in favor of this requirement.

Changes: None.

Comments: Under proposed § 668.22(l)(9), a student in a program offered in modules is scheduled to complete the days in a module if the student's coursework in that module was used to determine the amount of the student's eligibility for title IV, HEA funds for the payment period or period of enrollment. One commenter requested that the Department clarify whether the most recent determination of enrollment status would be used for this purpose or whether the Department is referring to a specific initial or "census" date, or whether this can be a matter of institutional policy. The commenter asked, if the latter, will institutions have the latitude to implement a policy with multiple points of determination during the term much like existing policies with multiple Pell recalculation dates?

Discussion: In the preamble to the NPRM, the Department proposed to use the student's schedule at a fixed point to determine the number of days the student is scheduled to attend during the period for R2T4 purposes. Using this approach, subsequent fluctuations in the student's enrollment would have no effect on the number of days in the denominator of the R2T4 calculation if the student withdraws, resulting in a greater degree of certainty for students, a diminished likelihood of improper payments, and reduced administrative burden for institutions performing such calculations. In order to allow institutions flexibility in adopting a policy that is practical for their program(s), we are not prescribing a specific date that institutions must use as the fixed point for determining the number of days the student is scheduled to attend. A Pell recalculation date or census date is an allowable option, as would be some other date determined by the institution. An institutional policy that includes multiple dates, such as is permitted for Pell recalculation dates, is acceptable.

Changes: None.

Comments: One commenter noted that the proposed amendatory text in § 668.22(a)(2)(ii)(A)(*3*), addressing written confirmation for a payment period or period of enrollment in which courses in the program are offered in modules, specifically allows ''electronic confirmation,'' whereas § 668.22(a)(2)(ii)(A)(*4*) and (*5*) pertaining to subscription-based programs and non-term programs respectively, make no reference to the use of electronic confirmation.

Discussion: We thank the commenter for bringing this inconsistency to our attention. It is the Department's longstanding policy that, in the absence of regulations specifically requiring that a notification or authorization be sent via U.S. mail, a school may provide notices or receive authorizations electronically. It is further permissible to use an electronic process to provide required notices and make disclosures by directing students to a secure website that contains the required notifications and disclosures. Because of this, we believe specific mention, in any regulation, of the option to distribute required notifications and disclosures, or collect required authorizations and confirmations through electronic means, is redundant and may cause confusion.

Changes: We have revised § 668.22(a)(2)(ii)(A)(*3*) to remove the reference to ''electronic confirmation.''

Satisfactory Academic Progress (§ 668.34)

Comments: Several commenters expressed general support for the proposed changes to satisfactory academic progress (SAP). However, some of those commenters asked that the Department consider amending the proposed rule to account for enrollment status in determining whether a student is meeting maximum timeframe requirements as measured in calendar time. One commenter objected to allowing institutions to measure maximum timeframe in calendar time because it could negatively affect students for whom life challenges preclude ongoing full-time attendance. The commenter suggested an alternative of allowing a maximum timeframe of 200 percent of program length. The commenter also suggested grandfathering students under existing standards as another alternative.

Discussion: We appreciate the support for our proposals to eliminate redundancy and provide greater flexibility in the application of SAP requirements. In response to those commenters who suggested that the definition of ''maximum timeframe,'' as measured in calendar time, accommodate differences in enrollment status, we note that the limitation on maximum timeframe of 150 percent of the published length of the program (for an undergraduate program) is an intentionally static measure designed to ensure completion of that program within a reasonable time. For example, a four-year, 120 credit Bachelor of Arts program may have a maximum timeframe of 180 attempted credits or six years. Measuring maximum timeframe for the program in credit hours, with pace determined by dividing the cumulative number of successfully completed credit hours by the cumulative number of attempted hours, does account for variances in enrollment status. However, this is because credit hours are measured only as attempted, not because students who attend part-time are permitted additional hours beyond 180. Calendar time elapses at a constant rate regardless of how many credit hours a student attempts or completes. As a result, maximum time frame expressed in calendar time is, necessarily, less flexible with respect to variances in enrollment status. Factoring part-time enrollment into the measurement of students' pace would potentially result in a maximum timeframe, as expressed in calendar time, of greater than 150 percent of published program length.

We do not agree that allowing institutions to measure maximum timeframe in calendar time will negatively affect students whose personal situations preclude full-time attendance in a program. First, this flexibility was not proposed with the expectation that large numbers of institutions would adopt calendar time in lieu of credit hours. Most institutions will continue to express maximum timeframe for their programs in credit hours which, as described above, does account for differing enrollment statuses throughout a student's matriculation. Those institutions opting to measure in calendar time will likely do so having determined that it makes better sense for the type of programs they offer, *e.g.,* competency-based programs or programs requiring a prescribed set of courses in each term for all students. Last, we remind commenters that a student who fails to meet SAP, including for reasons related to maximum timeframe, may file a SAP appeal (if the institution's SAP policy permits such appeals).

Changes: None.

Foreign Schools (§§ 600.52 and 600.54)

Comments: Two commenters supported retaining the current exception for independent research done by an individual student in the United States. The provision permits not more than one academic year of research conducted during the dissertation phase of a doctoral program (and where the research can only be performed at a facility in the United States). The provision also permits an eligible foreign institution to enter into a written arrangement with an eligible institution within the United States to provide no more than 25 percent of the courses required for a student's eligible program. However, both commenters requested that the proposed regulation be broadened such that a doctoral student, having already completed 25 percent of his or her eligible program by taking coursework in the United States, would be permitted an additional full academic year to conduct independent research there. One of those commenters opined that the research phase of a doctoral program can take years and should not be subject to an artificial time limit that could preclude students from pursuing a program that provides insights into their chosen field. The commenter concluded that since the research phase of a doctoral program is separate and distinct from the classroom phase, it is both logical and equitable that students be permitted to undertake research in the United States without regard to whether or not they have taken a portion of their classroom study in that country.

Responding to the Department's request for comments on whether written arrangements for students studying in the U.S. should include organizations that are not eligible institutions, one commenter replied in the affirmative. The commenter explained that a student's home institution is responsible for designing and supervising its students and that any written arrangement involving another entity, whether an eligible institution or not, is ultimately subject to the approval and review of the home, eligible institution. The eligible institution must itself be approved to offer postsecondary education by a recognized authority in its home country that provides oversight that is the equivalent of that provided in the United States. The commenter further stressed that, as proposed, the rules regarding written arrangements would circumscribe the ability of eligible foreign institutions to offer diverse programs that include partnerships with other universities that specialize in certain topics, and entities which provide unique experiences within a student's program of study, as well as access to career-enhancing internships.

One commenter supported the proposed revisions to § 600.54(c) that would permit written arrangements between an eligible foreign institution and an ineligible entity, provided the ineligible entity is an institution that satisfies the definition in paragraphs (1)(iii) and (iv) of ''foreign institution'' and the ineligible foreign institution provides 25 percent or less of the educational program. The same commenter requested that, given the potential for ongoing ramifications related to the COVID–19 pandemic, the Department increase the percentage of study permitted at recognized ineligible foreign institutions to as much as 50 percent. This, it was suggested, would provide students the flexibility to navigate the changing situation without having to appeal for special dispensation in future circumstances that are impossible to predict.

Two commenters asked that the Department reconsider the prohibition on foreign institutions offering any portion of an eligible program through distance education found in current § 600.51(d). One of those commenters suggested that there is sufficient ambiguity in the applicable statute on which to base permitting some use of distance education, especially in view of the temporary flexibilities extended under the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act.[20] Another commenter expressed the opinion that temporary flexibility, under the CARES Act, for foreign institutions to use distance education is tacit acknowledgement by Congress of the difficulties American students face as a result of the ban on distance education. In view of this, the commenter asked that the Department modify its regulations to permit American students to take up to 25 percent of their program of study via distance education.

Finally, one commenter rejected the proposal to allow students enrolled in foreign institutions to complete up to 25 percent of a program in the United States based on concerns that, in conjunction with other Department rule changes, there would be no way to determine the fiscal and academic quality of such foreign institutions, and the potential for the change to result in opening the door to millions of students receiving degrees without completing the requirements deemed necessary by academic and industry leaders. The commenter further expressed opposition to foreign institutions gaining access to, and leveraging control over title IV financial aid, explaining that this would be a direct and overtly questionable act, constituting an ethical breach, and not in the best interest of the Department, American higher education institutions, or our nation's students.

Discussion: We appreciate the commenters' concerns over the need for universities to make flexible and diverse research opportunities available for doctoral candidates whose specialized research often takes place over several years, and requires travel to specific locations, including in the United States. However, the Department is not convinced that providing those opportunities necessitates or warrants allowing students who have already completed 25 percent of their programs in the United States to spend an additional year conducting research in the United States. This ''stacking'' would create the potential for a student enrolled in a four-year doctoral program at an eligible foreign institution to complete half of that program in the United States. As explained in the preamble of the NPRM, the Department's intention in proposing these rules is to enhance the range of educational opportunities available to U.S. students enrolled in eligible foreign institutions, aligning them with those enjoyed by students attending domestic institutions, while adhering to the basic principle that U.S. students borrowing from the Direct Loan program for enrollment in a program at an eligible foreign institution should reside in the country where that institution is located. We believe this balance to be equally necessary at the graduate and undergraduate level.

The Department is declining to permit stacking of the allowance for a student to complete up to 25 percent of their program at an eligible institution in the United States under proposed § 600.52. However, an exception is permitted for independent research done by an individual student in the United States for not more than one academic year for research conducted during the dissertation phase of a doctoral program (where the research can only be performed at a facility in the United States) under current § 600.51. Nevertheless, we wish to clarify that the proposed changes to § 600.52 do not preclude an institution from allowing doctoral students to study and/or conduct research in the United States using the flexibilities provided in each section. The examples below illustrate the practical application of both provisions.

Example 1

A student in the dissertation phase of her three-year doctoral program requests permission from the institution to conduct research in the United States. The student has not completed any portion of her program in the United States. Having concurred that her research can only be performed at a facility located there, the institution approves one year of research time in the United States.

Example 2

A student enrolled in a three-year doctoral program requests to study at an institution in the United States under a written arrangement. The home institution approves her request to take 12 credits at the Ph.D. level over two 16-week semesters, 24 percent of the length of the program as determined under proposed § 668.5(g) (*i.e.,* dividing the number of semester, trimester, or quarter credit hours, clock hours, or the equivalent that are provided by the eligible U.S. institution by the total number of semester, trimester, or quarter credit hours, clock hours, or the equivalent required for completion of the program). Subsequently, while in the dissertation phase of her program, the student requests to conduct research in the United States. Because the one-year limit on the amount of time a doctoral student may remain in the United States in order to conduct research is measured in calendar time, it is necessary for the institution to consider any time the student has already spent studying or conducting research there. With 32 weeks of previous study factored in, the student is approved for an additional period of research in the United States of up to 20 weeks.

We thank the commenter who responded to our request for comments on whether written arrangements for students studying in the U.S. should include organizations that are not eligible institutions. With respect to internships, we agree with the commenter that limiting these to eligible institutions would circumscribe opportunities for U.S. students attending eligible foreign institutions in a way that is contrary to the intent of proposed regulations. The preponderance of internship opportunities is not at eligible postsecondary institutions but rather with corporations, other businesses, and non-profit organizations other than

[20] S. 3548, 116th Congress (2020).

postsecondary institutions. Given the extent to which relevant internship experience can enhance a student's educational experience and affect a graduate's employment prospects, we are convinced that U.S. students attending eligible foreign institutions should not be placed at a disadvantage relative to their counterparts attending domestic institutions, and should have the same opportunities to pursue internships in any country including the United States.

While appreciative of the commenter's position that increased latitude be accorded coursework as well, we are not similarly persuaded of the need to allow U.S. students attending eligible foreign institutions to take coursework in the United States, as part of their eligible program, at any entity other than an eligible institution. Unlike the situation in foreign countries, where another eligible institution may not exist or be within a reasonable travel distance for ground-based instruction, there is no lack of eligible institutions in the United States with which to execute a written arrangement. We believe the partnerships with other universities in specialized topics and unique student experiences referred to by the commenter can readily be secured through written arrangements with one or more of the 6,000 plus eligible institutions in the United States. In addition, we are concerned that an institution in a foreign country may not have sufficient opportunity to enforce elements of a written arrangement with a non-eligible entity located in the U.S., making such arrangements inherently risky.

As a result, we are amending proposed § 600.52 (Foreign institution) to remove internships and externships from the list of program-related activities that may only be performed in the United States at an eligible institution, and specifying that internships and externships may be provided by an ineligible organization as described in proposed § 668.5(h)(2). Proposed § 668.5(h)(2) clarifies that the limitations on written arrangements are not applicable to the internship or externship portion of a program if the internship or externship is governed by the standards of an outside oversight entity, such as an accrediting agency or government entity, that require the oversight and supervision of the institution, where the institution is responsible for the internship or externship and students are monitored by qualified institutional personnel.

We thank the commenter for writing in support of the proposed revisions to § 600.54(c) that would permit written arrangements between an eligible foreign institution and an ineligible entity (other than in the United States), provided the ineligible entity is an institution that satisfies the definition in paragraphs (1)(iii) and (iv) of "foreign institution" and the ineligible foreign institution provides 25 percent or less of the educational program. However, we disagree with the commenter that the percentage of a program that is provided by the ineligible entity should be increased to 50 percent. Domestic institutions entering into a written arrangement with an ineligible entity to offer more than 25 percent, but less than 50 percent of an eligible program, must obtain accreditor approval. No similar protocol exists for foreign institutions. Requiring that a non-eligible entity satisfy the regulatory definition of "foreign institution" does reasonably assure some degree of program integrity. However, the Department is not persuaded that this is an adequate substitute for accreditor approval where the percentage of the eligible program offered by an ineligible entity would be greater than 25 percent. Moreover, it would create a standard for eligible foreign institutions lower than that applied to domestic institutions.

In response to the commenters who asked that the Department reconsider the prohibition on foreign institutions offering any portion of an eligible program through distance education reflected in current § 600.51(d), we note that this prohibition (sec. 481(b)(3) of the HEA) is statutory and provides no flexibility. Although the CARES Act does authorize the use of distance education by eligible foreign institutions, and we believe that students benefit from having access to distance learning opportunities, including while enrolled at a foreign institution, that authority is temporary and tied to the national emergency declared on March 13, 2020.

We disagree with the commenter who objected to allowing students enrolled in foreign institutions to complete up to 25 percent of a program in the United States, and asserted that the Department would be unable—(1) To determine the fiscal and academic quality of such foreign institutions; or (2) to prevent millions of students from receiving degrees without completing the requirements deemed necessary by academic and industry leaders. We further disagree that these changes facilitate foreign institutions gaining access to or leveraging control over title IV financial aid. First, eligible foreign institutions already participate in the Direct Loan program. The changes proposed in the NPRM do not, in any way, increase the scope of foreign institutions' participation in the title IV programs, nor do they loosen the existing financial responsibility standards that eligible foreign institutions must adhere to. Regarding academic quality and the potential for students to receive degrees that their work does not merit, we note that the proposed regulations make no changes to the current rules governing institutional eligibility. Lastly, we are uncertain of what the commenter means with reference to foreign institutions gaining access to or leveraging control over the title IV programs. As previously discussed, eligible foreign institutions already participate in the Direct Loan program, and the title IV, HEA programs are not structured in such a way that it is possible for any institution, foreign or domestic, to leverage control over them.

Changes: The definition of Foreign institution in proposed § 600.52 (Foreign institution, paragraph (1)(ii)(C)) is changed to remove internships and externships from the list of program-related activities that may only be performed in the United States at an eligible institution. Paragraph (1)(ii)(C)(*2*) is added to allow participation in an internship or externship provided by an ineligible organization as described in § 668.5(h)(2).

Request for Review (§ 668.113)

Comments: One commenter expressed strong support for the proposed changes to § 668.113, establishing that if a final audit determination or final program review determination includes liabilities resulting from the institution's classification of a course or program as distance education, or the institution's assignment of credit hours, the Secretary would rely on the requirements of the institution's accrediting agency or State approval agency regarding qualifications for instruction and whether the work associated with the institution's credit hours is consistent with commonly accepted practices in higher education.

Another commenter, offering qualified support for the proposed changes, suggested that the Department clarify which fields would be suitable for distance education as the criteria for applying the standards in § 668.113. To make these determinations, the commenter offered that the Department should analyze whether the use of distance education is appropriate for and sustains the quality of instruction in those online programs where a final program review or audit determination has assessed liabilities.

Discussion: We thank the commenter who expressed strong support for these proposed changes. In response to the commenter who suggested the Department clarify which fields are suitable for distance education and make determinations regarding the appropriateness of that mode of instruction for individual programs, we note that the applicable statute and regulations place no constraints on the fields of study in which an institution may offer instruction using distance education, nor do they grant the Department authority to make such determinations. Assessing the quality of an educational program offered by an eligible postsecondary institution or establishing if that program may be offered using distance education is entirely within the purview of the institution's accrediting agency and, in some cases, the State agency with oversight responsibilities. Were an institution to offer a program through distance education that its accrediting agency or State agency had determined may not be taught using that modality, the Department would hold the institution potentially liable for all of the title IV funds disbursed to students enrolled in that program. The proposed changes to § 668.113 do not, in any way, compromise the Department's oversight authority in this area and, if anything, clarify that institutions are accountable to accreditor and State agency requirements in offering programs through distance education.

Changes: None.

Past Performance (§ 668.174)

Comments: Several commenters agreed that the proposal that an institution is not financially responsible if a person who exercises substantial ownership or control over an institution also exercised substantial ownership or control over another institution that closed without a viable teach-out plan approved by that institution's accrediting agency and/or state regulatory body. The commenters believed the proposal change will help to protect students attending institutions that close and ensure that individuals affiliated with an institution that closed without a viable teach out plan, will not participate again in the title IV programs.

Discussion: The Secretary thanks the commenters for their support.

Changes: None.

Factors of Financial Responsibility (§§ 668.15 and 668.171–668.175)

Comments: One commenter questioned the need for, and implications of, the proposal to apply the financial standards in § 668.15 to institutions that undergo a change of ownership and control. The commenter noted that historically, the Department has used only two of the financial measures in this section—the acid test ratio and positive tangible net worth or positive unrestricted net asset standards—to evaluate institutions that changed ownership and control. The commenter argued that applying, or potentially applying, all of § 668.15 to changes in ownership would constitute a significant change in Department practice that would more appropriately call for a substantive rulemaking to clarify the relationship between the two sections of the regulations that address financial responsibility—§§ 668.15 and 668.171 through 668.175. In addition, the commenter stated that the proposed change to the title and applicability of this section was presented during negotiated rulemaking as a technical update rather than a substantive change.

Given the significant concern of many institutions and others for the Department to initiate a rulemaking on financial responsibility standards and the composite score, the commenter urged the Department to withdraw this proposed change and defer making revisions to changes of ownership standards to a broader rulemaking discussion.

Discussion: In as much as the Department intended to clarify that § 668.15 applies only to institutions that undergo a change of ownership and control, we agree with the commenter that a broader discussion is warranted, particularly since the Department intends to conduct future negotiated rulemaking for the financial responsibility standards, including those applicable to changes of ownership.

Changes: We have withdrawn the proposed changes to § 668.15.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) determines whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

OMB has determined that this rule is an economically significant action and would have an annual effect on the economy of more than $100 million. This regulation will enable institutions to harness the power of innovation to expand postsecondary options, leverage advances in technology to improve student learning, and allow students to progress by demonstrating competencies rather than seat time. According to the Department's FY 2020 Budget Summary, Federal Direct Loans and Pell Grants accounted for almost $124 billion in new aid available in 2018. Given this scale of Federal student aid amounts disbursed yearly, the addition of even small percentage changes could result in transfers between the Federal Government and students of more than $100 million on an annualized basis.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866, and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. The rule is considered an E.O. 13771 deregulatory action. We believe the effect of this regulation will be to remove barriers for development of distance and direct assessment programs and their participation in title IV, HEA funding, reduce the Department's role in approving programs, and promote innovation in higher education. We believe this regulatory action will be, in sum, deregulatory.

As required by Executive Order 13563, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action, and we are issuing these regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that the regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action will not unduly interfere with State, local, or Tribal governments in the exercise of their governmental functions.

In accordance with the Executive orders, the Department has assessed, both quantitatively and qualitatively, the potential costs and benefits of this regulatory action.

In this regulatory impact analysis, we discuss the need for regulatory action, the potential costs and benefits, net budget impacts, and regulatory alternatives we considered.

Elsewhere in this section, under Paperwork Reduction Act of 1995, we identify and explain burdens specifically associated with information collection requirements.

Need for Regulatory Action

The emphasis in the regulations is on clarifying the distinctions between distance education and correspondence courses, affirming the permissibility of team teaching models, improving worker mobility by accommodating differences in licensure requirements across State lines, simplifying conversions between clock and credit hours to enable students to meet licensure requirements while also earning credits more likely to transfer to other institutions, establishing regulations regarding subscription-based programs so that institutions can confidently implement programs that measure competencies rather than seat time, and reducing barriers that limit the number of direct assessment programs available to students.

These changes benefit institutions by enabling them to employ innovative methods and models without undue risk of inadvertently violating title IV requirements. These options benefit students by expanding the number of postsecondary education opportunities available to them, including those who may have been poorly served by more traditional ''seat-time'' instructional models. By providing a larger variety of postsecondary options and strategies such as blended learning, adaptive learning, and competency-based education, students may be much more likely to persist in and complete their programs and institutions will be much more equipped to drive student success.[21] [22] The regulations define or clarify terms such as ''correspondence course,'' ''distance education,'' and ''regular and substantive interaction,'' and would streamline the current regulations to reduce the complexity of performing clock-to-credit hour conversions, disbursing aid to students enrolled in subscription-based programs, and ensuring that programs align with program length restrictions, while improving worker mobility across State lines. In some instances, the definitions clarify terms used in, but not defined by, the HEA. In other cases, the regulations codify program administration requirements that had previously been communicated only through sub-regulatory guidance, to give institutions the certainty they need to expand the postsecondary education options that they make available to students.

For instance, while CBE programs using direct assessment have been permitted by statute since 2006, most institutions continue to evaluate progress in CBE programs based on measures of time (or time equivalency) rather than a student's demonstration of competency. This is largely due to uncertainties regarding how to disburse and calculate return-to-title IV for students enrolled in programs that measure competencies rather than time.

As a result, the potential benefits of CBE programs, such as accelerated learning and completion as well as providing better assurances to employers that graduates are prepared for workplace demands, were mitigated because programs still were required to adhere to time-based title IV disbursement methodologies.[23] These regulations provide needed certainty to institutions about how to disburse aid to students enrolled in CBE programs. The regulations also eliminate a significant legal obstacle to the adoption of direct assessment CBE programs by permitting title IV-eligible programs to be offered partly through direct assessment and partly using credit or clock hours. Eliminating this restriction makes it easier for institutions to experiment with direct assessment without having to immediately establish and implement a program offered entirely through direct assessment.

The regulations acknowledge that subscription-based programs are permissible and provide instructions to institutions about how to disburse aid and evaluate satisfactory academic progress for students enrolled in these programs. These regulations also reduce the steps involved in gaining approval for direct assessment programs, which reduces the burden associated with administering these programs and reduces the risk that an institution could invest resources in designing a high-quality program that the Department denies or unnecessarily delays. Institutions that better understand the rules for administering Federal student aid in circumstances that depart from traditional delivery models are more likely to invest in developing one of those models, and administering it properly, thus avoiding improper payments and improving the student experience.

The regulations also acknowledge that, given the cost of developing sophisticated technology-driven instructional tools or building specialized facilities on college campuses, a rational approach may be to rely on a third-party provider with a much broader reach than an individual institution or on industry partners who have other incentives to maintain state-of-the-art facilities and equipment. Until institutions fully understand what is permissible in the development and implementation of innovative delivery models, institutional leaders will remain largely risk averse, and solutions that would otherwise help large numbers of students will not be made available to them.

Finally, the regulations change the return of title IV funds and satisfactory academic progress provisions to reduce administrative burden and increase flexibility for many postsecondary institutions offering innovative programs. Reducing the amount of burden and expense associated with the administration of the title IV, HEA programs for unique or non-traditional programs will also encourage institutions to offer programs that do not fit into the traditional mold and improve the available offerings for students.

The Department believes this regulatory action will have an annual effect on the economy of more than $100 million. If students have more postsecondary options to select from and if more students persist to completion, the number of students who enroll for the full duration of a program may increase. For example, although

[21] *www2.deloitte.com/us/en/insights/industry/public-sector/improving-student-success-in-higher-education.html.*

[22] *www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/.*

[23] *www2.deloitte.com/us/en/insights/industry/public-sector/improving-student-success-in-higher-education.html.*

extremely limited in availability now, if there were fewer barriers to starting a direct assessment program, there could be an increase in the number available, and perhaps adult learners would find this to be a more satisfying way to learn, or the only way they can juggle the demands of work, school, and family.

While a limited number of experienced institutions with established direct assessment programs may increase their program offerings, it is difficult to predict whether larger numbers of students will be attracted to higher education, in general, or if the current number of students would be distributed differently across the landscape of available programs. Direct assessment programs may be considerably more attractive to busy adult learners who would get credit for what they know from prior work or life experience.[24]

The demand for distance education programs has visibly increased in recent years. In 2003–04, 15.6 percent of undergraduate students took at least one distance education class and only 4.9 percent of students were exclusively in distance education while by 2015–16, 43 percent of undergraduate students took at least one distance education class and approximately 11 percent were in exclusively distance programs.[25] In many cases, more students are taking at least one online class while enrolled in a traditional ground-based program. Correspondingly, there has also been significant growth in the number of students who are enrolled in exclusively online programs.[26] We have also seen significant redistribution of online enrollments as some large non-profit and public institutions have increased their market share, while at the same time some proprietary schools that once dominated distance education delivery are suffering sizeable enrollment losses and even closures. Overall, growth in the number of students enrolled exclusively online has been moderate, increasing 22 percent between 2013 and 2018. The number of students taking at least one online class has increased 28 percent between 2013 and 2018.[27 28 29]

While current providers of CBE and direct assessment learning do so through distance learning modalities, it is possible that, as regulatory requirements become clearer, those institutions that primarily provide ground-based education will also develop and implement CBE and direct assessment programs. On the other hand, programs that lead to licensure may be slower to introduce CBE or direct assessment models since licensing boards may resist change—although in the wake of COVID–19 we are seeing greater receptivity among licensing boards to distance learning.[30]

As can be seen in Table 1 below, which is based on data collected by the National Center for Education Statistics (NCES), while the percentage of students who are enrolled exclusively in online programs has increased slightly between 2013 and 2018, the largest growth has been in the percentage of students who take at least one, but not all, of their classes online. The number of students engaged in online learning grew between 2013 and 2018 from approximately 5.5 million to 6.9 million. This suggests that learning modalities will change as innovation creates a broader range of options. However, despite the increase in enrollments in online options, the total number of postsecondary enrollments has been in decline for the last several years. Therefore, it is clear that an increase in the percentage of students who enroll in online classes will, alone, not likely result in overall increases in postsecondary enrollments. College enrollments are most dependent upon economic cycles, so changes in delivery models may be less important than macroeconomic conditions in determining total enrollments.

TABLE 1

All institutions	Total students (#)	No-distance education courses (%)	At least one distance course, not all (%)	All-distance education courses (%)
2018	20,008,434	65.3	18.4	16.3
2017	19,765,598	66.3	18.0	15.7
2015	19,977,270	70.2	15.4	14.4
2013	20,375,789	72.9	14.1	13.1
4-year (total):				
2018	13,901,011	64.3	18.0	17.6
2017	13,823,640	65.8	17.3	16.9
2015	13,486,342	69.7	14.4	15.9
2013	13,407,050	73.0	12.2	14.8
2-year (total):				
2018	6,107,423	67.6	19.2	13.2
2017	5,941,958	67.5	19.5	13.0
2015	6,490,928	71.2	17.6	11.2
2013	6,968,739	72.7	17.6	9.8
Public:				
2018	14,639,681	66.1	21.5	12.3
2017	14,560,155	67.8	20.8	11.4
2015	14,568,103	72.0	18.0	10.0
2013	14,745,558	74.6	16.7	8.7
Private Non-Profit:				
2018	4,147,604	69.7	10.1	20.2

[24] *onlinelibrary.wiley.com/doi/full/10.1002/cbe2.1008.*

[25] U.S. Department of Education, National Center for Education Statistics, Digest of Education Statistics 2018, Table 311.22. Number and percentage of undergraduate students enrolled in distance education or online classes and degree programs, by selected characteristics: Selected years, 2003–04 through 2015–16. Available at *nces.ed.gov/programs/digest/d18/tables/dt18_311.22.asp.*

[26] *www.insidehighered.com/digital-learning/article/2019/12/11/more-students-study-online-rate-growth-slowed-2018.*

[27] *nces.ed.gov/programs/digest/d18/tables/dt18_311.15.asp.*

[28] *nces.ed.gov/programs/digest/d14/tables/dt14_311.15.asp.*

[29] U.S. Department of Education, National Center for Education Statistics, IPEDS, Spring 2019, Fall Enrollment component (provisional data)., Number and percentage distribution of students enrolled at title IV institutions, by control of institution, student level, level of institution, distance education status of student, and distance education status of institution: United States, fall 2018.

[30] *ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf.*

TABLE 1—Continued

All institutions	Total students (#)	No-distance education courses (%)	At least one distance course, not all (%)	All-distance education courses (%)
2017	4,106,477	71.3	9.5	19.2
2015	4,063,372	75.0	8.5	16.5
2013	3,974,004	80.0	6.9	13.1
Private For-Profit:				
2018	1,221,149	41.0	8.6	50.4
2017	1,098,966	29.0	11.1	59.9
2015	1,345,795	35.9	8.6	55.5
2013	1,656,227	40.7	7.6	51.7

Growth in the number and percentage of online learners was especially strong among private not-for-profit institutions, where students who took all courses through distance education increased over 54 percent, from 13.1 to 20.2 percentage points. At 2-year institutions, the percentage of students taking all courses online increased from 9.8 to 13.2 percentage points, almost a 35-percent jump from 2013 to 2018. However, total enrollments at 2-year institutions during that same time period decreased by over 850,000 students.

While the percentage of students enrolled exclusively in distance learning is highest among proprietary institutions (60 percent), relatively few students are enrolled at these institutions (only approximately 1 million of the nearly 20 million enrolled in postsecondary education in 2017 were enrolled at proprietary institutions). There have been sizable decreases in total enrollments at proprietary institutions between 2013 and 2017, and in 2017 only 659,379 students were enrolled exclusively online at proprietary institutions as compared to 821,296 students who were enrolled exclusively online at private non-profit institutions and 1.6 million who were enrolled exclusively in online programs at public institutions. These data suggest that increases in enrollments among exclusively online courses do not necessarily result in increased number of total postsecondary enrollments.

The information about the number and distribution of distance education programs and students has clearly been temporarily altered in 2020 because of COVID–19 and the disruption of ground-based campus operations during times of mandatory or recommended quarantine. While some students may have withdrawn because of COVID–19 related circumstances, the Department believes that most students continued their program, albeit at least temporarily in a distance format. The extent to which this transformation continues in the remainder of 2020 and beyond will depend on the further developments with respect to COVID–19, the experience students have in their distance education courses and the value they place on campus activities, and the decisions institutions make about resuming on-campus programs. Additionally, as noted by the commenter, adverse economic conditions have been associated with increases in postsecondary enrollment, particularly for programs with an emphasis on career training and development. Postsecondary enrollment increased substantially from 2007–08 to 2010–11 as students responded to the recession during that time.[31] Table 2 reflects this increase and the significant growth in proprietary enrollment during this period. The shape of the economic recovery from COVID–19 and the experience and outcomes of those who pursued postsecondary credentials during the last recession may affect how big an increase is seen in future postsecondary enrollment. The Department believes it is reasonable to expect some additional increase in new distance education students, the possibility of which is incorporated into the cost estimate in the *Net Budget Impact* section of this RIA.

TABLE 2[32]—TRENDS IN FALL ENROLLMENT 2007–2013 BY CONTROL OF INSTITUTION

Year	Public		Private		Proprietary		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
2007	13,603,772	....	3,595,466	....	1,478,231	....	18,677,469	....
2008	14,090,863	3.6	3,684,190	2.5	1,778,731	20.3	19,553,784	4.7
2009	14,936,402	6.0	3,793,751	3.0	2,123,270	19.4	20,853,423	6.6
2010	15,279,455	2.3	3,881,630	2.3	2,430,657	14.5	21,591,742	3.5
2011	15,251,185	−0.2	3,954,173	1.9	2,368,440	−2.6	21,573,798	−0.1
2012	15,000,302	−1.6	3,973,422	0.5	2,174,457	−8.2	21,148,181	−2.0
2013	14,856,309	−1.0	3,990,858	0.4	2,000,883	−8.0	20,848,050	−1.4

The CBE marketplace overall has also seen significant attention from within the postsecondary education community and general public, but the direct assessment component of CBE has not, potentially because of the

[31] Foote, A. & Grosz, M. (2019). The Effect of Local Labor Market Downturns on Postsecondary Enrollment and Program Choice. MIT Press Journals.

Schmidt, Erik, ''Postsecondary Enrollment Before, During, and Since the Great Recession,'' P20–580, *Current Population Reports,* U.S. Census Bureau, Washington, DC, 2018. (*https://www.census.gov/content/dam/Census/library/publications/2018/demo/P20-580.pdf*).

Barr, Andrew, and Sarah Turner. 2012. ''Out of a Job and into School: Labor Market Policies and College Enrollment during the Great Recession.'' Working Paper, University of Virginia.

[32] U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 2018, Table 303.20: Total fall enrollment in all postsecondary institutions participating in title IV programs and annual percentage change in enrollment, by degree-granting status and control of institution: 1995 through 2017.* Available at *https://nces.ed.gov/programs/digest/d18/tables/dt18_303.20.asp.* Last Accessed May 26, 2020.

length of time it takes for the Department to review applications for direct assessment programs, and because several audits by the Department's OIG in the past decade have been sharply critical of the oversight of direct assessment by the Department and accrediting agencies.[33] [34] [35] The Department also believes that another recent report by the Department's Inspector General, which found one institution's team teaching model did not comply with title IV, HEA requirements, may have deterred other institutions that were considering the development of CBE programs. Even the threat of an audit finding recommending the return of hundreds of millions of dollars in title IV funds could dissuade institutions from pursuing such innovations. This may still be the case even if audit recommendations are not accepted by the Department.[36]

The Department's data does not break out information about competency-based education students to the same extent as it does for distance education students, but a number of surveys and articles provide some background on existing programs. According to the 2018 National Survey of Postsecondary Competency-Based Education (NSPCBE), co-authored by American Institutes of Research (AIR) and Eduventures, a majority of respondents believe that CBE will experience strong growth although they also perceive that a number of barriers to implementation remain.[37] The survey was sent to over 3,000 institutions including primarily 2- and 4-year institutions listed in the Integrated Postsecondary Education Data System (IPEDS). About 69 percent of respondents were 4-year institutions and 31 percent were 2-year institutions. A total of 501 institutions replied to the survey, representing a survey response rate of 16 percent. It is possible that the survey may suffer from selection bias if the institutions that completed the survey were more likely to be those institutions considering adding CBE programs, which would mean that the survey results could not be accurately projected to the full postsecondary system.

[33] *www2.ed.gov/about/offices/list/oig/auditreports/fy2014/a05n0004.pdf.*

[34] *www2.ed.gov/about/offices/list/oig/auditreports/fy2015/a05o0010.pdf.*

[35] *www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a05p0013.pdf.*

[36] *www2.ed.gov/documents/press-releases/20190111-wgu-audit.pdf.*

[37] *www.air.org/sites/default/files/National-Survey-of-Postsec-CBE-2018-AIR-Eduventures-Jan-2019.pdf.*

Four-hundred-thirty of the 501 respondents reported being interested in, or in the process of, implementing CBE programs, while 71 indicated no interest. Some 57 institutions stated that they were currently offering at least one CBE program, with these institutions, in aggregate, offering a total of 512 CBE programs. The largest portion of programs (427 of 512) was at the undergraduate level with 85 at the graduate level. The highest concentration of CBE programs was in the fields of nursing and computer science. Given the requirement for nursing students to participate in clinical rotations, it is likely that CBE programs in nursing were designed to target students who are already registered nurses (with an associate degree) and now wish to complete a bachelor's degree.

Over 50 percent of institutions reported CBE undergraduate enrollments of no more than 50 students per program while only a small number of institutions (approximately 4 percent) enrolled more than 1,000 undergraduate students in CBE programs at their institution. Thus, assuming these findings are characteristic of the overall CBE landscape, it appears that most institutions are still in the early stages of implementing CBE programs with only a handful of institutions operating large-scale programs.

Similar results were described in the 2019 survey that had 602 respondents with 54 percent from public institutions, 42 percent from private, nonprofit institutions and 4 percent were from proprietary institutions.[38] Of the 588 programs offered by 64 institutions, 84 percent were undergraduate and 16 percent were graduate programs. The majority of existing programs remain small, with 53 percent with enrollment under 50 students.[39] As in the 2018 survey, popular fields for competency-based programs include nursing, computer and information sciences, and business administration.[40] Seventy-seven percent of responding institutions with competency-based programs reported that they are eligible for Federal financial aid. Of those, 75 percent report they maintain that eligibility by using a course structure to map to credit hours.[41]

[38] American Institutes for Research, State of the Field—Findings from the 2019 National Survey of Postsecondary Competency-Based Education, available at *www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf.*

[39] *Id.,* p. 25.

[40] *Id.,* p.26.

[41] *Id.,* p.31.

One of the three top barriers to implementing CBE programs, as cited by over 50 percent of the responding institutions, was ''Federal student aid regulations.'' The other two key barriers to entry included the need to change business processes and the high costs associated with start-up. While the survey results point to a guarded optimism on the growth of CBE programs, this optimism is tempered by a perception that the regulatory climate needs to be flexible and conducive to expansion of CBE programs; however, the report suggests that it is crucial to preserve consumer protections.

The Department agrees with this theme, as we noted in the executive summary of the NPRM that ''the purpose of these distance education and innovation regulations is to reduce barriers to innovation in the way institutions deliver educational materials and opportunities to students, and assess their knowledge and understanding, while providing reasonable safeguards to limit the risks to students and taxpayers.''

Therefore, these final regulations send a signal to the higher education community that the Department is committed to reducing regulatory burden to make way for responsible innovations, such as CBE programs and direct assessment programs. Further, the regulations would enable institutions to develop new title IV disbursement models, such as subscription-based programs, to align the delivery of aid with programs that allow students to complete as many classes as possible during a given period of time, but to also pace themselves appropriately based on other demands and learning needs.

While technology has transformed the way almost every industry in America does business, it may have not fundamentally transformed the way we educate students, monitor their progress, or diagnose when and what kind of additional support services a student needs. Many institutions are educating postsecondary students today in a very similar manner to methods and practices used a hundred years ago. Nonetheless, there have been some early innovators who have made advances despite the Department's lagging in this area. In that regard, this rule represents the Department's effort to catch up with innovations that are already taking place at forward-looking institutions. We seek to promote continuing innovation, both in distance learning and ground-based education. The regulations update our definitions of ''distance education'' and ''correspondence courses'' to acknowledge that as a result of CBE and direct assessment, many students enrolled in distance education progress at their own pace, which is a characteristic that in the past was determinant of a correspondence course. With the introduction of adaptive learning and other technologies, a student enrolled in distance education is likely to be learning at his or her own pace, although that learner continues to have regular and substantive interactions with the instructor(s). The regulations acknowledge that adaptive learning can play an important role in a student's educational experience and can facilitate regular and substantive interaction between students and instructors by providing students with continuous feedback regarding their learning. The Department appreciates the considerable effort of negotiators to recommend and agree to regulatory changes that promote and enable flexibility, while at the same time ensuring the preservation of student protections and the responsible distribution of title IV, HEA assistance.

It is the combination of changes addressed in these final regulations that cumulatively would have sufficient impact on the economy to warrant classifying this regulation as economically significant. Specifically, while there could be increases in the number of students seeking title IV, HEA assistance, or the number of students who persist to completion, these increased Federal expenditures could result in the preparation of a more capable workforce and a better-educated citizenry. As more adults are required to obtain additional postsecondary courses or credentials throughout their professional lifetime, the availability of more efficient learning opportunities, such as CBE and direct assessment learning, will enable more adults to evolve in their careers.

Summary of Comments and Changes From NPRM

As described throughout this preamble, the Department considered a number of comments and made some technical corrections and changes in these final regulations. One comment focused on the RIA analysis and emphasized that the Department should have accounted for the effects of COVID–19 and the resulting increase in distance education. The commenter noted that previous recessions had resulted in significant increases in postsecondary enrollment and that the specifics of the COVID–19 situation would likely result in students choosing distance education options over traditional, campus-based programs. The commenter also pointed out that distance education and competency-based programs are often attractive to veterans, students of color, low-income students, students who are parents, or working students who are disproportionately affected by the COVID–19 health effects and economic disruption. The commenter encouraged the Department to rescind the rule, open a new round of negotiated rulemaking in light of COVID–19, or, at least to redo the cost estimates and regulatory analysis for these final regulations to take COVID–19 impacts into account.

The Department appreciates the comment and recognizes that the NPRM was published on April 2, 2020, when we were still understanding the impact that COVID–19 could have on enrollments in distance learning. The rapid transformation of the postsecondary educational landscape as a result of COVID–19 supports the Department's point that the creation of innovative postsecondary programs, including distance education and competency-based programs, will be driven by student demands and other events that generate demand. The changes in these final regulations allow those student-driven program development decisions to be implemented more efficiently while maintaining appropriate safeguards for students.

Another consideration is that the cost estimate for the NPRM and these final regulations is intended to capture the impacts of the regulatory changes. The rapid transformation to distance education occurred independent of these final regulations, although the Department did waive several provisions in line with the proposed changes in these final regulations to facilitate the response to COVID–19. For example, the Department waived preapproval requirements that would have otherwise delayed institutions in their efforts to move to distance learning, and it permitted accreditors to develop policies and procedures to enable rapid transition to distance learning without going through the regular policy-making process that would have taken months to accomplish. In addition, the Department permitted students enrolled at foreign institutions to complete up to 25 percent of their program at an eligible U.S. institution or an ineligible foreign institution so that students whose primary institution suspended operations could continue their education elsewhere without jeopardizing their continued participate in title IV programs. The consequences of COVID–19 and subsequent economic disruption are part of the conditions and environment within which these regulations will have an impact, and while it may be impossible to definitively distinguish between the effects of the regulations versus the effects of COVID–19 on the transition to distance learning, we attempt in this RIA to do so. In light of the recent, COVID–19 related transformation in postsecondary education, the Department has updated some of the information about such programs and has considered how the experience over the past months may increase or accelerate institutions' plans to develop additional distance or competency-based programs. This is addressed in the *Net Budget Impact* section of this RIA.

Costs, Benefits, and Transfers

The Department anticipates that the regulations would affect students, IHEs, accrediting agencies, and the Federal Government. State government may also be impacted in some instances. Table 3 refers to key changes described in the identified preamble sections and summarizes potential impacts.

TABLE 3—SUMMARY OF KEY CHANGES

Change	Affected parties	Impacts
Reg Section 600.2—Definitions		
Create definition for "academic engagement" ...	Students/Institutions/ Federal Government.	Clarifies and expands the types of activities that verify student enrollment for the purpose of performing return to title IV funds calculations while standardizing the Department's definition of "academic engagement" for use elsewhere in the regulations. Prevents improper payment of title IV funds to students who are not legitimately engaged in postsecondary learning.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Defines "clock hour" for distance education	Students/Institutions/ Federal Government/Accrediting Agencies.	Codifies current policy allowing institutions to record clock hours earned through distance education but requires such hours to be taught through synchronous or, as permitted by these final regulations, asynchronous instruction by the instructor. Clock hours may be earned through distance education only when permitted by licensing boards or other regulatory entities that require enrollment to be measured in clock hours. Regulatory clarity may encourage greater use of distance education to provide the didactic portion of occupationally focused programs, thus expanding access to students who are working, raising families, or live far from campus. As described in the preamble and further discussed after this table, potential concerns with allowing asynchronous instruction include a lack of direct interaction and the use of the hours for the completion of homework.
Modifies definitions of "correspondence course" and "distance education" to clarify that it is permissible to employ a team approach to instruction and clarifies that the requirements for regular interaction are met if the institution provides opportunities for interaction, even if each student does not take advantage of each opportunity. Removes self-pacing from definition of "correspondence course" as it is not a necessary characteristic for such courses.	Students/Institutions/ Federal Government/Accrediting Agencies.	Benefits students by encouraging the development of programs taught by instructional teams consisting of experts in the various elements of high-quality instruction, as opposed to a more traditional model that relies on a single faculty member to meet all of the student's learning needs. Benefits students and institutions by potentially reducing some of the costs of instruction. Reduces the need for institutions to require students to engage in less substantive work solely for the purpose of documenting that regular and substantive interaction took place in order to document that a course is offered using distance education and is not a correspondence course.
Refines definition of "credit hour" to reflect current sub-regulatory guidance in DCL GEN–11–06 that references a variety of delivery methods.	Students/Institutions/ Federal Government.	Maintains time-based standard to ensure consistency among institutions regarding the awarding of academic credit, while also creating the necessary flexibility to consider that many new educational delivery models are not based on seat time. Codifies flexibility provided in sub-regulatory guidance under the Department's Dear Colleague Letter GEN–11–06.
Amends definition of "distance education" by removing references to specific kinds of electronic media used in providing instruction, relegating the determination of instructor qualifications to accrediting agencies, including the use of interactive technologies to meet the requirements for "substantive interaction," and establishing standards for "regular interaction" that include predictable opportunities for interaction and monitoring of student engagement.	Students/Institutions/ Federal Government/Accrediting Agency.	Updates regulations to remove references to outdated forms of electronic media and to ensure that new forms of electronic media will be covered by the regulations in the future. Acknowledges that the use of interactive learning technologies can facilitate regular and substantive interaction between students and instructors. Benefits institutions by more clearly explaining regulatory compliance requirements for educational innovations, thus reducing risk and potential financial penalties for those institutions pursuing educational innovation. Benefits students by expanding learning opportunities and flexibilities, including personalized learning, without unnecessary bureaucratic hurdles for the purpose of meeting title IV requirements for regular participation. Benefits the Federal Government by ensuring that students are receiving high-quality education when using Federal student aid to pay for that education. Benefits students by ensuring that online learning includes meaningful interactions with qualified instructors who can monitor and improve student learning.
Clarifies definitions of "incarcerated student" and "juvenile justice facilities".	Students/Institutions/ Federal Government.	Reflects current practice and sub-regulatory guidance and clarifies that individuals in certain correctional facilities may be eligible for Pell grants, but limits the use of Pell grants to appropriate instructional expenses.
Amends definition of "nonprofit institution" to delete reference to 501(c)(3) tax status.	Institutions	Redundant language removed; no impact anticipated.
Reg Section 600.7—Conditions of Institutional Eligibility		
Establishes that a student is not considered to be "enrolled in correspondence courses" until at least 50 percent of the student's classes are correspondence courses.	Students/Institutions ...	Impact minimal based on the small number of correspondence courses operating in the country. Potential benefit to institutions and students is that enrollment in a single or small number of correspondence courses does not cause a student to be counted against the institution for eligibility purposes. Provides greater flexibilities for students who are managing multiple life demands or for whom travel to the campus is difficult or for whom technology access is limited, by allowing them to participate in a small number of correspondence courses without putting title IV participation for the institution at risk.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Reg Section 600.10—Date, Extent, Duration, and Consequences of Eligibility		
Limits Secretary's approval of direct assessment programs at the same academic levels to the first such program at an institution.	Students/Institutions/ Federal Government.	Acknowledges that the Department's role in approving direct assessment programs is limited to ensuring the integrity of the title IV, HEA programs, and assumes that if an institution can disburse aid properly to students in one program at a given academic level, it is likely to be able to do so for additional programs. Ensures that an institution that creates a first new direct assessment program at a new academic level is reviewed by the Department to ensure appropriate administration of title IV funds. Encourages institutions that have demonstrated the ability to design and operate a direct assessment program to expand that model of instruction and enables institutions to respond more quickly to student and workforce needs. Reduces a potential barrier or reduces time required to establish a direct assessment program. A consequence of eliminating the requirement that the Secretary approve each new direct assessment program at the same academic level is that it may lead to the rapid expansion a direct assessment programs without the guardrail of the Department's review.
Reg Section 600.20—Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification		
Requires the Secretary to provide timely review of new program applications and enables institutions to start advertising programs early enough to enroll a full cohort of students.	Students/Institutions/ Federal Government.	Benefits institutions and students by allowing faster development of new programs, especially those responsive to workforce development needs. Reflects role of accreditors in assessing program quality and Department's intent to rely on accreditor's assessment except in rare circumstances related to the Department's statutory and regulatory requirements or specific requirements of the institution's PPA. Protects an institution from Department's failure to act on an application for new program approval and reduces the likelihood that delays on the Department's part will require an institution to navigate the State and accreditor approval process a second time.
Reg Section 600.21—Updating Application Information		
Adds reporting requirements for (1) the addition of second and subsequent direct assessment programs at the same academic level.	Institutions/Federal Government.	With the elimination of the requirement for the Department to approve subsequent programs, this allows the Department to monitor the growth and development of direct assessment programs. Also allows cross-checking with accreditors to be sure program or arrangement has approval.
Reg Section 600.52 and 600.54 (related to Foreign Institutions)		
Amended to permit written arrangements with an eligible institution in the United States to provide no more than 25 percent of a student's program.	Students/Institutions/ Federal Government.	Benefits students by allowing them to take Federal student loans to enroll at certain foreign institutions but retain the ability to take a limited number of courses in the U.S., such as during summer breaks. Also enables title IV-participating students enrolled at foreign institutions to pursue qualifying internships or externships in the United States at entities other than eligible institutions. Benefits students by allowing them to find internships or externships in a variety of settings in which they may wish to pursue a career.
Amended to permit written arrangements between a foreign institution and an ineligible entity for no more than 25 percent of a student's program; provided that the ineligible entity satisfies definition of "foreign institution".	Students/Foreign Institutions/Federal Government.	Allows students at eligible foreign institutions to take courses at other approved foreign institutions in that country, thus benefiting from the same opportunities as their international peers enrolled at foreign schools. Broadens educational opportunities available to U.S. students at foreign institutions while maintaining reasonably equivalent quality. However, while the regulations require the ineligible institution to meet the requirements of the foreign country in which it is located, these arrangements would not be overseen by a recognized accrediting agency or the Department, outside of the regulatory requirements, which may make it difficult to ensure academic quality of the coursework offered by the ineligible foreign institution.
Reg Section 668.2—Definitions		
Eliminates definition of Academic Competitiveness Grant (ACG).	None	ACG program is no longer authorized by HEA. Removing definition has no impact on students or institutions.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Amends "full-time student" to define requirements for subscription-based programs and to prevent an institution offering such a program from including repeated courses for which a student has already received a passing grade in a student's enrollment status.	Students/Institutions/ Federal Government.	Provides clarity for institutions regarding subscription-based models and how they can be structured to permit students to receive title IV, HEA assistance.
Defines "subscription-based program" for title IV disbursement purposes as standard or non-standard term program for which an institution charges a student for a term with the expectation that the student completes a specified number of credit hours within the term. Clarifies that no specific timeframe applies for the terms and that students must complete a cumulative number of credit hours (or the equivalent) during or following the term before receiving another disbursement of title IV funds.	Students/Institutions/ Federal Government.	Revision from NPRM expands use of subscription-based model to all types of programs, not just direct assessment programs. Benefits all parties by clarifying how title IV aid disbursements work for subscription-based programs. Provides flexibility for students to take advantage of self-pacing inherent in this program model while limiting potential for abuse by requiring completion before subsequent disbursements of aid. Some protection for students with possibility of one single subscription period for catch-up work before loss of title IV eligibility. Clarity provided by definition may increase the establishment of direct assessment programs or other programs that could benefit from this approach, to the benefit of the institutions that offer them, and as options for students, including the non-traditional students that have taken advantage of existing CBE programs. Provides an opportunity for students who fall behind in a subscription-based program to catch up and get back on track. A potential risk of expanding subscription-based model beyond direct assessment programs include the possibility that students in subscription-based programs will quickly accrue debt early in their programs while falling behind in their coursework.
Requires institutions to establish a single enrollment status that applies to a student throughout his or her enrollment in a subscription-based program, with the student able to change their enrollment status once in an academic year.	Students/Institutions/ Federal Government.	Provides consistency for students regarding expectations for completion of coursework in a subscription-based program. Offers clarity to institutions regarding requirements for structuring such programs to ensure access to Federal aid. Improves program integrity by limiting options for students to avoid completion requirements through changes in enrollment status.
Explains method for determining number of credit hours (or the equivalent) that must be completed before subsequent disbursements of title IV aid.	Students/Institutions/ Federal Government.	Benefits institutions by clarifying how to match disbursements to pace of each student's progress. Benefits the Federal Government by establishing a clear completion standard for students to meet before they receive subsequent disbursements of Federal aid. Benefits students by allowing for an additional term to "catch-up" on coursework before losing title IV eligibility.
Modifies definition of "third party servicer" to use "originating loans" instead of "certifying loan applications".	None	Reflects current practices and terminology. No impact anticipated on any party.
Reg Section 668.3—Academic Year		
Revises definition of "week of instructional time" as it pertains to an institution's "academic year." One part of the definition would cover traditional postsecondary programs and remain unchanged and the other would cover programs using asynchronous coursework through distance education or correspondence courses. For these courses, defines it as a week in which the institution "makes available the instructional material, other resources, and instructor support necessary for academic engagement and completion of course objectives".	Students/Institutions/ Federal Government.	Benefits institutions by clarifying requirements for building instructional calendars in programs offered asynchronously through distance education and may spur additional innovation given better understanding of compliance thresholds. Benefits students and the Federal Government by ensuring that institutions make appropriate instructional materials and support available during instructional periods in exchange for Federal student aid. As noted by commenters, the interactions in asynchronous courses may not be predictable.
Reg Section 668.5—Written Arrangements to Provide Educational Programs		
Clarifies that institutions using written arrangements may align or modify their curriculum to meet requirements of industry advisory boards or other industry-recognized credentialing bodies rather than going through a mandatory, and typically lengthy, shared governance decision-making process.	Institutions/Faculty/Students/Accrediting Agencies.	Enables institutions to keep pace with changing needs of employers and protects non-accredited providers from having their educational programs or technologies manipulated by others. This is important since providers through written arrangements must prove the efficacy of their programs, so outsiders should not be allowed to modify or change the program in a way that could influence those results. Ensures that students are better prepared for entry to the workforce in certain occupations. Could create tension with faculty and reduce their influence over certain aspects of the curriculum but could require proper oversight by partnering institutions and accreditors to reduce risk of harm to students.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Clarifies calculation of percentage of program that could be provided by an ineligible institution.	Students/Institutions/Accreditors/Ineligible Entities involved in Written Arrangements.	Ensures that degree-granting institutions retain academic control of a program and maintain the responsibility for delivering at least half of an academic program. Setting out a clear methodology makes clear when and how written arrangements may be used but ensures that colleges and universities are not simply outsourcing instructional responsibilities to non-accredited providers. Benefits institutions by improving speed with which accrediting agencies review and approve such arrangements. While the accrediting agency can deny the request for a written arrangement, increasing the speed for review and expanding the options for staff that can review these arrangements could make for a less robust or rigorous review. Benefits students and institutions by allowing institutions to engage other providers, such as unions and apprenticeship providers, who may have specialized facilities and uniquely trained employees who can serve as teachers and mentors. Benefits institutions by allowing them to offer educational opportunities or technologies that are developed by outside providers who may be better situated to invest in new technologies due to their opportunities to deliver them to a larger population of students than are typically at a single institution.
Clarifies that written arrangements are not necessary for certain other interactions with outside entities. Specifically, the limitations in § 668.5 do not apply to the transfer of credits, use of prior learning assessment or other non-traditional methods of providing academic credit, or the internship or externship portion of a program.	Institutions/Students ...	Offers clarity for institutions to ensure that use of written arrangements does not result in fewer credits being accepted through transfer or awarded through prior learning assessment. Benefits students by reducing costs and time to completion for those who bring pre-existing knowledge and skills to the classroom.
Removes 50 percent limitation on written arrangements between two or more eligible institutions under joint ownership.	Institutions	Allows greater opportunities for institutions to share administrative or instructional resources when under shared ownership.
Ineligible entities would not, as was proposed in the NPRM, have to demonstrate experience in delivery and assessment of the program or portion the ineligible entity delivers and that the programs have been successful in meeting stated learning objectives.	Institutions	Allows institutions to use third parties to deliver portions of programs, to integrate advanced technologies, enable student access to specialized facilities and experts, expand the number of learning options available to students and potentially increase the number of students an institution can responsibly serve. While written arrangements may reduce the cost of delivering certain kinds of instruction, constructing specialized facilities, or developing new technologies, the written arrangement will have associated costs that could reduce revenue. Students could have access to newer technologies or higher quality instruction than could be provided by the institution. In the final regulations, ineligible entities will not be required to demonstrate prior experience and success in meeting learning objectives for portions of programs they deliver. However, there are potential risks inherent in contracting with an ineligible entity that lacks demonstrable experience. The outside provider could be of lower quality, have less of a vested interest in the student's success, or lack the necessary resources to provide the educational services agreed upon in the written arrangement.
Reg Section 668.8—Eligible Programs		
Eliminates consideration of ''out-of-class'' hours for purposes of performing clock-to-credit conversions for non-degree programs that are subject to those requirements.	Institutions	Aligns the Department's requirements with those of most licensing boards and simplifies the conversion process. Enables students to meet licensure requirements in programs that are title IV eligible and helps institutions by allowing them to comply with the reasonable length requirements while also allowing credit hour to clock hour conversions. May result in additional title IV funds expenditures for programs currently lacking any out-of-class components.
Reg Section 668.10—Direct Assessment Programs		
Revises definition of ''direct assessment'' and eliminates separate definitions of key terms for direct assessment programs, referring instead to requirements elsewhere in regulations.	Institutions	Simplifies and clarifies requirements related to direct assessment programs.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Eliminates certain prohibitions on types of coursework that can be offered through direct assessment, including remedial coursework, and enables "hybrid" programs to provide students options to take some direct assessment courses and some traditional or distance learning courses.	Students/Institutions/ Federal Government.	Allows institutions to provide students with more options so that learners can select the learning modality that best meets their needs. Allows students to take some traditional courses even if some of their other courses are direct assessment courses. Recognizes that co-remediation is a promising practice, and direct assessment classes may increase the number of students who can participate in co-remediation programs while taking other classes.
Codifies current policy by adding prohibition on paying title IV, HEA funds for credit earned solely through prior learning assessment.	Students/Institutions/ Federal Government.	Benefits students and taxpayers by discouraging institutions from charging excessive fees for conducting prior learning assessment and ensures that taxpayer dollars are not being used to pay institutions for instruction that they are not providing.
Reg Section 668.13—Certification Procedures		
Automatic renewal of an institution's certification if the Secretary does not make a decision on an application for recertification submitted no later than 90 calendar days before its PPA expires within 12 months.	Institutions	Benefits institutions by setting a time limit for the uncertainty of month-to-month eligibility. With the option of provisional recertification, the Department retains sufficient control over recertification process but cannot use certification delays to prevent institutions from starting new programs or making other necessary changes.
Reg Section 668.14—Program Participation Agreement		
Clarifies requirements related to making data available to prospective students about the most recent employment statistics, graduation statistics, or other information to substantiate the truthfulness of its advertising that uses job placement rates to attract students.	Institutions	Benefits institutions by reducing the amount of information that must be disclosed to students to enable institutions to include graduation rates or employment statistics in their marketing materials. Benefits students by improving the accuracy and truthfulness of published outcomes data, and by making an appropriate amount of information available to students without overwhelming them with extraneous data. Maintains the requirement for institutions to make available any information needed to substantiate the truthfulness of the institution's advertisements about job placement or graduation rates.
Eliminates requirements to provide the source of such statistics, associated timeframes, and methodology.	....	Considered redundant to requirement to provide data and other information to substantiate truth in the institution's advertising.
Aligns program length to occupational requirements. Limits program length to 150 percent of minimum program length for the State in which the institution is located or 100 percent of the minimum program hours for licensure in an adjoining State.	Students/institutions	Allows institutions to create programs that meet professional licensure requirements in multiple States, thus expanding the potential pool of students served and the number of job opportunities available to graduates. Students benefit by increased occupational mobility and, in some cases, being able to go to school in a lower cost State but work upon graduation in a different State where wages are higher. Conversely, if an institution increases program length, a student may have to pay more to meet requirements of a State in which the student does not plan to work.
Requires updates to teach-out plans after specified negative events.	Students/Institutions/ Accrediting Agencies.	Allows accrediting agencies to gather more information from institutions that will be helpful to triad partners in assisting students find transfer and teach-out opportunities, and retain access to their academic records, when a school closure occurs. Requires institutions to update teach-out plans in instances where risk of closure increases.
Reg Section 668.22—Treatment of Title IV Funds When a Student Withdraws		
Adds several exceptions to determination a student has withdrawn, including early completion of requirements for graduation, completion of module(s) containing 49 percent or more of the days in the payment period, or completion of coursework equal to or greater than the institution's requirements for a half-time student.	Students/Institutions ...	Benefits institutions by not requiring them to return title IV funds simply because a student is a faster learner. Benefits students by allowing them to complete courses at a quicker pace and still retain full title IV eligibility. Could improve completion rates and reduce time to completion if students are not required to participate in busy work if they finish the legitimate work required by the course more quickly than other students.
Applies 45-day time limit on delaying withdrawal for students who cease attendance to standard term programs. Eliminates references to modules for nonterm programs and revises timeframes for allowing students to provide written confirmation of intent to return without beginning an approved leave of absence.	Students/Institutions ...	Improves consistency of regulations as they apply to programs with different types of academic calendars and addresses concerns about long periods of non-attendance by students. Ensures that institutions perform return of title IV calculations when students cease attendance for long periods of time without beginning an approved leave of absence.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Clarifies requirements for determining the number of days in the payment period or period of enrollment for a student who is enrolled in a program offered using modules. Requires an institution to include all the days in modules that included coursework used to determine the student's eligibility for title IV, HEA assistance.	Institutions/Federal Government.	Simplifies and clarifies requirements for establishing the denominator of the return of title IV funds calculation when a student is enrolled in a program that uses modules. May result in a greater amount of title IV funds being returned for a limited number of students who enroll in numerous modules during a payment period or period of enrollment but fail to attend those modules.
Eliminates references to programs under which financial aid is no longer disbursed. Adds Iraq and Afghanistan Service Grants to types of aid subject to the return of title IV funds calculation and clarifies order for application of returned funds.	....	No impact anticipated for technical changes incorporating current policy.
Reg Section 668.28—Non-Title IV Revenue (90/10)		
Removes references to net present value when including institutional loans in the 90/10 calculation.	....	No impact anticipated for technical changes.
Reg Section 668.34—Satisfactory Academic Progress		
Eliminates pace requirements for satisfactory academic progress for subscription-based programs.	Students/Institutions/ Federal Government.	Reduces burden on institutions for making pace-based title IV calculations for students in subscription-based programs. Improves flexibility for students by allowing them to determine the pace of their learning without certain limits.
Allows maximum timeframe for undergraduate programs measured in credit hours to be expressed in calendar time in addition to current credit hour measurement. Limited to 150 percent of published length of program.	Students/Institutions/ Federal Government.	Increases flexibility for institutions and students and provides new options for monitoring student progress when traditional semester-based time constraints conflict with a student's work or life responsibilities. However, sets outer limit for use of aid to ensure that students are progressing through their program and using Federal student aid funds efficiently.
Reg Section 668.111—Scope and Purpose and 668.113—Request for Review		
Indicates that, for final audit or program review determinations related to classification of a program as distance education or the assignment of credit hours, the Secretary will rely on institution's accrediting agency or State agency requirements.	Institutions/Federal Government.	Conforms with changes to definitions of "distance education" and "credit hour" and provides regulatory clarity that accreditors are the triad member given the responsibility of monitoring program quality and establishing standards for academic quality, faculty credentials, and effective distance learning.
Reg Section 668.164—Disbursing Funds		
Establishes disbursement requirements specific to subscription-based programs. Sets the later of 10 days before the first day of classes in the payment period or the date the student completed the cumulative number of credit hours associated with student's enrollment status in all prior terms attended.	Students/Institutions/ Federal Government.	Conforming change with disbursement pattern for subscription-based programs in § 668.2 to enforce requirement that no disbursements be made until the student has completed the appropriate credit hours.
Reg Section 668.171—General		
Allows the Secretary to determine an institution is not financially responsible if the institution does not submit its financial and compliance audits by the date permitted and manner required under § 668.23.	Institutions/Federal Government.	Codifies current practice; no impact expected.
Reg Section 668.174—Past Performance		
Adds the term "entity" or "entities" to various provisions as ownership may be vested in an entity or an individual.	Institutions/Federal Government.	Allows the Department to consider more ownership structures when evaluating past performance.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Clarifies that institution is not financially responsible if a person who exercises substantial ownership or control over the institution also exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution.	Institutions/Federal Government.	Allows the Department to consider whether a person or entity affiliated with an institution has overseen the precipitous closure of another institution with the goal of preventing an institution from being substantially owned or controlled by persons or entities that would cause the institution to be financially irresponsible and close without providing to students a plan to finish their education in place or at another institution.
Reg Section 668.175—Alternative Standards and Requirements		
Eliminates reference to fax transmission	None	Change to recognize technological advancements. No impact.

A key change that would result from this regulation is greater certainty among institutions about how to implement innovative programs without running afoul of title IV disbursement requirements. Institutions are not inherently opposed to regulations, but instead crave information that will enable them to be sure they are complying with regulations that are otherwise difficult to interpret. The new definitions ensure a shared understanding of the various kinds of programs an institution can provide and the rules for disbursing title IV aid to students enrolled in those programs. Greater clarity in our regulations will reduce the likelihood that student and taxpayer dollars will be wasted or that institutions will face undeserved negative program review findings and financial liabilities that could have devastating consequences to the institution and its students.

Significant changes in the final regulation from the proposed regulations include: (1) The expansion of the subscription-based disbursement model to all programs, not just direct assessment; (2) modification of the clock hour definition to include clock hours in which instruction occurs asynchronously; (3) clarification that internships and externships of students at foreign institutions can be completed at entities in the United States that are not eligible institutions; (4) elimination of the prior experience requirement for ineligible entities involved in a written agreement; and (5) withdrawal of the proposed provisions regarding change of ownership in § 668.15.

Students

Students will benefit from the expanded program options available when institutions understand the ground rules for offering new kinds of programs and when they do not fear surprises at a program review. Despite being permitted by the HEA for decades, there are relatively few competency-based programs available to students, and even fewer direct assessment programs. Yet these types of programs may be very appealing to adult learners who bring considerable knowledge and skills to their programs. Expansion of subscription-based programs provides students with the scheduling flexibility they may need if managing responsibilities from school, work, and family. A clearer framework for administering title IV aid to students enrolled in competency-based programs on a subscription basis may increase institutions' willingness to develop new programs. To the extent that institutions determine that this funding model fits other types of programs, the expansion of this disbursement model beyond direct assessment programs in these final regulations increases the flexibility and options for students. Students will have to evaluate if programs using this model meet their schedule and educational objectives.

The regulations eliminate the financial penalties that students and institutions would otherwise face when a student progresses quickly through a course and completes it early. Students, especially non-traditional students, could benefit from the flexible pacing and different model for assessing progress offered by this type of program. The emphasis on flexibility, workforce development, and innovative educational approaches could be beneficial to students and the national economy.

According to U.S. Census data,[42] for the civilian non-institutionalized population, there were approximately 44 million adults between the ages of 25 and 49 with high school or some college as their highest educational level in 2018. Even a small percentage of that group represents a sizeable potential market for expansion of competency-based or other distance education programs. Additionally, students outside that age range and those with a degree may want to pursue competency-based graduate certificates or degrees to enhance their careers. While a variety of factors may explain individual education attainment, to the extent that traditional programs were not suitable for some students' academic and employment goals, competency-based programs may provide an appealing option. However, evaluating the quality of new programs may be challenging, and it could be difficult to determine how much a student should learn to be awarded a certain amount of credit, as opposed to more traditional delivery models that award aid and mark progress by the number of hours during which a student is scheduled to be in class (many institutions do not take attendance, and therefore do not monitor how much time an individual student actually is in class). As with all programs, students would need to carefully consider if specific competency-based or distance education programs are appropriate for their objectives and learning. Distance learning, subscription-based programs, and other self-paced options require a higher degree of academic discipline on the part of students, which may pose challenges to students who are already burdened by work and family responsibilities.[43] For those who are so motivated, they could complete their program more quickly. For those who struggle to stay engaged, innovative learning models emphasizing coach or mentor support may improve retention and completion in online programs

[42] U.S. Census Bureau, Table 1. Educational Attainment of the Population 18 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2018. Available at *www.census.gov/data/tables/2018/demo/education-attainment/cps-detailed-tables.html.* Last accessed November 29, 2019.

[43] California Community College Chancellor's Office, 2017 Distance Education Report, 2017, *http://californiacommunitycolleges.cccco.edu/Portals/0/Reports/2017-DE-Report-Final-ADA.pdf.*

where students with poor self-directed learning skills might otherwise fail.[44] [45]

Another potential benefit for students in competency-based programs could be reduced costs to obtain a postsecondary credential. Western Governors University (WGU), for example, is known for its success in adopting this instructional approach, although it still disburses aid using a time-based model. In its 2018 annual report, WGU states that the average time to a bachelor's degree completion among its students is 2.5 years, which could generate substantial savings to students and taxpayers. An analysis done by Robert Kelchen [46] based on 14 cost structures at 13 institutions for credits earned through portfolio or prior learning assessment found that significant savings could be generated, but they vary substantially among colleges. Potential savings for 3 credits varied from $127 to $1,270.[47] The fee structure, amount of credits allowed to be obtained through these methods, the availability of Federal aid, and the ability of students to pass those assessments with limited attempts all contribute to determining whether a competency-based approach would generate savings for a given student. The other pricing model, one that is supported by the regulations, is subscription based pricing in which the potential savings relate to the number of credits a student completes during a subscription period and student's eligibility for financial aid in their specific program. Kelchen calculates the number of credits needed in a subscription period for students who receive a full Pell Grant and non-aided students to break even with traditional pricing models at 5 institutions that offer a subscription pricing option. These range from 6 credits for a non-aided student to 27 credits for a student in a bachelor's degree program who receives a full Pell Grant.[48] The subscription periods and prices vary by institution and pricing policies may have been updated since the time of this analysis, but that idea that subscription pricing may result in cost savings for students depending upon the speed of their progress is still valid.[49]

While more difficult to quantify, the Department also expects students would find benefits in programs they can complete more quickly in terms of reduced opportunity costs, which include wages lost when the student is in school rather than in the job for which the student is preparing. Also, since student retention declines as time to degree completion expands, programs that enable students to finish more quickly are likely to increase credential completion.

Of course, it could be the unique attributes of WGU, or the students attracted to the institution, that contribute to these results, and it is not yet known if the results would be replicated by other institutions that adopt the WGU model. A number of factors, including a given student's anticipated pace of learning, likelihood of completion, desired employment outcomes, personal motivation, and the range of options available to them will influence the return the student enjoys on their educational investment.

Students will also benefit from the changes to the definition of a week of instruction. Under the regulations, institutions would be less likely to assign less substantive work to students (such as posting a blog or responding to a chat) simply to meet title IV requirements. Where these activities are substantive, they will likely continue to take place, but in many instances, these activities have been integrated into courses simply to provide evidence of "regular and substantive" interaction. Students who may otherwise be successful in distance learning can become frustrated if they are not allowed to move at their own pace because of requirements to post blogs, participate in chats, or answer questions that do not actually enhance learning.

The inclusion of asynchronous coursework that provides for direct interaction between students and instructors in the definition of clock-hours could expand the options for students in such programs. Asynchronous coursework has the advantage of being able to facilitate an individualized learning experience for each student in a way that cannot be accomplished through scheduled meetings or lectures. Students can access lectures and other class activities as their schedules permit, spending as much time as is necessary to master a particular task or concept. New technologies permit lectures to be combined with videos and other resources enabling students to pause at any point to reinforce mastery of subject matter. Moreover, the availability of asynchronous learning allows for mixed model learning reflective of non-title IV eligible programming with theory learned asynchronously and specific practical tasks through synchronous instruction.

Adjustments made for COVID–19 conditions have demonstrated to institutions, accrediting agencies, and licensing agencies that at least some parts of certain clock-hour programs can be delivered effectively through asynchronous coursework. While this will need to be monitored on an ongoing basis, this development will benefit students involved in these programs.

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this final rule and none of the burden is assigned to students in that analysis.

Institutions

Institutions should benefit from the regulatory clarifications, especially those institutions that seek to expand competency-based and direct assessment learning options but are uncertain as to the Department's requirements for disbursing aid to students enrolled in those programs. A significant barrier to entry for institutions seeking to provide direct assessment programs is a lack of clarity regarding what the Department expects of these programs in order to approve them, and the slowness with which the Department has made decisions on applications submitted by institutions. Only six institutions, as of 2020, have been approved by the Department to offer direct assessment programs. This indicates that there could be a lack of interest in offering direct assessment programs, or institutions are hesitant to invest in their development because approval requirements are too burdensome or uncertainties too great about what the Department and accreditors require. The regulations will reduce burden and provide clarity to encourage more institutions to experiment with direct assessment programs. Under the rule, the Department is required to approve the first direct assessment program offered by an institution at a given credential level, but after that, only the accreditor would be required to review the

[44] *www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/.*

[45] Xu, D. and Xu, Y. March 2019. The Promises and Limits of Online Higher Education: Understanding How Distance Education Affects Access, Cost, and Quality. American Enterprise Institute.

[46] Robert Kelchen, The Landscape of Competency-Based Education—Enrollments, Demographics, and Affordability, January 2015. Center for Higher Education Reform, American Enterprise Institute AEI Series on Competency-Based Higher Education. Available at *www.aei.org/wp-content/uploads/2015/04/Competency-based-education-landscape-Kelchen-2015.pdf.*

[47] Id, p. 11, Table 4 Cost Structures of Portfolio and Prior Learning Assessment Programs.

[48] Id, p.14. Table 5 Costs of Subscription-Based CBE Programs Compared to Other Online Providers.

[49] Western Governors University, *WGU 2018 Annual Report,* p. 17. Available at *www.wgu.edu/content/dam/western-governors/documents/annual-report/annual-report-2018.pdf.*

program to ensure academic quality. Some institutions may aggressively seek approval for more direct assessment programs, while others may take a wait-and-see attitude until other institutions have forged new ground.

In the short term, it is likely that institutions already approved to offer at least one direct assessment program will expand offerings since their experience well positions them to do so. According to the Department's data, there are only six institutions that have established direct assessment programs. Although these institutions may expand the number of direct assessment programs available, the Department anticipates that these programs would mostly attract students away from more traditional distance learning programs, but may not add significantly to the total number of students enrolled in postsecondary education. Students looking for a flexible postsecondary program can find many advantages through distance education already but may gravitate to direct assessment programs because of added advantages, including in pacing and format. The Department's assumptions about potential student growth related to the regulations are described in the Net Budget Impact section of this analysis.

However, over time, additional institutions may develop new direct assessment programs, especially if early adopters create demand among students for this new form of education. The Department projects that if new institutions engage in direct assessment, and those already approved to offer direct assessment programs launch new programs, there could be shifting of students from other programs to self-paced direct assessment programs. It is also possible that students not interested in current pedagogical models will find direct assessment programs to be attractive and will decide to enroll in a postsecondary program. This could increase the number of students who would qualify for Pell Grants or take Federal Direct Loans. While increased interest in direct assessment could result in higher title IV participation, it is possible that students enrolled in direct assessment programs would finish their programs more quickly, therefore reducing the amount of financial aid a student uses to complete his or her program.

Changes to the limitations on the ability of clock hour programs to offer didactic instruction through distance learning may enable more individuals to enroll in these programs. The inclusion of asynchronous coursework with sufficient monitoring of participation and direct interaction between instructors and students in the definition of clock hour in these final regulations could expand institutions' program offerings. In turn, this could increase the number of individuals qualified for State licensure or certification, and thus gainful employment, in licensed occupations. There are very few clock-hour programs that use distance learning to provide portions of the program since there are few State or professional licensing boards that permit distance learning for clock-hour programs. However, for clock-hour programs permitted to incorporate distance learning, it is possible that more students will be served or that more students will persist to completion.

The regulations more clearly define what constitutes a reasonable length for clock-hour programs and allow institutions to meet the licensure requirements of surrounding States, thus enabling greater student and workforce mobility. There are only a few States that have licensure requirements that are significantly longer than other States, but if programs in surrounding States increase their clock hours to meet those requirements, there could be small increases in cost and utilization of title IV, HEA assistance. On the other hand, if programs can be structured to ensure that students can work if they cross State lines, there could be cost savings since, under the status quo, a student who moves from one State to another may be required to start their program over in order to meet the clock-hour requirements since shorter-term ''completer programs'' are not typically approved by those States. Therefore, this regulation could reduce the cost of education for students who move from one State to the next and could increase worker mobility in fields that employ large numbers of workers, such as cosmetology and massage therapy.[50] [51]

Institutions will also benefit from simplifications to the formula for clock-to-credit hour conversions. The regulations would eliminate the need for institutions to consider the number of homework hours associated with each credit hour in programs that are subject to the conversion. This change reduce administrative burden while allowing institutions to offer programs in credit hours that are more likely to transfer to other schools than clock hours, but still meet the clock-hour requirements of licensing boards by calculating clock-hour equivalencies.

Institutions will also benefit from the options allowed in these final regulations with respect to asynchronous coursework in clock-hour programs and the expansion of subscription-based disbursement beyond direct assessment programs. Institutions considering asynchronous coursework would have to invest in systems to monitor active engagement, but several such technologies are available. Expanding subscription-based disbursement could lead to economies of scale that make it worthwhile for institutions to develop such subscription-based pricing plans. These changes from the NPRM give institutions additional options in designing their programs. This could also result in additional competition from expanded course offerings at other institutions.

As discussed further in the *Paperwork Reduction Act of 1995* section of this preamble, the regulations are expected to result in a net reduction in burden for institutions. In estimating costs and savings associated with these changes in burden, we assume that these activities are conducted by postsecondary administrators, which earn an average wage of $53.47.[52] Throughout, to estimate the total costs and savings associated with these changes, we multiply wage rates by two to account for overhead and benefits. The elimination of the Net Present Value calculation related to the 90/10 rule is estimated to save −2,808 hours, which would generate cost savings of approximately $300,000 annually. The regulations also impose burden related to reporting subsequent direct assessment programs estimated to impose 18 hours of burden annually for a cost of $1,926 using the same hourly rate of $53.47 multiplied by two for overhead and benefits for a rate of $106.94. Together, the estimated net reduction in burden for institutions is −2,790 hours and $−298,363.

Accrediting Agencies

The regulations recognize the primary role that accrediting agencies play in evaluating the quality of new programs and approving institutions to offer them. Although the Department's review of direct assessment programs focuses on an institution's technical ability to calculate and disburse title IV aid to students enrolled in these programs, accreditors have always had—and will continue to have—the responsibility of ensuring that these programs are

[50] *www.bls.gov/ooh/personal-care-and-service/barbers-hairstylists-and-cosmetologists.htm.*

[51] *www.bls.gov/ooh/healthcare/massage-therapists.htm.*

[52] *www.bls.gov/oes/current/oes119033.htm.*

rigorous and of high quality. In conjunction with the recently published Accreditation and State Authorization Regulations, one or more existing or new accrediting agencies may step forward to become a leader in the field for assessing and approving direct assessment programs, which could lead to more rapid expansion of direct assessment programs. Accrediting agencies will continue to play an important role in approving written arrangements covering between 25 and 50 percent of a program; however, changes already published in the accreditation regulations to allow these approvals to take place at the staff level, and requirements for accrediting agencies to approve or deny them within 90 days, could encourage more institutions to consider entering into written arrangements.

Accrediting agencies play an important role in evaluating the quality of academic programs, including distance education programs, and will continue to play that role. These regulations do not create new responsibilities in this regard; however, until accrediting agencies have more experience in reviewing and approving competency-based and direct assessment programs, the approval process could be somewhat more burdensome. Some agencies may also need to develop new standards to facilitate the evaluation of these programs, but many already have such standards in place. If growth in competency-based programs is more significant than anticipated, there could be an increase in accrediting agency workload, but it is possible that demand for approval of traditional programs would decline as interest shifts to competency-based or direct assessment programs.

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this final rule and does not estimate any additional burden to accrediting agencies from the regulations.

Federal Government

In the regulations, the Federal Government is reducing some of the complexity of administering Federal student aid and calculating return-to-title IV obligations. These regulations also reaffirm that it is accreditors—and not the Department—who are authorized by the HEA to establish and evaluate compliance with education quality standards, including when innovative delivery models challenge the status quo. The regulations require the Secretary to provide a timely review of new program applications and limit the Secretary's approval of direct assessment programs at the same academic level to the first such program at an institution, both provisions designed to support the expansion of innovative educational programs.

Net Budget Impact

We estimate that these regulations will have a net Federal budget impact for Federal student loan cohorts between 2020–2029, of $[−54] million in outlays in the primary estimate scenario and an increase in Pell Grant outlays of $1,163 million over 10 years, for a total net impact of $1,109 million. A cohort reflects all loans originated in a given fiscal year. Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans. The Net Budget Impact is compared to a modified version of the 2020 President's Budget baseline (PB2021) that adjusts for the publication of the final Borrower Defense, Gainful Employment, and Accreditation and State Authorization rules.

The Department emphasizes that its estimates of transformations in higher education delivery that could occur as a result of these regulations are uncertain. Similarly, the Department is constrained in its budget estimates by the limited data available to it. We estimate how institutions and students would respond to the regulatory changes, and we present alternative scenarios to capture the potential range of impacts on Federal student aid transfers. Similarly, we do not attempt to estimate effects based on evidence cited in this preamble that students enrolled in similar programs have persisted longer, completed at higher rates, and finished in a shorter period of time with less debt. While increased enrollment and persistence could result in increased transfers to students in the form of Federal student aid grants and loans, it could also produce graduates better prepared to succeed in the workplace and encourage robust economic growth. The Administration's emphasis on workforce development may encourage more institutions to implement competency-based educational programs, which could improve employment outcomes and loan repayment performance.

There is anecdotal evidence that competency-based education programs may have strong loan repayment performance. Looking again to WGU, an institution that has been an early adopter of competency-based learning, we note that its three-year cohort default rates of 4.6 percent for 2014, 4.1 percent for 2015, and 4.2 percent for 2016 [53] are below the national average of 10.1 percent overall in 2016 (6.6 percent for private, 9.6 percent for public, and 15.2 percent for proprietary institutions).[54] Comparatively, Capella University, another leader in competency-based education, had a cohort default rate of 6.5 percent in 2015 and 6.8 percent in 2016.[55] Factors that could lead to lower defaults among institutions employing innovative learning models—and in particular when those models are used to provide graduate education—may be that they would attract older students who are employed and are seeking specific credentials for advancement or a career change. These individuals may be more likely to have resources (including those provided by current employers) to reduce the need to borrow and to repay any loans they need to take. On the other hand, the non-traditional students that may be the primary market for competency-based learning or direct assessment may have employment and family obligations that could make them less likely to complete their programs, potentially increasing their default risk.

An additional complicating factor in developing these estimates are the related regulatory changes on which the committee reached consensus in this negotiated rulemaking that we addressed in separate notices of rulemaking. The budget impacts estimated here are in addition to the potential increases attributed to the accreditation changes promulgated in the final rule published November 1, 2019 that are reflected in the PB 2021 baseline.[56]

The main budget impacts estimated from these final regulations come from changes in loan volumes and Pell Grants disbursed to students if these new delivery models were to attract an increased number of students who receive title IV, HEA funds. The Department believes that much of the growth in this area will come from future students that shift from more traditional ground-based or distance

[53] U.S. Department of Education, Official Cohort Default Rates for Schools, PEPS300.xls available at *www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html.*

[54] U.S. Department of Education, Comparison of FY 2016 Official National Cohort Default Rates to Prior Two Official Cohort Default Rates available at *www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf.* Accessed February 21, 2020.

[55] U.S. Department of Education, Official Cohort Default Rates for Schools, PEPS300.xls available at *www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html.*

[56] 84 FR 58834.

learning programs to those offered using competency-based learning or direct assessment methods. In developing the primary estimate, the Department does not estimate the types of programs and institutions students who choose competency-based education may come from or the potential cost differential between those programs, as further discussed after Table 5. Instead, we assume that the growth associated with programs that are developed or expanded in part because the regulations make it easier to administer title IV aid to such programs comes from students who would not otherwise have borrowed to attend a different type of program and apply an average level of borrowing to each estimated enrollee. The Department believes that many of the students who enroll in CBE will do so as a substitute for a different type of program for which they likely would receive some form of title IV aid, but there will be some small increase in enrollment from students who either not have pursued postsecondary education or who would not have received title IV aid for their program. Additionally, the alternate budget scenarios consider the possibility that the implementation of new pedagogical and delivery models could result in more or fewer new students being interested in pursuing a postsecondary credential. Expansion of subscription-based programs, provisions in these regulations that would encourage innovation, the growth of workforce development programs, and the new methods of delivery may particularly appeal to non-traditional students. Tables 4.A to 4.E illustrate the changes in title IV grant and loan volume developed for use in estimating the net budget impact of these regulations for the primary scenario, with discussion about underlying assumptions following the tables.

In order to have a common basis for the Pell Grant and loan assumptions and to facilitate comment, we started the estimate with an assumption about the number of additional programs that would be established because of the combined effect of the regulations. As noted in response to the comment about the RIA in the NPRM, the expansion of distance education in response to COVID–19 disruptions is not a response to these regulations, and the extent to which the transformation will persist is unknown. Instead, the response to COVID–19 has provided evidence that additional flexibilities are necessary and appropriate to enable institutions to adapt to the changing needs of students and society.

We did not increase the estimated number of students to reflect the current shift of campus-based students to distance learning, nor did we attribute to the regulation the possibility that some students may prefer that distance programs or alternative types of programs like CBE after their experience during the COVID–19 shutdown. Additionally, any COVID–19 related economic downturn will be reflected in future baseline updates, with the potential increase in enrollment and related financial aid as a reaction to economic conditions and not driven by the changes in these final regulations. However, we did recognize that institutions' experience in shifting programs to distance platforms may encourage them to accelerate the development of distance of CBE programs. Students may also decide that distance learning is a good approach for them and consider it for furthering their education or for future programs. This is reflected in an increase in programs in Table 4.A to 968 compared to 864 in the NPRM, leading to an estimated 60,379 additional Pell Grant recipients. On the other hand, because the rapid shift to distance may provide students with sub-optimal experiences, there could also be a negative backlash in which students will resist engaging in distance learning if their experience during the COVID–19 necessitated transition was less than satisfactory.

TABLE 4.A—ASSUMPTIONS ABOUT CUMULATIVE NUMBER OF ADDITIONAL PROGRAMS BY SIZE OF PROGRAM

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	24	72	95	150	225	275	325	375	420	450
75	12	20	40	60	90	110	135	150	175	200
150	10	18	26	40	68	75	90	113	120	128
350	8	15	25	30	38	50	60	70	80	90
750	3	8	14	20	30	38	48	56	65	70
1500	1	4	7	10	14	18	20	25	28	30

As seen in Table 4.A, we expect the current trends of distance education programs capturing an increasing share of students to continue, and perhaps to accelerate as institutions and accreditors become more experienced in establishing or evaluating these programs. We also expect more institutions to engage in competency-based learning and direct assessment, which may or may not be delivered online. The initial distribution of programs by enrollment size uses information from the 2018 AIR survey and the 2019 survey; [57] however, we acknowledge that the results of that survey may be biased in that we expect the small proportion of institutions interested in starting CBE or direct assessment programs were more likely to respond. Nonetheless, these are the best data available to us, and we projected the results of that survey onto the postsecondary system as a whole. We assumed, based on the 2018 and 2019 survey data, that the majority of programs will be small, but assumed that over time larger programs would evolve.

In addition, as institutions become more comfortable with using written agreements to access facilities and experts that private sector organizations and unions make available, there could be growth in career and technical education programs that are currently limited due to the high cost of constructing facilities, procuring equipment and hiring faculty qualified to teach in those programs.[58] As more hospitals and health care facilities require nurses to have bachelor's degrees, we expect to see continued growth of RN to BSN programs, which can be delivered using CBE or direct assessment because students in these programs are typically required to be working in the field, thus negating the need for the institution to provide clinical placements.

[57] American Institutes for Research, State of the Field—Findings from the 2019 National Survey of Postsecondary Competency-Based Education, available at *www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf.*

[58] Shulock, N., Lewis, J., & Tan, C. (2013). Workforce Investments: State Strategies to Preserve Higher-Cost Career Education Programs in Community and Technical Colleges. California State University: Sacramento. Institute for Higher Education Leadership & Policy.

Other factors that support the increase in programs are recent regulatory developments with respect to accreditation and no requirement for approval of new delivery methods as a substantive change. The provisions requiring the Secretary to provide a timely review of new program applications and to limit the Secretary's review to the first competency-based education program at a given academic level could also accelerate the process of establishing programs.

We then had to develop an assumption for how many of the additional programs would be undergraduate or graduate programs for the purposes of determining how many would potentially serve Pell recipients and subsidized loan borrowers. Of the 512 programs described in the 2018 survey, approximately 17 percent were identified as graduate programs and of the 588 programs described in the 2019 survey, 16 percent were graduate programs. However, competency-based programs could be a good fit for working adults wanting a self-paced program to earn a graduate credential, so we assumed that that the distribution of undergraduate versus graduate programs would change over time, especially among smaller programs, as shown in Table 4.B.

TABLE 4.B—UNDERGRADUATE SHARE OF CUMULATIVE ADDITIONAL PROGRAMS

Size of program	2021 (%)	2022 (%)	2023 (%)	2024 (%)	2025 (%)	2026 (%)	2027 (%)	2028 (%)	2029 (%)	2030 (%)
25	83	78	70	65	60	55	50	50	45	45
75	83	78	70	65	60	60	60	60	60	60
150	83	78	70	65	60	60	60	60	60	60
350	83	80	75	75	75	70	70	70	70	70
750	83	80	80	80	75	75	75	75	75	75
1,500	83	83	80	80	78	78	75	75	75	75

This resulted in an assumed number of additional undergraduate and graduate students who may receive Pell Grants or take loans.

TABLE 4.C—NUMBER OF ADDITIONAL UNDERGRADUATE STUDENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	498	1,404	1,663	2,438	3,375	3,781	4,063	4,688	4,725	5,063
75	747	1,170	2,100	2,925	4,050	4,950	6,075	6,750	7,875	9,000
150	1,245	2,106	2,730	3,900	6,075	6,750	8,100	10,125	10,800	11,520
350	2,324	4,200	6,563	7,875	9,975	12,250	14,700	17,150	19,600	22,050
750	1,743	4,800	8,400	12,000	16,875	21,375	27,000	31,500	36,563	39,375
1,500	1,245	4,980	8,400	12,000	16,380	21,060	22,500	28,125	31,500	33,750
Total	7,802	18,660	29,855	41,138	56,730	70,166	82,438	98,338	111,063	120,758

TABLE 4.D—NUMBER OF ADDITIONAL GRADUATE STUDENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	100	400	710	1,310	2,250	3,090	4,060	4,690	5,780	6,190
75	150	330	900	1,580	2,700	3,300	4,050	4,500	5,250	6,000
150	260	590	1,170	2,100	4,050	4,500	5,400	6,750	7,200	7,680
350	480	1,050	2,190	2,630	3,330	5,250	6,300	7,350	8,400	9,450
750	360	1,200	2,100	3,000	5,630	7,130	9,000	10,500	12,190	13,130
1,500	260	1,020	2,100	3,000	4,620	5,940	7,500	9,380	10,500	11,250
Total	1,610	4,590	9,170	13,620	22,580	29,210	36,310	43,170	49,320	53,700

The next assumption involved the percent of those additional students who would receive Pell Grants and would take out different types of loans. For existing programs, the percent of undergraduates with Pell Grants is approximately 39 percent overall,[59] but this varies significantly by institution and program type. One motivating factor for competency-based programs is to expand opportunities for non-traditional students, who typically qualify for Pell grants at higher rates; in the 2018–19 award year 54% of dependent applicants had a Pell eligible expected family contribution (EFC), while 85% of independent applicants met that threshold. However, independent applicants are often ineligible for Pell at relatively moderate incomes—in AY 2018–19 88 percent of the eligible independent applicants with dependents had family incomes under $50,000 and 96 percent of the eligible independent applicants without dependents had family incomes under $25,000. If programs attract more students from lower income brackets, Pell Grant costs will increase. On the other hand, CBE and distance learning programs, including direct assessment programs, may be more attractive to working adults, who may be less likely to qualify for Pell grants given their earnings. Evidence is mixed from existing programs, both because the data does not always distinguish students in CBE programs from those in traditional programs at the institution and the

[59] U.S. Department of Education, The FY 2021 Justification of Appropriations Estimates to Congress Vol. II: Student Financial Assistance, p. p-11. Available at *www2.ed.gov/about/overview/budget/budget21/justifications/p-sfa.pdf.*

percentage of students receiving Pell Grants does vary among institutions with at least some CBE programs. In 2017–18 IPEDS student financial assistance data, the percent of undergraduates receiving a Pell Grant at some institutions known for at least some CBE programs was 30 percent for Western Governor's University, 33 percent for Sinclair Community College, 35 percent for Northern Arizona University, 43 percent for Capella University, 45 percent for the University of Wisconsin Flex program, and 47 percent for Southern New Hampshire University. Nonetheless, we assumed that the percentage of students who may be eligible for Pell Grants increases to 50 percent, resulting in the estimated number of additional Pell recipients shown in Table 4.E.

TABLE 4.E—ESTIMATED ADDITIONAL PELL RECIPIENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	249	702	831	1,219	1,688	1,891	2,031	2,344	2,363	2,531
75	374	585	1,050	1,463	2,025	2,475	3,038	3,375	3,938	4,500
150	623	1,053	1,365	1,950	3,038	3,375	4,050	5,063	5,400	5,760
350	1,162	2,100	3,281	3,938	4,988	6,125	7,350	8,575	9,800	11,025
750	872	2,400	4,200	6,000	8,438	10,688	13,500	15,750	18,281	19,688
1,500	623	2,490	4,200	6,000	8,190	10,530	11,250	14,063	15,750	16,875
Total	3,901	9,330	14,928	20,569	28,365	35,083	41,219	49,169	55,531	60,379

We also assumed a distribution of Pell recipients based on expected growth in programs by type and control of institutions, as shown in Table 4.F. However, the share of programs reflected in Table 4.F does not necessarily reflect the share of students at each type of institution.

TABLE 4.F—ASSUMED DISTRIBUTION OF NEW PROGRAMS BY INSTITUTIONAL CATEGORY

	Share of programs (%)
4-year public	22
2-year public	30
4-year private	15
2-year private	8
Proprietary	25

We recognize that competency-based and direct assessment programs, in particular, are a relatively new and developing part of the postsecondary market and it is not clear what institutions will pursue opportunities in this area or how the size and scope of programs offered will develop. Estimated program costs for Pell Grants range from $30.1 billion in AY 2021–22 to $36.1 billion in AY 2030–31, with a 10-year total estimate of $329.0 billion. On average, the FY 2021 President's Budget projects a baseline increase in Pell Grant recipients from 2021 to 2030 of approximately 150,000 annually. The increase in Pell Grant recipients estimated due to these regulations ranges from about 6 percent in 2022 to approximately 41 percent by 2030 of the projected annual increase that would otherwise occur. The additional 60,379 recipients estimated for 2030 would account for under 1 percent of all estimated 8.25 million Pell recipients in 2030–31 and result in an increase in program costs of approximately $1,397 million, a 0.4 percent increase in estimated 10-year Pell Grant program costs of $329.0 billion.

For the loan programs, we used the estimated split between graduate and undergraduate programs to develop additional volume estimates by loan type and student loan model risk-group. Table 4.G presents the assumed borrowing rate by loan type of the additional students.

TABLE 4.G—ESTIMATED BORROWING RATES BY LOAN TYPE

	2021 (%)	2022 (%)	2023 (%)	2024 (%)	2025 (%)	2026 (%)	2027 (%)	2028 (%)	2029 (%)	2030 (%)
Subsidized	45	45	45	45	45	45	45	45	45	45
Unsubsidized	55	55	55	55	55	55	55	55	55	55
Parent PLUS	10	10	10	10	10	10	10	10	10	10
Grad Unsubsidized	35	35	35	35	35	35	35	35	35	35
Grad PLUS	25	25	25	25	25	25	25	25	25	25

We then used estimated average loans by loan type as projected for the PB2021 estimates to estimate a total increase in volume by loan type, as shown in Tables 4.H and 4.I.

TABLE 4.H—ESTIMATED AVERAGE AMOUNTS PER BORROWER BY LOAN TYPE

Average loan	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
Subsidized	4,240	4,240	4,240	4,250	4,250	4,260	4,260	4,270	4,280	4,290
Unsubsidized	4,630	4,660	4,700	4,720	4,760	4,780	4,820	4,830	4,860	4,880
PLUS	18,550	18,880	19,290	19,620	19,920	20,440	20,780	21,070	21,460	21,860
Grad Unsubsidized	20,660	20,910	21,120	21,230	21,330	21,590	21,810	22,080	22,290	22,500
Grad PLUS	25,990	26,760	27,510	28,130	28,640	29,330	30,100	30,870	31,760	32,660

TABLE 4.I—ESTIMATED ADDITIONAL LOAN VOLUME BY LOAN TYPE

Additional loan volume	2021	2022	2023	2024	2025
Subsidized	14,886,216	35,603,280	56,963,340	78,675,469	108,496,125
Unsubsidized	19,867,793	47,825,580	77,175,175	106,792,950	148,519,140
Parent PLUS	14,472,710	35,230,080	57,590,295	80,711,775	113,006,160
Grad Unsubsidized	11,641,910	33,591,915	67,784,640	101,203,410	168,570,990
Grad PLUS	10,460,975	30,707,100	63,066,675	95,782,650	161,672,800
Additional loan volume	**2026**	**2027**	**2028**	**2029**	**2030**
Subsidized	134,508,701	158,032,688	188,955,506	213,906,375	233,122,354
Unsubsidized	184,467,071	218,541,813	261,233,569	296,870,063	324,113,130
Parent PLUS	143,419,815	171,305,125	207,197,113	238,340,125	263,975,895
Grad Unsubsidized	220,725,365	277,172,385	333,617,760	384,769,980	422,887,500
Grad PLUS	214,182,325	273,232,750	333,164,475	391,600,800	438,460,500

Clearly, the large average borrowing amounts of graduate students contribute significantly to the loan volume estimates, so a different mix of programs or a different borrowing level would affect the estimated impact of the regulations, so we adjust this factor in the alternate scenarios to identify a range of possible impacts.

As subsidy rates differ by risk group and loan type, the Department assumed a distribution of the undergraduate loans as shown in Table 4.J. This distribution is based on the PB2021 distribution of loan volume by risk group, but reduces the share in the 4-year Junior/Senior risk group by 10–15 percentage points and the 4-year Freshman/Sophomore risk group by approximately 5 percentage points and increases the share in the 2-year risk groups. All graduate loans are in the graduate risk group.

TABLE 4.J—ASSUMED DISTRIBUTION OF ADDITIONAL LOAN VOLUMES BY RISK GROUP

	Subsidized (%)	Unsubsidized (%)	Parent PLUS (%)
2-year Proprietary	18	15	10
2-year Not-for-Profit	20	15	10
4-year Freshman/Sophomore	32	35	42
4-year Junior/Senior	30	35	38

The resulting additional loan volumes are generated by simple multiplication of the estimated additional undergraduate students by the percent borrowing and average amount per borrower by loan type, and then by the distribution by risk group. The same process occurred for graduate students.

As seen from the approximately $100 billion total annual loan volume, even small changes would result in a significant amount of additional loan transfers. We update loan volume estimates regularly; for PB2021 the total non-consolidated loan volume estimates between FY2021 and FY2030 range from $94 billion to $107 billion. The assumed changes in loan volume would result in a small savings that represents the net impact of offsetting subsidy changes by loan type and risk group due to positive subsidy rates for Subsidized and Unsubsidized Stafford loans and negative subsidy rates for PLUS Loans. Given the higher loan amounts associated with PLUS loans and loans to graduate students, the negative subsidy rates that range from –20.57 in 2021 to –16.60 in 2028 generate significant savings ($−427 mn in outlays) to offset the increased costs in other loan types. In Alternate 2, the higher non-consolidated loan volume eventually results in higher consolidated loan volume, that, combined with the other positive subsidy categories results in a net cost in that scenario.

We do not assume any changes in subsidy rates from the potential creation of new programs or the other changes reflected in the regulations. We are uncertain to what extent and in what direction the performance of programs that expand or develop under the regulations will shift relative to current programs. As indicated previously, several institutions known for competency-based programs have default performance that is as good as or better than national averages, but it is not clear that most programs that will be created in the future will achieve that result. Depending on how programs are configured, the market demand for them, and their quality, key subsidy components such as defaults, prepayments, and repayment plan choice may vary and affect the cost estimates.

Table 5 summarizes the Pell and loan effects for the Main, Alt1, and Alt2 scenarios over a 10-year period. Each column reflects a scenario showing estimated changes to Pell Grants and Direct Loans under those conditions. Therefore, the overall amounts reflect the sum of outlay changes occurring under each scenario for Pell Grants and Direct Loans when combined.

TABLE 5—ESTIMATED NET IMPACT OF PELL GRANT AND LOAN CHANGES— 2021–2030 OUTLAYS

[$mns]

	Main	Alt 1	Alt 2
Pell Grants	1,163	465	1,804
Loans	−54	−26	107
Overall	1,109	439	1,911

The cost estimates presented above do not attempt to account for several factors that could ultimately result in a different net budget impact than the primary estimate presented in Table 5, including potential cost differences among programs and relative repayment performance. As discussed previously, one potential benefit of competency based programs is reduced costs for students relative to other programs. If a large share of students would have attended a different program or completed faster, their Pell Grant or borrowing may be lower than assumed in the PB2021 baseline. However, without more significant evidence, we are not estimating any savings from that possibility. Other provisions that we do not include in the budget estimate because of limited information on the potential significance include the treatment of out-of-class hours and the reasonable length provisions related to clock hour programs.

As discussed previously, the uncertainty around several factors affected by the changes led the Department to develop some alternative scenarios for the potential impacts. The extent to which institutions invest in making direct assessment programs work and try to enroll additional students as opposed to converting some portion of existing enrollments to this type of program is unclear. In the AIR survey about competency-based education, approximately 40 percent of the 501 institutional respondents indicated CBE is in their institutions' strategic plans in a ''minor way'' and 16 percent in a ''major way''.[60] It is also unclear if the size and type of existing CBE programs is representative of future CBE programs, especially direct assessment programs.

In order to capture the effect of changing some of the key assumptions associated with the primary budget estimate, the Department developed the Alternate Scenarios presented in Table 6. Alternate 1 is a low impact scenario that reduces the number of additional programs and students and lowers the average amount borrowed and the percentage of students eligible for Pell Grants. Alternate 2, the high impact scenario, increases programs and student growth, the percentage of Pell recipients, and amounts borrowed.

TABLE 6—ALTERNATE SCENARIOS

	Alternate 1—low impact	Alternate 2—high impact
Program Growth	Eliminate half the programs per cell for 3 smallest categories and one-third of programs in 3 largest size categories.	+ 20 programs per cell for 3 smallest categories; +5 programs per cell for 3 largest size categories through 2025 and +10 per cell for 2026 to 2029.
Undergraduate Program Share	+15 percent	−15 percent.
Percent of Pell Recipients	30 percent	75 percent.
Distribution of Pell Recipients by Institutional Category.	4-yr Public 10%	4-yr Public 30%.
	4-yr Private 5%	4-yr Private 24%.
	2-yr Public 38%	2-yr Public 20%.
	2-yr Private 10%	2-yr Private 5%.
	Proprietary 37%	Proprietary 21%.
Borrowing Rates	Subsidized −10%	Subsidized +5%.
	Unsubsidized −15%	Unsubsidized +10%.
	Plus −5%	Plus +5%.
	Grad Unsub −15%	Grad Unsub +10%.
	Grad Plus −15%	Grad Plus +10%.
Average Loan Amount	Decrease 20 percent	Increase 10 percent.
Distribution by Risk Group (Subsidized and Unsubsidized).	2-yr Prop −10%	2-yr Prop +15%.
	2-yr NFP −5%	2-yr NFP +10%.
	4-yr FRSO +10%	4-yr FRSO −15%.
	4-yr JRSR +5%	4-yr JRSR −10%.
	GRAD No change	GRAD No change.
Distribution by Risk Group (PLUS)	2-yr Prop −6%	2-yr Prop +12%.
	2-yr NFP −3%	2-yr NFP +8%.
	4-yr FRSO +6%	4-yr FRSO −12%.
	4-yr JRSR +3%	4-yr JRSR −8%.
	GRAD No change	GRAD No change.

[60] *www.air.org/sites/default/files/National-Survey-of-Postsec-CBE-2018-AIR-Eduventures-Jan-2019.pdf.*

Accounting Statement

As required by OMB Circular A–4 (available at *www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf*), in the following table we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these final regulations. This table provides our best estimate of the changes in annual monetized transfers as a result of these final regulations. Expenditures are classified as transfers from the Federal Government to affected student loan borrowers and Pell Grant recipients.

TABLE 7—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES
[in millions]

Category	Benefits	
Clarification of terms and processes related to establishing programs and administering title IV aid to encourage development of new programs	Not Quantified	
Net Reduction in Paperwork Burden on Institutions, primarily due to elimination of Net Present Value calculation related to the 90/10 rule	7%	3%
	$ − 0.30	$ − 0.30
	Not Quantified	
Category	Costs	
Category	Transfers	
Increased transfers of Pell Grants	7% $101.2	3% $109.6
Increased transfers of loans to students in additional programs established, in part, due to the regulations	$ − 6.9	$ − 6.1

Alternatives Considered

Several proposals were considered on various sections of the regulations as the negotiated rulemaking committee moved toward consensus. Some key alternatives that were considered are summarized in Table 76.

TABLE 8—KEY ALTERNATIVES CONSIDERED

Topic	Alternative proposal	Reasons rejected
Definition of Credit Hour	Eliminate time-based requirements	Retain definition for some consistency across higher education.
Subscription-based programs.	Disbursement based on attempted programs, not completed ones. Include a competency in student's enrollment status more than once if it overlapped more than one subscription period.	Concern for potential abuse leading to paying title IV aid for same course twice.
Written Arrangement	No limitation on percentage of program that could be provided by written arrangement with ineligible entity.	Goal was to facilitate partnerships with organizations using trade experts in workplace environment. Committee found sufficient flexibility with existing limit and changes would call into question whether the eligible institution was really offering the program.
Program Length	Allow limiting program length to 100 percent of the requirements in any State and then 100 percent required for licensure in an adjoining State.	Concern that changes would encourage institutions to add hours beyond what is necessary for student to become employed.

Regulatory Flexibility Act Analysis

These final regulations are expected to have a significant impact on institutions, many of which are considered to be small entities. The analysis presented below evaluates the impact of the final regulations on these small entities.

Description of the Reasons That Action by the Agency Is Being Considered

The Department is regulating to reflect the development in postsecondary education delivery models, including those facilitated by technology and those that are based on the demonstration of competencies rather than seat time, to help institutions understand regulatory requirements for such programs and to facilitate further innovations in such areas. The regulations provide or clarify definitions of terms such as correspondence course, distance education, subscription-based program, and clock hour, where the HEA provides no definition.

The regulations send a signal to the higher education community that the Department is committed to supporting educational innovations such as subscription-based and direct assessment programs as well as new technology-driven delivery mechanisms, such as adaptive learning. The regulations also seek to clarify definitions used to differentiate between distance education and correspondence courses, while at the same time preserving student protections and title IV financial aid distribution.

Succinct Statement of the Objectives of, and Legal Basis for, the Regulations

These final regulations amend the Institutional Eligibility regulations issued under the HEA, related to distance education and innovation in 34 CFR part 600. In addition, these regulations amend the Student Assistance General Provisions regulations issued under the HEA in 34 CFR parts 602 and 668. The changes to part 600 are authorized by 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c. The change to part 602, removing the definition of ''Distance education'' (now defined in part 600), is authorized by 20 U.S.C. 1099b while the changes to part 668 are authorized by 20 U.S.C. 1001–1003, 1070a, 1070g, 1085, 1087b, 1087d, 1087e, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221e–3, and 3474.

Through the final regulations, we attempt to remove barriers that institutions face when trying to create and implement new and innovative ways of providing education to students, and also provide sufficient flexibility to ensure that future innovations we cannot yet anticipate have an opportunity to move forward.

The regulations are also designed to protect students and taxpayers from unreasonable risks. Inadequate consumer information could result in students enrolling in programs that will not help them meet their goals. In addition, institutions adopting innovative methods of educating students may expend taxpayer funds in ways that were not contemplated by Congress or the Department, resulting in greater risk to the taxpayers of waste, fraud, and abuse and to the institution of undeserved negative program review findings. These regulations attempt to limit risks to students and taxpayers resulting from innovation by delegating various oversight functions to the bodies best suited to conduct that oversight—States and accreditors. This delegation of authority through the higher education regulatory triad entrusts oversight of most consumer protections to States, assurance of academic quality to accrediting agencies, and protection of taxpayer funds to the Department.

Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Regulations Will Apply

Of the entities that the final regulations will affect, we consider many institutions to be small. The Department recently proposed a size classification based on enrollment using IPEDS data that established the percentage of institutions in various sectors considered to be small entities, as shown in Table 8. We described this size classification in the NPRM published in the **Federal Register** on July 31, 2018 for the borrower defense rule (83 FR 37242, 37302). The Department discussed the proposed standard with the Chief Counsel for Advocacy of the Small Business Administration, and while no change has been finalized, the Department continues to believe this approach most accurately reflects a common basis for determining size categories that is linked to the provision of educational services.

TABLE 9 [61]—SMALL ENTITIES UNDER ENROLLMENT BASED DEFINITION

Level	Type	Small	Total	Percent
2-year	Public	342	1,240	28
2-year	Private	219	259	85
2-year	Proprietary	2,147	2,463	87
4-year	Public	64	759	8
4-year	Private	799	1,672	48
4-year	Proprietary	425	558	76
Total		3,996	6,951	57

The regulations would provide needed clarity around title IV eligibility for distance education, correspondence courses, subscription-based programs, and direct assessment programs. They would also provide greater clarity regarding how the Department determines whether a program is of reasonable length. The effect on small entities would vary by the extent they currently participate in such programs or that they choose to do so going forward. Introducing competency-based programs in areas with strong demand could be an opportunity for some small entities to maintain or expand their business. On the other hand, small entities could be vulnerable to competition from other institutions, large or small, that are capturing an increasing share of the postsecondary market with distance or competency-based programs. Developing and implementing new programs and delivery models, and especially those that require sophisticated technology, may be impractical for small institutions that cannot distribute the cost among a population of enough size to result in favorable return-on-investment. We expect that the development of the first direct assessment program at an institution would be a multi-stage and multi-year process involving choosing the subject areas appropriate for this model, developing competencies, modifying course materials and teaching approaches, reaching out to potential future employers to build acceptance of the credential, and getting approval from accreditors and the Department, and recruiting students. The Department does not have a detailed understanding of the costs and timeframe involved with establishing these programs, especially for small entities and we welcome such information. Small institutions may be more inclined to rely on consortia arrangements with other, larger institutions, to make distance learning and competency-based education available to their students. The regulations would remove many barriers to innovation that currently restrain institutions, including small ones, and may accelerate innovations, but these innovations were likely to take place in postsecondary education anyway given the call for new, more efficient delivery models for the growing population of non-traditional students and the likelihood that adults will be engaged in postsecondary education throughout their lifetime.

[61] U.S. Department of Education analysis of IPEDs 2015–16 enrollment data.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this final rule. Overall, the Department estimates $300,288 in reduced paperwork burden associated with the elimination of the net present value calculation related to the 90/10 rule. This affects proprietary institutions, of which approximately 85 percent are considered small according to Table 8 (2,572/3,021), so most of that burden reduction ($300,288*85 percent = $255,245) will be enjoyed by small entities. The Department is unable to estimate the effect of this change on the profits of institutions, including those considered to be small entities. No mechanism exists to track profits at institutions. The only way to obtain data on profits would be through a manual review of financial statements submitted by each institution. Even with that information, the effect of this change on profits could not be estimated with any degree of accuracy. First, it would be necessary to determine which schools used (NPV), which was optional per our regulations. Second, it would have to be known, for the period that an institution used NPV, what revenue from institutional loans would have been had that revenue included only loan payments received by the institution during the fiscal year. Also, despite the estimated cost savings due to paperwork burden reduction, the full time equivalent of those employees who calculated NPV most likely remains a salary expense. Finally, any savings identified that would benefit profits would have to be offset by the corresponding reduction in revenue resulting from no longer being able to apply NPV. Regarding overall economic impact, it would be negligible given that total savings of $255,245 is spread over 85% of the nearly 3,000 participating for-profit institutions. There are also some small increases in burden related to reporting about direct assessment programs that is expected to increase burden on small entities by approximately 10 hours, a small increase for those small institutions that choose to participate in direct assessment programs or written arrangements.

Identification, to the Extent Practicable, of All Relevant Federal Regulations That May Duplicate, Overlap, or Conflict With the Regulations

The regulations are unlikely to conflict with or duplicate existing Federal regulations.

Alternatives Considered

As described above, the Department participated in negotiated rulemaking when developing the regulations and considered several options for some of the provisions. These included: (1) Eliminating time-based requirements for credit hours; (2) no limitation on the percentage of a program that could be offered through written arrangement with an ineligible entity; (3) allowing limiting program length to 100 percent of the requirements in any State and then 100 percent required for licensure in an adjoining State, (4) disbursing funds in subscription-based programs based on attempted competencies, not completed ones; and (5) including a competency that overlaps subscription periods in a student's enrollment status more than once. In proposing to remove limits on the portion of a program that may be offered through a written arrangement with an ineligible entity, the Department sought to make a wider range of occupationally-related educational resources available to students than could be reasonably provided by the institutions they attend. It was the Department's belief that this change would particularly benefit smaller institutions whose resources are typically more limited than those of larger entities.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number.

Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

Section 600.21—Updating Application Information

Requirements: The regulations in § 600.21 require the institution to only report the addition of a second or subsequent direct assessment program without the review and approval of the Department when it previously has such approval. The regulations also require an institution to report the establishment of a written arrangement between the eligible institution and an ineligible institution or organization in which the ineligible institution or organization will provide more than 25 percent of a program. We also intend to request that institutions report additional information related to the use of asynchronous distance education in clock hour programs and would incorporate this change in the Department's system for reporting information related to the eligibility of academic programs. We would meet all applicable Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) requirements before collecting this information.

Burden Calculation: We believe that the reporting of written arrangements will impose burden on institutions. We estimate that 36 institutions will need to report such activities. We anticipate that an institution will require an average of .5 hours (30 minutes) to report such activities for a total estimated burden of 18 hours under OMB Control Number 1845–NEW1.

We estimate that there are 12 proprietary institutions that will be required to report this information for 6 burden hours (12 institutions × .5 hours = 6 hours). We estimate that there are 11 private institutions that will be required to report this information for 5 burden hours (11 institutions × .5 hours = 5 hours). We estimate that there are 13 public institutions that will be required to report this information for 7 burden hours (13 institutions × .5 hours = 7 hours).

600.21—UPDATING APPLICATION INFORMATION—1845–NEW1

Institution type	Respondents	Responses	Time factor (hours)	Burden hours	Cost $106.94
Proprietary	12	12	.5	6	$642
Private	11	11	.5	5	538
Public	13	13	.5	7	749
Total	36	36		18	1,926

Section 668.5—Written Arrangements To Provide Education Programs

Requirements: The proposed regulations in § 668.5 which required an eligible institution to demonstrate how an ineligible institution has the experience in the delivery and assessment of the program or portions thereof that the ineligible institution would be contracted to deliver under the terms of the written arrangement has been removed from the final rule.

Burden Calculation: The proposed burden of 120 hours in the information collection 1845–NEW2 is being withdrawn.

Section 668.28—Non-Title IV Revenue (90/10)

Requirements: The regulations in § 668.28 remove the Net Present Value calculation currently in the regulations.

Burden Calculation: This regulatory language change will remove burden from the institution. Based on the explanation provided in the preamble, the regulations in § 668.28(b) no longer applies to the calculation of the treatment of revenue. Therefore, the current burden applied under OMB Control Number 1845–0096 will be eliminated. Upon the effective date of these regulation, the currently assessed 2,808 burden hours will be discontinued.

SECTION 668.28—NON-TITLE IV REVENUE (90/10)—1845–0096

Institution type	Respondents	Responses	Time factor (hours)	Burden hours	Cost savings $106.94/hour
Proprietary	−936	−936	2	−1,872	$−200,192
Proprietary	−936	−936	1	−936	−100,096
Total	−1,872	−1,872		−2,808	−300,288

The estimated cost to institutionsis $53.47 per hour based on the 2018 mean hourly information from the Bureau of Labor Statistics Occupational Employment Statistics for Postsecondary Education Administrators[62] × 2 to account for benefits and expenses for a total per hour cost of $106.94. As 85 percent of for-profit institutions are considered to be small entities, most of the reduction and corresponding cost savings will accrue to those institutions.

Regulatory section	Information collection	OMB control No. & estimated burden (change in burden)	Estimated costs $106.94/hour
§ 600.21 Updating application information.	The regulations in § 600.21 require the institution to only report the addition of a second or subsequent direct assessment program without the review and approval of the Department when it previously been awarded such approval. The regulations also require an institution to report the establishment of a written arrangement between the eligible institution and an ineligible institution or organization in which the ineligible institution or organization would provide more than 25 percent of a program.	1845–NEW1—18 hours	$1,926
§ 668.5—Written arrangements to provide education programs.	The regulations in § 668.5 requiring the eligible institution to demonstrate how the ineligible institution has the experience in the delivery and assessment of the program or portions thereof that the ineligible institution would be contracted to deliver under the terms of the written arrangement has been removed from the final rule and this estimated burden is withdrawn.	1845–NEW2—0 hours	0
§ 668.28 Non-title IV revenue (90/10).	The regulations in § 668.28 removes the Net Present Value calculation currently in the regulations.	−2,808	(300,288)

[62] *www.bls.gov/oes/current/oes119033.htm.*

Collection of Information

The total burden hours and change in the burden hours associated with each OMB control number affected by the regulations follows:

OMB control No.	Total burden hours	Change in burden hours
1845–NEW1	+ 18	+ 18
1845–NEW2	0	0
1845–0096	−2,808	−2,808
Total	−2,790	−2,790

Intergovernmental Review

These regulations are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. ''Federalism implications'' means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. In the NPRM we noted that parts 600 and 668 may have federalism implications and encouraged State and local elected officials to review and provide comments on these final regulations. In the *Public Comment* section of this preamble, we discuss any comments we received on this subject.

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List of Subjects

34 CFR Part 600

Colleges and universities, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

34 CFR Part 602

Colleges and universities, Vocational education.

34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

Betsy DeVos,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends parts 600, 602, and 668 of title 34 of the Code of Federal Regulations as follows:

PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED

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

Authority: 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c, unless otherwise noted.

■ 2. Section 600.2 is amended by:
■ a. Adding, in alphabetical order, a definition for ''Academic engagement''.
■ b. Revising the definitions of ''Clock hour'', ''Correspondence course'', ''Credit hour'', ''Distance education'', and ''Incarcerated student''.
■ c. Adding, in alphabetical order, a definition for ''Juvenile justice facility''.
■ d. Revising the definition ''Nonprofit institution''.
■ e. Removing the authority citation at the end of the section.

The additions and revisions read as follows:

§ 600.2 Definitions.

* * * * *

Academic engagement: Active participation by a student in an instructional activity related to the student's course of study that—

(1) Is defined by the institution in accordance with any applicable requirements of its State or accrediting agency;

(2) Includes, but is not limited to—

(i) Attending a synchronous class, lecture, recitation, or field or laboratory activity, physically or online, where there is an opportunity for interaction between the instructor and students;

(ii) Submitting an academic assignment;

(iii) Taking an assessment or an exam;

(iv) Participating in an interactive tutorial, webinar, or other interactive computer-assisted instruction;

(v) Participating in a study group, group project, or an online discussion that is assigned by the institution; or

(vi) Interacting with an instructor about academic matters; and

(3) Does not include, for example—

(i) Living in institutional housing;

(ii) Participating in the institution's meal plan;

(iii) Logging into an online class or tutorial without any further participation; or

(iv) Participating in academic counseling or advisement.

* * * * *

Clock hour: (1) A period of time consisting of—

(i) A 50- to 60-minute class, lecture, or recitation in a 60-minute period;

(ii) A 50- to 60-minute faculty-supervised laboratory, shop training, or internship in a 60-minute period;

(iii) Sixty minutes of preparation in a correspondence course; or

(iv) In distance education, 50 to 60 minutes in a 60-minute period of attendance in—

(A) A synchronous or asynchronous class, lecture, or recitation where there is opportunity for direct interaction between the instructor and students; or

(B) An asynchronous learning activity involving academic engagement in which the student interacts with technology that can monitor and document the amount of time that the student participates in the activity.

(2) A clock hour in a distance education program does not meet the requirements of this definition if it does not meet all accrediting agency and State requirements or if it exceeds an agency's or State's restrictions on the number of clock hours in a program that may be offered through distance education.

(3) An institution must be capable of monitoring a student's attendance in 50 out of 60 minutes for each clock hour under this definition.

Correspondence course: (1) A course provided by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructors. Interaction between instructors and students in a correspondence course is limited, is not regular and substantive, and is primarily initiated by the student.

(2) If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course.

(3) A correspondence course is not distance education.

Credit hour: Except as provided in 34 CFR 668.8(k) and (l), a credit hour is an amount of student work defined by an institution, as approved by the institution's accrediting agency or State approval agency, that is consistent with commonly accepted practice in postsecondary education and that—

(1) Reasonably approximates not less than—

(i) One hour of classroom or direct faculty instruction and a minimum of two hours of out-of-class student work each week for approximately fifteen weeks for one semester or trimester hour of credit, or ten to twelve weeks for one quarter hour of credit, or the equivalent amount of work over a different period of time; or

(ii) At least an equivalent amount of work as required in paragraph (1)(i) of this definition for other academic activities as established by the institution, including laboratory work, internships, practica, studio work, and other academic work leading to the award of credit hours; and

(2) Permits an institution, in determining the amount of work associated with a credit hour, to take into account a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels.

* * * * *

Distance education: (1) Education that uses one or more of the technologies listed in paragraphs (2)(i) through (iv) of this definition to deliver instruction to students who are separated from the instructor or instructors and to support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.

(2) The technologies that may be used to offer distance education include—

(i) The internet;

(ii) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(iii) Audio conference; or

(iv) Other media used in a course in conjunction with any of the technologies listed in paragraphs (2)(i) through (iii) of this definition.

(3) For purposes of this definition, an instructor is an individual responsible for delivering course content and who meets the qualifications for instruction established by an institution's accrediting agency.

(4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following—

(i) Providing direct instruction;

(ii) Assessing or providing feedback on a student's coursework;

(iii) Providing information or responding to questions about the content of a course or competency;

(iv) Facilitating a group discussion regarding the content of a course or competency; or

(v) Other instructional activities approved by the institution's or program's accrediting agency.

(5) An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student's completion of a course or competency—

(i) Providing the opportunity for substantive interactions with the student on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course or competency; and

(ii) Monitoring the student's academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

* * * * *

Incarcerated student: A student who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution. A student is not considered incarcerated if that student is in a half-way house or home detention or is sentenced to serve only weekends. For purposes of Pell Grant eligibility under 34 CFR 668.32(c)(2)(ii), a student who is incarcerated in a juvenile justice facility, or in a local or county facility, is not considered to be incarcerated in a Federal or State penal institution, regardless of which governmental entity operates or has jurisdiction over the facility, including the Federal Government or a State, but is considered incarcerated for the purposes of determining costs of attendance under section 472 of the HEA in determining eligibility for and the amount of the Pell Grant.

Juvenile justice facility: A public or private residential facility that is operated primarily for the care and rehabilitation of youth who, under State juvenile justice laws—

(1) Are accused of committing a delinquent act;

(2) Have been adjudicated delinquent; or

(3) Are determined to be in need of supervision.

* * * * *

Nonprofit institution: An institution that—

(1)(i) Is owned and operated by one of more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;

(ii) Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and

(iii) Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)); or

(2) For a foreign institution—

(i) An institution that is owned and operated only by one or more nonprofit corporations or associations; and

(ii)(A) If a recognized tax authority of the institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for title IV purposes, is determined by that tax authority to be a nonprofit educational institution; or

(B) If no recognized tax authority of the institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for title IV purposes, the foreign institution demonstrates to the satisfaction of the Secretary that it is a nonprofit educational institution.

* * * * *

■ 3. Section 600.7 is amended by:

■ a. Redesignating paragraph (b)(2) as (b)(3).

■ b. Adding a new paragraph (b)(2).

■ c. Removing the authority citation at the end of the section.

The addition reads as follows:

§ 600.7 Conditions of institutional eligibility.

* * * * *

(b) * * *

(2) *Calculating the number of correspondence students.* For purposes of paragraph (a)(1)(ii) of this section, a student is considered ''enrolled in correspondence courses'' if the student's enrollment in correspondence courses constituted more than 50 percent of the courses in which the student enrolled during an award year.

* * * * *

■ 4. Section 600.10 is amended by revising paragraph (c)(1)(iii) and removing the authority citation at the end of the section to read as follows:

§ 600.10 Date, extent, duration, and consequence of eligibility.

* * * * *

(c) * * *

(1) * * *

(iii) For a first direct assessment program under 34 CFR 668.10, the first direct assessment program offered at each credential level, and for a comprehensive transition and postsecondary program under 34 CFR 668.232, obtain the Secretary's approval.

* * * * *

■ 5. Section 600.20 is revised to read as follows:

§ 600.20 Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.

(a) *Initial eligibility application.* (1) An institution that wishes to establish its eligibility to participate in any HEA program must submit an application to the Secretary for a determination that it qualifies as an eligible institution under this part. The Secretary must ensure prompt action is taken by the Department on any materially complete application required under this section.

(2) If the institution also wishes to be certified to participate in the title IV, HEA programs, it must indicate that intent on the application, and submit all the documentation indicated on the application to enable the Secretary to determine that it satisfies the relevant certification requirements contained in 34 CFR part 668, subparts B and L.

(3) A freestanding foreign graduate medical school, or a foreign institution that includes a foreign graduate medical school, must include in its application to participate—

(i)(A) A list of all medical school educational sites and where they are located, including all sites at which its students receive clinical training, except those clinical training sites that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a total of eight weeks; and

(B) The type of clinical training (core, required clinical rotation, not required clinical rotation) offered at each site listed on the application in accordance with paragraph (a)(3)(i)(A) of this section; and

(ii) Whether the school offers—

(A) Only post-baccalaureate/equivalent medical programs, as defined in § 600.52;

(B) Other types of programs that lead to employment as a doctor of osteopathic medicine or doctor of medicine; or

(C) Both; and

(iii) Copies of the formal affiliation agreements with hospitals or clinics providing all or a portion of a clinical training program required under § 600.55(e)(1).

(b) *Reapplication.* (1) A currently designated eligible institution that is not participating in the title IV, HEA programs must apply to the Secretary for a determination that the institution continues to meet the requirements in this part if the Secretary requests the institution to reapply. If the institution chooses to be certified to participate in the title IV, HEA programs, it must submit an application to the Secretary and must submit all the supporting documentation indicated on the application to enable the Secretary to determine that it satisfies the relevant certification requirements contained in subparts B and L of 34 CFR part 668.

(2)(i) A currently designated eligible institution that participates in the title IV, HEA programs must apply to the Secretary for a determination that the institution continues to meet the requirements in this part and in 34 CFR part 668 if the institution chooses to—

(A) Continue to participate in the title IV, HEA programs beyond the scheduled expiration of the institution's current eligibility and certification designation;

(B) Reestablish eligibility and certification as a private nonprofit, private for-profit, or public institution following a change in ownership that results in a change in control as described in § 600.31; or

(C) Reestablish eligibility and certification after the institution changes its status as a proprietary, nonprofit, or public institution.

(ii) The Secretary must ensure prompt action is taken by the Department on any materially complete application required under paragraph (a)(2)(i) of this section.

(3) A freestanding foreign graduate medical school, or a foreign institution that includes a foreign graduate medical school, must include in its reapplication to participate—

(i)(A) A list of all of the foreign graduate medical school's educational sites and where they are located, including all sites at which its students receive clinical training, except those clinical training sites that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a total of eight weeks; and

(B) The type of clinical training (core, required clinical rotation, not required clinical rotation) offered at each site listed on the application in accordance with paragraph (b)(3)(i)(A) of this section; and

(ii) Whether the school offers—

(A) Only post-baccalaureate/equivalent medical programs, as defined in § 600.52;

(B) Other types of programs that lead to employment as a doctor of osteopathic medicine or doctor of medicine; or

(C) Both; and

(iii) Copies of the formal affiliation agreements with hospitals or clinics providing all or a portion of a clinical training program required under § 600.55(e)(1).

(c) *Application to expand eligibility.* A currently designated eligible institution that wishes to expand the scope of its eligibility and certification and disburse title IV, HEA Program funds to students enrolled in that expanded scope must apply to the Secretary and wait for approval to—

(1) Add an educational program or a location at which the institution offers or will offer 50 percent or more of an educational program if one of the

following conditions applies, otherwise it must report to the Secretary under § 600.21:

(i) The institution participates in the title IV, HEA programs under a provisional certification, as provided in 34 CFR 668.13.

(ii) The institution receives title IV, HEA program funds under the reimbursement or cash monitoring payment method, as provided in 34 CFR part 668, subpart K.

(iii) The institution acquires the assets of another institution that provided educational programs at that location during the preceding year and participated in the title IV, HEA programs during that year.

(iv) The institution would be subject to a loss of eligibility under 34 CFR 668.188 if it adds that location.

(v) The Secretary notifies, or has notified, the institution that it must apply for approval of an additional educational program or a location under § 600.10(c).

(2) Increase its level of program offering (*e.g.,* adding graduate degree programs when it previously offered only baccalaureate degree programs);

(3) Add an educational program if the institution is required to apply to the Secretary for approval under § 600.10(c);

(4) Add a branch campus at a location that is not currently included in the institution's eligibility and certification designation;

(5) For a freestanding foreign graduate medical school, or a foreign institution that includes a foreign graduate medical school, add a location that offers all or a portion of the foreign graduate medical school's core clinical training or required clinical rotations, except for those locations that are included in the accreditation of a medical program accredited by the Liaison Committee on Medical Education (LCME) or the American Osteopathic Association (AOA); or

(6) Convert an eligible location to a branch campus.

(d) *Notice and application*—(1) *Notice and application procedures.* (i) To satisfy the requirements of paragraphs (a), (b), and (c) of this section, an institution must notify the Secretary of its intent to offer an additional educational program, or provide an application to expand its eligibility, in a format prescribed by the Secretary and provide all the information and documentation requested by the Secretary to make a determination of its eligibility and certification.

(ii)(A) An institution that notifies the Secretary of its intent to offer an educational program under paragraph (c)(3) of this section must ensure that the Secretary receives the notice described in paragraph (d)(2) of this section at least 90 days before the first day of class of the educational program.

(B) If an institution does not provide timely notice in accordance with paragraph (d)(1)(ii)(A) of this section, the institution must obtain approval of the additional educational program from the Secretary for title IV, HEA program purposes.

(C) If an additional educational program is required to be approved by the Secretary for title IV, HEA program purposes under paragraph (d)(1)(ii)(B) of this section, the Secretary may grant approval, or request further information prior to making a determination of whether to approve or deny the additional educational program.

(D) When reviewing an application under paragraph (d)(1)(ii)(C) of this section, the Secretary will take into consideration the following:

(*1*) The institution's demonstrated financial responsibility and administrative capability in operating its existing programs.

(*2*) Whether the additional educational program is one of several new programs that will replace similar programs currently provided by the institution, as opposed to supplementing or expanding the current programs provided by the institution.

(*3*) Whether the number of additional educational programs being added is inconsistent with the institution's historic program offerings, growth, and operations.

(*4*) Whether the process and determination by the institution to offer an additional educational program that leads to gainful employment in a recognized occupation is sufficient.

(E)(*1*) If the Secretary denies an application from an institution to offer an additional educational program, the denial will be based on the factors described in paragraphs (d)(1)(ii)(D)(*2*) and (*3*) of this section, and the Secretary will explain in the denial how the institution failed to demonstrate that the program is likely to lead to gainful employment in a recognized occupation.

(*2*) If the Secretary denies the institution's application to add an additional educational program, the Secretary will permit the institution to respond to the reasons for the denial and request reconsideration of the denial.

(2) *Notice format.* An institution that notifies the Secretary of its intent to offer an additional educational program under paragraph (c)(3) of this section must at a minimum—

(i) Describe in the notice how the institution determined the need for the program and how the program was designed to meet local market needs, or for an online program, regional or national market needs. This description must contain any wage analysis the institution may have performed, including any consideration of Bureau of Labor Statistics data related to the program;

(ii) Describe in the notice how the program was reviewed or approved by, or developed in conjunction with, business advisory committees, program integrity boards, public or private oversight or regulatory agencies, and businesses that would likely employ graduates of the program;

(iii) Submit documentation that the program has been approved by its accrediting agency or is otherwise included in the institution's accreditation by its accrediting agency, or comparable documentation if the institution is a public postsecondary vocational institution approved by a recognized State agency for the approval of public postsecondary vocational education in lieu of accreditation; and

(iv) Provide the date of the first day of class of the new program.

(e) *Secretary's response to applications.* (1) If the Secretary receives an application under paragraph (a) or (b)(1) of this section, the Secretary notifies the institution—

(i) Whether the applicant institution qualifies in whole or in part as an eligible institution under the appropriate provisions in §§ 600.4 through 600.7; and

(ii) Of the locations and educational programs that qualify as the eligible institution if only a portion of the applicant qualifies as an eligible institution.

(2) If the Secretary receives an application under paragraph (a) or (b) of this section and that institution applies to participate in the title IV, HEA programs, the Secretary notifies the institution—

(i) Whether the institution is certified to participate in those programs;

(ii) Of the title IV, HEA programs in which it is eligible to participate;

(iii) Of the title IV, HEA programs in which it is eligible to apply for funds;

(iv) Of the effective date of its eligibility to participate in those programs; and

(v) Of the conditions under which it may participate in those programs.

(3) If the Secretary receives an application under paragraph (b)(2) of this section, the Secretary notifies the institution whether it continues to be certified, or whether it reestablished its

eligibility and certification to participate in the title IV, HEA programs and the scope of such approval.

(4) If the Secretary receives an application under paragraph (c)(1) of this section for an additional location, the Secretary notifies the institution whether the location is eligible or ineligible to participate in the title IV, HEA programs, and the date of eligibility if the location is determined eligible.

(5) If the Secretary receives an application under paragraph (c)(2) of this section for an increase in the level of program offering, or for an additional educational program under paragraph (c)(3) of this section, the Secretary notifies the institution whether the program qualifies as an eligible program, and if the program qualifies, the date of eligibility.

(6) If the Secretary receives an application under paragraph (c)(4) or (5) of this section to have a branch campus certified to participate in the title IV, HEA programs as a branch campus, the Secretary notifies the institution whether that branch campus is certified to participate and the date that the branch campus is eligible to begin participation.

■ 6. Amend § 600.21 by revising paragraph (a)(11) and adding paragraphs (a)(12) and (13) and removing the authority citation at the end of the section to read as follows:

§ 600.21 Updating application information.

(a) * * *

(11) For any program that is required to provide training that prepares a student for gainful employment in a recognized occupation—

(i) Establishing the eligibility or reestablishing the eligibility of the program;

(ii) Discontinuing the program's eligibility;

(iii) Ceasing to provide the program for at least 12 consecutive months;

(iv) Losing program eligibility under § 600.40; or

(v) Changing the program's name, CIP code or credential level.

(12) Its addition of a second or subsequent direct assessment program.

(13) Its establishment of a written arrangement for an ineligible institution or organization to provide more than 25 percent of a program pursuant to 34 CFR 668.5(c).

* * * * *

■ 7. Section 600.52 is amended by revising the definition of ''Foreign institution'' and removing the authority citation at the end of the section to read as follows:

§ 600.52 Definitions.

* * * * *

Foreign institution: (1) For the purposes of students who receive title IV aid, an institution that—

(i) Is not located in the United States;

(ii) Except as provided with respect to clinical training offered under § 600.55(h)(1), § 600.56(b), or § 600.57(a)(2)—

(A) Has no U.S. location;

(B) Has no written arrangements, within the meaning of 34 CFR 668.5, with institutions or organizations located in the United States for those institutions or organizations to provide a portion of an eligible program, as defined under 34 CFR 668.8, except for written arrangements for no more than 25 percent of the courses required by the program to be provided by eligible institutions located in the United States; and

(C) Does not permit students to complete an eligible program by enrolling in courses offered in the United States, except that it may permit students to complete up to 25 percent of the program by—

(*1*) Enrolling in the coursework, research, work, or special studies offered by an eligible institution in the United States; or

(*2*) Participating in an internship or externship provided by an ineligible organization as described in 34 CFR 668.5(h)(2);

(iii) Is legally authorized by the education ministry, council, or equivalent agency of the country in which the institution is located to provide an educational program beyond the secondary education level; and

(iv) Awards degrees, certificates, or other recognized educational credentials in accordance with § 600.54(e) that are officially recognized by the country in which the institution is located.

(2) Notwithstanding paragraph (1)(ii)(C) of this definition, independent research done by an individual student in the United States for not more than one academic year is permitted, if it is conducted during the dissertation phase of a doctoral program under the guidance of faculty, and the research is performed only in a facility in the United States.

(3) If the educational enterprise enrolls students both within the United States and outside the United States, and the number of students who would be eligible to receive title IV, HEA program funds attending locations outside the United States is at least twice the number of students enrolled within the United States, the locations outside the United States must apply to participate as one or more foreign institutions and must meet all requirements of paragraph (1) of this definition, and the other requirements of this part. For the purposes of this paragraph (3), an educational enterprise consists of two or more locations offering all or part of an educational program that are directly or indirectly under common ownership.

* * * * *

■ 8. Section 600.54 is amended by revising paragraph (c) and removing the authority citation at the end of the section to read as follows:

§ 600.54 Criteria for determining whether a foreign institution is eligible to apply to participate in the Direct Loan Program.

* * * * *

(c)(1) Notwithstanding 34 CFR 668.5, written arrangements between an eligible foreign institution and an ineligible entity are limited to those under which—

(i) The ineligible entity is an institution that meets the requirements in paragraphs (1)(iii) and (iv) of the definition of ''foreign institution'' in § 600.52; and

(ii) The ineligible foreign institution provides 25 percent or less of the educational program.

(2) For the purpose of this paragraph (c), written arrangements do not include affiliation agreements for the provision of clinical training for foreign medical, veterinary, and nursing schools.

* * * * *

PART 602—THE SECRETARY'S RECOGNITION OF ACCREDITING AGENCIES

■ 9. The authority citation for part 602 continues to read as follows:

Authority: 20 U.S.C. 1099b, unless otherwise noted.

■ 10. Section 602.3 is amended by:

■ a. Adding periods at the ends of paragraphs (a)(1) through (14).

■ b. Redesignating paragraphs (a)(6) through (14) as paragraphs (a)(7) through (15).

■ c. Adding a new paragraph (a)(6).

■ d. In paragraph (b), removing the definition of ''Distance education.''

■ e. Removing the authority citation at the end of the section.

The addition reads as follows:

§ 602.3 What definitions apply to this part?

(a) * * *

(6) Distance education.

* * * * *

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

■ 11. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1001–1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221–3, and 1231a, unless otherwise noted.

Section 668.14 also issued under 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099a–3, 1099c, and 1141.

Section 668.41 also issued under 20 U.S.C. 1092, 1094, 1099c.

Section 668.91 also issued under 20 U.S.C. 1082, 1094.

Section 668.171 also issued under 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109.

Section 668.172 also issued under 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109.

Section 668.175 also issued under 20 U.S.C. 1094 and 1099c.

■ 12. Section 668.1 is amended by revising paragraph (b) introductory text and removing the authority citation at the end of the section to read as follows:

§ 668.1 Scope.

* * * * *

(b) As used in this part, an ''institution,'' unless otherwise specified, includes—

* * * * *

■ 13. Section 668.2 is amended by:

■ a. Designating the undesignated words and phrases in paragraph (a) as paragraphs (a)(1) through (26).

■ b. Adding periods at the ends of newly designated paragraphs (a)(1) through (26).

■ c. Removing newly designated paragraph (a)(26).

■ d. Further redesignating newly designated paragraphs (a)(7) through (23), (24), and (25) as paragraphs (a)(8) through (24), (26), and (27), respectively.

■ e. Adding new paragraphs (a)(7) and (25) and paragraphs (a)(28) through (31).

■ f. In paragraph (b):

■ i. Removing the definition of ''Academic Competitiveness Grant (ACG) Program'' and the authority citation following the definition;

■ ii. Revising the definition of ''Full-time student'' and removing the authority citation following the definition;

■ iii. Adding in alphabetical order the definition of ''Subscription-based program''; and

■ iv. In the definition of ''Third-party servicer'', revising paragraph (1)(i)(D) and removing the authority citation at the end of the definition.

The additions and revisions read as follows:

§ 668.2 General definitions.

(a) * * *

(7) Direct assessment program.

* * * * *

(25) Religious mission.

* * * * *

(28) Teach-out.

(29) Teach-out agreement.

(30) Teach-out plan.

(31) Title IV, HEA program.

(b) * * *

Full-time student: An enrolled student who is carrying a full-time academic workload, as determined by the institution, under a standard applicable to all students enrolled in a particular educational program. The student's workload may include any combination of courses, work, research, or special studies that the institution considers sufficient to classify the student as a full-time student. For a term-based program that is not subscription-based, the student's workload may include repeating any coursework previously taken in the program; however, the workload may not include more than one repetition of a previously passed course. For an undergraduate student, an institution's minimum standard must equal or exceed one of the following minimum requirements, based on the type of program:

(1) For a program that measures progress in credit hours and uses standard terms (semesters, trimesters, or quarters), 12 semester hours or 12 quarter hours per academic term.

(2) For a program that measures progress in credit hours and does not use terms, 24 semester hours or 36 quarter hours over the weeks of instructional time in the academic year, or the prorated equivalent if the program is less than one academic year.

(3) For a program that measures progress in credit hours and uses nonstandard-terms (terms other than semesters, trimesters, or quarters) the number of credits determined by—

(i) Dividing the number of weeks of instructional time in the term by the number of weeks of instructional time in the program's academic year; and

(ii) Multiplying the fraction determined under paragraph (3)(i) of this definition by the number of credit hours in the program's academic year.

(4) For a program that measures progress in clock hours, 24 clock hours per week.

(5) A series of courses or seminars that equals 12 semester hours or 12 quarter hours in a maximum of 18 weeks.

(6) The work portion of a cooperative education program in which the amount of work performed is equivalent to the academic workload of a full-time student.

(7) For correspondence coursework—

(i) A full-time course load must be commensurate with the requirements listed in paragraphs (1) through (6) of this definition; and

(ii) At least one-half of the coursework must be made up of non-correspondence coursework that meets one-half of the institution's requirement for full-time students.

(8) For a subscription-based program, completion of a full-time course load commensurate with the requirements in paragraphs (1), (3), and (5) through (7) of this definition.

* * * * *

Subscription-based program: A standard or nonstandard-term program in which the institution charges a student for each term on a subscription basis with the expectation that the student completes a specified number of credit hours (or the equivalent) during that term. Coursework in a subscription-based program is not required to begin or end within a specific timeframe in each term. Students in subscription-based programs must complete a cumulative number of credit hours (or the equivalent) during or following the end of each term before receiving subsequent disbursements of title IV, HEA program funds. An institution establishes an enrollment status (for example, full-time or half-time) that will apply to a student throughout the student's enrollment in the program, except that a student may change his or her enrollment status no more often than once per academic year. The number of credit hours (or the equivalent) a student must complete before receiving subsequent disbursements is calculated by—

(1) Determining for each term the number of credit hours (or the equivalent) associated with the institution's minimum standard for the student's enrollment status (for example, full-time, three-quarter time, or half-time) for that period commensurate with paragraph (8) in the definition of ''full-time student,'' adjusted for less than full-time students in light of the definitions of ''half-time student'' and ''three-quarter time student,'' and adjusted to at least one credit (or the equivalent) for a student who is enrolled less than half-time; and

(2) Adding together the number of credit hours (or the equivalent) determined under paragraph (1) for each term in which the student was enrolled in and attended that program, excluding

the current and most recently attended terms.

* * * * *

Third-party servicer: (1) * * *

(i) * * *

(D) Originating loans;

* * * * *

■ 14. Section 668.3 is amended by revising paragraphs (b)(2) and (3) and removing the authority citation at the end of the section to read as follows:

§ 668.3 Academic year.

* * * * *

(b) * * *

(2) A week of instructional time is any week in which—

(i) At least one day of regularly scheduled instruction or examinations occurs, or, after the last scheduled day of classes for a term or payment period, at least one day of study for final examinations occurs; or

(ii)(A) In a program offered using asynchronous coursework through distance education or correspondence courses, the institution makes available the instructional materials, other resources, and instructor support necessary for academic engagement and completion of course objectives; and

(B) In a program using asynchronous coursework through distance education, the institution expects enrolled students to perform educational activities demonstrating academic engagement during the week; and

(3) Instructional time does not include any scheduled breaks and activities not included in the definition of ''academic engagement'' in 34 CFR 600.2, or periods of orientation or counseling.

* * * * *

■ 15. Section 668.5 is amended by:

■ a. Revising paragraphs (a), (c), and (d)(1).

■ b. Adding paragraphs (f), (g), and (h).

■ c. Removing the authority citation at the end of the section.

The revisions and additions read as follows:

§ 668.5 Written arrangements to provide educational programs.

(a) *Written arrangements between eligible institutions.* (1) Except as provided in paragraph (a)(2) of this section, if an eligible institution enters into a written arrangement with another eligible institution, or with a consortium of eligible institutions, under which the other eligible institution or consortium provides part of the educational program to students enrolled in the first institution, the Secretary considers that educational program to be an eligible program if the educational program offered by the institution that grants the degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8.

(2) If the written arrangement is between two or more eligible institutions that are owned or controlled by the same individual, partnership, or corporation, the Secretary considers the educational program to be an eligible program if the educational program offered by the institution that grants the degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8.

* * * * *

(c) *Written arrangements between an eligible institution and an ineligible institution or organization.* Except as provided in paragraph (d) of this section, if an eligible institution enters into a written arrangement with an institution or organization that is not an eligible institution under which the ineligible institution or organization provides part of the educational program of students enrolled in the eligible institution, the Secretary considers that educational program to be an eligible program if—

(1) The ineligible institution or organization has not—

(i) Had its eligibility to participate in the title IV, HEA programs terminated by the Secretary;

(ii) Voluntarily withdrawn from participation in the title IV, HEA programs under a termination, show-cause, suspension, or similar type proceeding initiated by the institution's State licensing agency, accrediting agency, or guarantor, or by the Secretary;

(iii) Had its certification to participate in the title IV, HEA programs revoked by the Secretary;

(iv) Had its application for recertification to participate in the title IV, HEA programs denied by the Secretary; or

(v) Had its application for certification to participate in the title IV, HEA programs denied by the Secretary;

(2) The educational program offered by the institution that grants the degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8; and

(3)(i) The ineligible institution or organization provides 25 percent or less of the educational program, including in accordance with 34 CFR 602.22(b)(4); or

(ii)(A) The ineligible institution or organization provides more than 25 percent but less than 50 percent of the educational program, in accordance with 34 CFR 602.22(a)(1)(ii)(J);

(B) The eligible institution and the ineligible institution or organization are not owned or controlled by the same individual, partnership, or corporation; and

(C) The eligible institution's accrediting agency or, if the institution is a public postsecondary vocational educational institution, the State agency listed in the **Federal Register** in accordance with 34 CFR part 603 has specifically determined that the institution's arrangement meets the agency's standards for executing a written arrangement with an ineligible institution or organization.

(d) *Administration of title IV, HEA programs.* (1) If an institution enters into a written arrangement as described in paragraph (a), (b), or (c) of this section, or provides coursework as provided in paragraph (h)(2) of this section, except as provided in paragraph (d)(2) of this section, the institution at which the student is enrolled as a regular student must determine the student's eligibility for the title IV, HEA program funds, and must calculate and disburse those funds to that student.

* * * * *

(f) *Workforce responsiveness.* Nothing in this or any other section in this part prohibits an institution utilizing written arrangements from aligning or modifying its curriculum or academic requirements in order to meet the recommendations or requirements of industry advisory boards that include employers who hire program graduates, widely recognized industry standards and organizations, or industry-recognized credentialing bodies, including making governance or decision-making changes as an alternative to allowing or requiring faculty control or approval or integrating industry-recognized credentials into existing degree programs.

(g) *Calculation of percentage of program.* When determining the percentage of the program that is provided by an ineligible institution or organization under paragraph (c) of this section, the institution divides the number of semester, trimester, or quarter credit hours, clock hours, or the equivalent that are provided by the ineligible organization or organizations by the total number of semester, trimester, or quarter credit hours, clock hours, or the equivalent required for completion of the program. A course is provided by an ineligible institution or organization if the organization with which the institution has a written arrangement has authority over the design, administration, or instruction in the course, including, but not limited to—

(1) Establishing the requirements for successful completion of the course;

(2) Delivering instruction in the course; or

(3) Assessing student learning.

(h) *Non-applicability to other interactions with outside entities.* Written arrangements are not necessary for, and the limitations in this section do not apply to—

(1) Acceptance by the institution of transfer credits or use of prior learning assessment or other non-traditional methods of providing academic credit; or

(2) The internship or externship portion of a program if the internship or externship is governed by accrediting agency standards, or, in the case of an eligible foreign institution, the standards of an outside oversight entity, such as an accrediting agency or government entity, that require the oversight and supervision of the institution, where the institution is responsible for the internship or externship and students are monitored by qualified institutional personnel.

■ 16. Section 668.8 is amended by revising paragraphs (e)(1)(iii), (k)(2), and (l) and removing the authority citation at the end of the section to read as follows:

§ 668.8 Eligible program.

* * * * *

(e) * * * (1) * * *

(iii) The institution can demonstrate reasonable program length, in accordance with § 668.14(b)(26); and

* * * * *

(k) * * *

(2) Each course within the program is acceptable for full credit toward completion of an eligible program offered by the institution that provides an associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, provided that—

(i) The eligible program requires at least two academic years of study; and

(ii) The institution can demonstrate that least one student graduated from the program during the current award year or the two preceding award years.

(l) *Formula.* For purposes of determining whether a program described in paragraph (h) of this section satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program for the purposes of the title IV, HEA programs—

(1) A semester or trimester hour must include at least 30 clock hours of instruction; and

(2) A quarter hour must include at least 20 clock hours of instruction.

* * * * *

17. Section 668.10 is revised to read as follows:

§ 668.10 Direct assessment programs.

(a)(1) A direct assessment program is a program that, in lieu of credit or clock hours as the measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others. The assessment must be consistent with the accreditation of the institution or program utilizing the results of the assessment.

(2) Direct assessment of student learning means a measure of a student's knowledge, skills, and abilities designed to provide evidence of the student's proficiency in the relevant subject area.

(3) An institution must establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours. This methodology must be consistent with the requirements of the institution's accrediting agency or State approval agency.

(4) All regulatory requirements in this chapter that refer to credit or clock hours as a measurement apply to direct assessment programs according to whether they use credit or clock hour equivalencies, respectively.

(5) A direct assessment program that is not consistent with the requirements of the institution's accrediting agency or State approval agency is not an eligible program as provided under § 668.8. In order for any direct assessment program to qualify as an eligible program, the accrediting agency must have—

(i) Evaluated the program based on the agency's accreditation standards and criteria, and included it in the institution's grant of accreditation or preaccreditation; and

(ii) Reviewed and approved the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours.

(b)(1) An institution that wishes to offer a direct assessment program must apply to the Secretary to have its direct assessment program or programs determined to be eligible programs for title IV, HEA program purposes. Following the Secretary's initial approval of a direct assessment program, additional direct assessment programs at an equivalent or lower academic level may be determined to be eligible without further approvals from the Secretary except as required by 34 CFR 600.10(c)(1)(iii), 600.20(c)(1), or 600.21(a), as applicable, if such programs are consistent with the institution's accreditation or its State approval agency.

(2) The institution's direct assessment application must provide information satisfactory to the Secretary that includes—

(i) A description of the educational program, including the educational credential offered (degree level or certificate) and the field of study;

(ii) A description of how the direct assessment program is structured, including information about how and when the institution determines on an individual basis what each student enrolled in the program needs to learn and how the institution excludes from consideration of a student's eligibility for title IV, HEA program funds any credits or competencies earned on the basis of prior learning;

(iii) A description of how learning is assessed and how the institution assists students in gaining the knowledge needed to pass the assessments;

(iv) The number of semester, trimester, or quarter credit hours, or clock hours, that are equivalent to the amount of student learning being directly assessed for the certificate or degree;

(v) The methodology the institution uses to determine the number of credit or clock hours to which the program or programs are equivalent; and

(vi) Documentation from the institution's accrediting agency or State approval agency indicating that the agency has evaluated the institution's offering of direct assessment program(s) and has included the program(s) in the institution's grant of accreditation and approval documentation from the accrediting agency or State approval agency indicating agreement with the institutions methodology for determining the direct assessment program's equivalence in terms of credit or clock hours.

(vii) Notwithstanding paragraphs (a) and (b) of this section, no program offered by a foreign institution that involves direct assessment will be considered to be an eligible program under § 668.8.

(c) A direct assessment program may use learning resources (*e.g.,* courses or portions of courses) that are provided by entities other than the institution providing the direct assessment program without regard to the limitations on contracting for part of an educational program in § 668.5(c)(3).

(d) Title IV, HEA program funds may be used to support instruction provided, or overseen, by the institution, except for the portion of the program that the student is awarded based on prior learning.

(e) Unless an institution has received initial approval from the Secretary to offer direct assessment programs, and the institution's offering of direct assessment coursework is consistent with the institution's accreditation and State authorization, if applicable, title IV, HEA program funds may not be used for—

(1) The course of study described in § 668.32(a)(1)(ii) and (iii) and (a)(2)(i)(B), if offered using direct assessment; or

(2) Remedial coursework described in § 668.20, if offered using direct assessment.

(f) Student progress in a direct assessment program may be measured using a combination of—

(1) Credit hours and credit hour equivalencies; or

(2) Clock hours and clock hour equivalencies.

■ 18. Section 668.13 is amended by:
■ a. Redesignating paragraph (a)(1) as paragraph (a)(1)(i).
■ b. Adding paragraph (a)(1)(ii).
■ c. Adding paragraph (b)(3).
■ d. Removing the word ''or'' at the end of paragraph (c)(1)(i)(D).
■ e. Removing the period and adding in its place ''; or'' at the end of paragraph (c)(1)(i)(E).
■ f. Adding paragraph (c)(1)(i)(F).
■ g. Removing the word ''facsimile'' and adding in its place the word ''electronic'' in paragraphs (d)(3)(i) and (d)(3)(ii)(C).
■ h. Revising paragraph (d)(3)(iii).
■ i. Removing paragraph (d)(3)(iv).
■ j. Revising paragraph (d)(5).
■ k. Removing the authority citation at the end of the section.

The additions and revisions read as follows:

§ 668.13 Certification procedures.

(a) * * * (1)(i) * * *

(ii) On application from the institution, the Secretary certifies a location of an institution that meets the requirements of § 668.13(a)(1)(i) as a branch if it satisfies the definition of ''branch'' in 34 CFR 600.2.

* * * * *

(b) * * *

(3) In the event that the Secretary does not make a determination to grant or deny certification within 12 months of the expiration of its current period of participation, the institution will automatically be granted renewal of certification, which may be provisional.

(c) * * * (1)(i) * * *

(F) The institution is a participating institution that has been provisionally recertified under the automatic recertification requirement in paragraph (b)(3) of this section.

* * * * *

(d) * * *

(3) * * *

(iii) Documents filed by electronic transmission must be transmitted to the Secretary in accordance with instructions provided by the Secretary in the notice of revocation.

* * * * *

(5) The mailing date of a notice of revocation or a request for reconsideration of a revocation is the date evidenced on the original receipt of mailing from the U.S. Postal Service or another service that provides delivery confirmation for that document.

* * * * *

■ 19. Section 668.14 is amended by revising paragraphs (b)(10), (26), and (31) introductory text to read as follows:

§ 668.14 Program participation agreement.

* * * * *

(b) * * *

(10) In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, the institution will make available to prospective students, at or before the time that those students apply for enrollment—

(i) The most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements; and

(ii) Relevant State licensing requirements of the State in which the institution is located for any job for which the course of instruction is designed to prepare such prospective students, as provided in § 668.43(a)(5)(v);

* * * * *

(26) If an educational program offered by the institution is required to prepare a student for gainful employment in a recognized occupation, the institution must—

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed the greater of—

(A) One hundred and fifty percent of the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement, or as established by any Federal agency; or

(B) The minimum number of clock hours required for training in the recognized occupation for which the program prepares the student as established in a State adjacent to the State in which the institution is located; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student;

* * * * *

(31) The institution will submit a teach-out plan to its accrediting agency in compliance with 34 CFR 602.24(c) and the standards of the institution's accrediting agency. The institution will update its teach-out plan upon the occurrence of any of the following events:

* * * * *

■ 20. Section 668.22 is amended by:
■ a. Removing the word ''or'' at the end of paragraph (a)(2)(i)(B).
■ b. Revising paragraph (a)(2)(i)(C).
■ c. Adding paragraph (a)(2)(i)(D).
■ d. Revising paragraph (a)(2)(ii).
■ e. Removing the word ''nonterm'' and adding in its place the word ''non-term'' in paragraph (a)(2)(iii)(B).
■ f. Revising paragraph (a)(3).
■ g. Removing the citation ''§ 668.164(g)'' at the end of paragraph (a)(5) and adding in its place the citation ''§ 668.164(i)''.
■ h. Revising paragraphs (a)(6)(ii)(A), (d)(1)(vii), and (i).
■ i. Removing the citation ''§ 668.164(g)'' in paragraph (l)(1) and adding in its place the citation ''§ 668.164(j)''.
■ j. Removing the citation ''§ 668.164(g)(2)'' in paragraph (l)(4) and adding in its place the citation ''§ 668.164(j)(2)''.
■ k. Revising paragraphs (l)(6) and (7).
■ l. Adding paragraph (l)(9).
■ m. Removing the authority citation at the end of the section.

The additions and revisions read as follows:

§ 668.22 Treatment of title IV funds when a student withdraws.

(a) * * *

(2)(i) * * *

(C) For a student in a standard or nonstandard-term program, excluding a subscription-based program, the student is not scheduled to begin another course within a payment period or period of enrollment for more than 45 calendar days after the end of the module the student ceased attending, unless the student is on approved leave of absence, as defined in paragraph (d) of this section; or

(D) For a student in a non-term program or a subscription-based program, the student is unable to resume attendance within a payment period or period of enrollment for more than 60 calendar days after ceasing attendance, unless the student is on an approved leave of absence, as defined in paragraph (d) of this section.

(ii)(A) Notwithstanding paragraph (a)(2)(i) of this section—

(*1*) A student who completes all the requirements for graduation from his or her program before completing the days or hours in the period that he or she was scheduled to complete is not considered to have withdrawn;

(*2*) In a program offered in modules, a student is not considered to have withdrawn if the student successfully completes—

(*i*) One module that includes 49 percent or more of the number of days in the payment period, excluding scheduled breaks of five or more consecutive days and all days between modules;

(*ii*) A combination of modules that when combined contain 49 percent or more of the number of days in the payment period, excluding scheduled breaks of five or more consecutive days and all days between modules; or

(*iii*) Coursework equal to or greater than the coursework required for the institution's definition of a half-time student under § 668.2 for the payment period;

(*3*) For a payment period or period of enrollment in which courses in the program are offered in modules—

(*i*) A student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will attend a module that begins later in the same payment period or period of enrollment; and

(*ii*) For standard and nonstandard-term programs, excluding subscription-based programs, that module begins no later than 45 calendar days after the end of the module the student ceased attending;

(*4*) For a subscription-based program, a student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will resume attendance, and that date occurs within the same payment period or period of enrollment and is no later than 60 calendar days after the student ceased attendance; and

(*5*) For a non-term program, a student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will resume attendance, and that date is no later than 60 calendar days after the student ceased attendance.

(B) If an institution has obtained the written confirmation of future attendance in accordance with paragraph (a)(2)(ii)(A) of this section—

(*1*) A student may change the date of return that begins later in the same payment period or period of enrollment, provided that the student does so in writing prior to the return date that he or she had previously confirmed;

(*2*) For standard and nonstandard-term programs, excluding subscription-based programs the later module that he or she will attend begins no later than 45 calendar days after the end of the module the student ceased attending; and

(*3*) For non-term and subscription-based programs, the student's program permits the student to resume attendance no later than 60 calendar days after the student ceased attendance.

(C) If an institution obtains written confirmation of future attendance in accordance with paragraph (a)(2)(ii)(A) of this section and, if applicable, paragraph (a)(2)(ii)(B) of this section, but the student does not return as scheduled—

(*1*) The student is considered to have withdrawn from the payment period or period of enrollment; and

(*2*) The student's withdrawal date and the total number of calendar days in the payment period or period of enrollment would be the withdrawal date and total number of calendar days that would have applied if the student had not provided written confirmation of a future date of attendance in accordance with paragraph (a)(2)(ii)(A) of this section.

* * * * *

(3) For purposes of this section, ''title IV grant or loan assistance'' includes only assistance from the Direct Loan, Federal Pell Grant, Iraq and Afghanistan Service Grant, TEACH Grant, and FSEOG programs, not including the non-Federal share of FSEOG awards if an institution meets its FSEOG matching share by the individual recipient method or the aggregate method.

* * * * *

(6) * * *

(ii)(A) If outstanding charges exist on the student's account, the institution may credit the student's account up to the amount of outstanding charges in accordance with § 668.164(c) with all or a portion of any—

(*1*) Grant funds that make up the post-withdrawal disbursement; and

(*2*) Loan funds that make up the post-withdrawal disbursement only after obtaining confirmation from the student, or parent in the case of a parent PLUS loan, that they still wish to have the loan funds disbursed in accordance with paragraph (a)(6)(iii) of this section.

* * * * *

(d) * * * (1) * * *

(vii) Except for a clock hour or non-term credit hour program, or a subscription-based program, upon the student's return from the leave of absence, the student is permitted to complete the coursework he or she began prior to the leave of absence; and

* * * * *

(i) *Order of return of title IV funds*—(1) *Loans.* Unearned funds returned by the institution or the student, as appropriate, in accordance with paragraph (g) or (h) of this section respectively, must be credited to outstanding balances on title IV loans made to the student or on behalf of the student for the payment period or period of enrollment for which a return of funds is required. Those funds must be credited to outstanding balances for the payment period or period of enrollment for which a return of funds is required in the following order:

(i) Unsubsidized Federal Direct Stafford loans.

(ii) Subsidized Federal Direct Stafford loans.

(iii) Federal Direct PLUS received on behalf of the student.

(2) *Remaining funds.* If unearned funds remain to be returned after repayment of all outstanding loan amounts, the remaining excess must be credited to any amount awarded for the payment period or period of enrollment for which a return of funds is required in the following order:

(i) Federal Pell Grants.

(ii) Iraq and Afghanistan Service Grants.

(iii) FSEOG Program aid.

(iv) TEACH Grants.

* * * * *

(l) * * *

(6) A program is ''offered in modules'' if the program uses a standard term or nonstandard-term academic calendar, is not a subscription-based program, and a course or courses in the program do not span the entire length of the payment period or period of enrollment.

(7)(i) ''Academic attendance'' and ''attendance at an academically-related activity'' must include academic engagement as defined under 34 CFR 600.2.

(ii) A determination of ''academic attendance'' or ''attendance at an academically-related activity'' must be made by the institution; a student's certification of attendance that is not supported by institutional documentation is not acceptable.

* * * * *

(9) A student in a program offered in modules is scheduled to complete the days in a module if the student's coursework in that module was used to determine the amount of the student's eligibility for title IV, HEA funds for the payment period or period of enrollment.

* * * * *

§ 668.28 [Amended]

■ 21. Section 668.28 is amended by removing and reserving paragraph (b) and removing the authority citation at the end of the section.

■ 22. Section 668.34 is amended by:
■ a. Revising paragraph (a)(5).
■ b. Revising paragraph (1) in the definition for "Maximum timeframe" in paragraph (b).
■ c. Removing the authority citation at the end of the section.

The revisions read as follows:

§ 668.34 Satisfactory academic progress.

(a) * * *

(5) The policy specifies—

(i) For all programs, the maximum timeframe as defined in paragraph (b) of this section; and

(ii) For a credit hour program using standard or nonstandard terms that is not a subscription-based program, the pace, measured at each evaluation, at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe, calculated by either dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted or by determining the number of hours that the student should have completed by the evaluation point in order to complete the program within the maximum timeframe. In making this calculation, the institution is not required to include remedial courses;

* * * * *

(b) * * *

Maximum timeframe. * * *

(1) For an undergraduate program measured in credit hours, a period that is no longer than 150 percent of the published length of the educational program, as measured in credit hours, or expressed in calendar time;

* * * * *

§ 668.111 [Amended]

23. Section 668.111 is amended by adding the phrase "issuance by the Department of and" after the phrase "establishes rules governing the" in the first sentence of paragraph (a) and removing the authority citation at the end of the section.

■ 24. Section 668.113 is amended by:
■ a. Removing the word "shall" and adding in its place the word "must" in both instances it is used in paragraph (c) introductory text.
■ b. Redesignating paragraphs (d)(1) and (2) as paragraphs (d)(2) and (3).
■ c. Adding a new paragraph (d)(1).
■ d. Removing the authority citation at the end of the section.

The addition reads as follows:

§ 668.113 Request for review.

* * * * *

(d)(1) If the final audit determination or final program review determination in paragraph (a) of this section results from the institution's classification of a course or program as distance education, or the institution's assignment of credit hours, the Secretary relies upon the requirements of the institution's accrediting agency or State approval agency regarding qualifications for instruction and whether the amount of work associated with the institution's credit hours is consistent with commonly accepted practice in postsecondary education, in applying the definitions of "distance education" and "credit hour" in 34 CFR 600.2.

* * * * *

■ 25. Section 668.164 is amended by:
■ a. Adding the phrase "that is not a subscription-based program" after the phrase "equal in length" in paragraphs (i)(1)(i) and (ii).
■ b. Removing the word "or" at the end of paragraph (i)(1)(i).
■ c. Removing the period and adding in its place "; or" in paragraph (i)(1)(ii)(B).
■ d. Adding paragraph (i)(1)(iii).

The addition reads as follows:

§ 668.164 Disbursing funds.

* * * * *

(i)(1) * * *

(iii) If the student is enrolled in a subscription-based program, the later of—

(A) Ten days before the first day of classes of a payment period; or

(B) The date the student completed the cumulative number of credit hours associated with the student's enrollment status in all prior terms that the student attended under the definition of a subscription-based program in § 668.2.

* * * * *

■ 26. Section 668.171 is amended by:
■ a. Removing the word "or" at the end of paragraph (i)(1).
■ b. Removing the period and adding in its place "; or" in paragraph (i)(2).
■ c. Adding paragraph (i)(3).

The addition reads as follows:

§ 668.171 General.

* * * * *

(i) * * *

(3) Deny the institution's application for certification or recertification to participate in the title IV, HEA programs.

■ 27. Section 668.174 is amended by:
■ a. Revising paragraph (b)(1)(i) introductory text.
■ b. Adding the phrase "ownership or" after the word "substantial" and removing the word "or" at the end of paragraph (b)(1)(i)(A).
■ c. Redesignating paragraph (b)(1)(i)(B) as paragraph (b)(1)(i)(C).
■ d. Adding a new paragraph (b)(1)(i)(B).
■ e. Adding "entity," after the phrase "That person," in paragraph (b)(1)(ii).
■ f. Adding the phrase "or entity" after the word "person" in paragraphs (b)(2)(i) and (ii).
■ g. Adding "entity," after the phrase "owes the liability by that" in paragraph (b)(2)(ii)(A).
■ h. Adding "entity," after the phrase "owes the liability that the" in paragraph (b)(2)(ii)(B).
■ i. Adding the phrase "or entity" after the phrase "The person" in paragraphs (b)(2)(iv)(A) and (B).
■ j. Adding the phrase "or entity" after both uses of the word "person" in paragraph (c)(3) introductory text.
■ k. Removing the authority citation at the end of the section.

The revisions and additions read as follows:

§ 668.174 Past performance.

* * * * *

(b) *Past performance of persons or entities affiliated with an institution.* (1)(i) Except as provided in paragraph (b)(2) of this section, an institution is not financially responsible if a person or entity who exercises substantial ownership or control over the institution, as described under 34 CFR 600.31, or any member or members of that person's family alone or together—

* * * * *

(B) Exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution; or

* * * * *

[FR Doc. 2020–18636 Filed 9–1–20; 8:45 am]

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Part IV

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 410, 413, 414, et al.

Medicare and Medicaid Programs, Clinical Laboratory Improvement Amendments (CLIA), and Patient Protection and Affordable Care Act; Additional Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 410, 413, 414, 422, 423, 482, 483, 485, 488 and 493

[CMS–3401–IFC]

RIN 0938–AU33

Medicare and Medicaid Programs, Clinical Laboratory Improvement Amendments (CLIA), and Patient Protection and Affordable Care Act; Additional Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency

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

ACTION: Interim final rule with comment period.

SUMMARY: This interim final rule with comment period (IFC) revises regulations to strengthen CMS' ability to enforce compliance with Medicare and Medicaid long-term care (LTC) facility requirements for reporting information related to coronavirus disease 2019 (COVID–19), establishes a new requirement for LTC facilities for COVID–19 testing of facility residents and staff, establishes new requirements in the hospital and critical access hospital (CAH) Conditions of Participation (CoPs) for tracking the incidence and impact of COVID–19 to assist public health officials in detecting outbreaks and saving lives, and establishes requirements for all CLIA laboratories to report COVID–19 test results to the Secretary of Health and Human Services (Secretary) in such form and manner, and at such timing and frequency, as the Secretary may prescribe during the Public Health Emergency (PHE).

DATES: *Effective date:* These regulations are effective on September 2, 2020.

Applicability date: These regulations are applicable for the duration of the PHE for COVID–19. Section 488.447 is applicable 1 year beyond the expiration of the PHE for COVID–19. The amendment to § 414.1305 and the expansion of telehealth codes used in beneficiary assignment for the CMS Web Interface and CAHPS for MIPS survey (found in section II.I. of the preamble) are applicable beginning January 1, 2020.

Comment date: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on November 2, 2020.

ADDRESSES: In commenting, please refer to file code CMS–3401–IFC. Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3401–IFC, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3401–IFC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:

Debra Lyons, (410) 786–6780, for information on the LTC enforcement regulation at 42 CFR part 488.

CAPT Scott Cooper, USPHS, (410) 786–9465, for the hospital and CAH COVID–19 reporting requirements.

Sarah Bennett, (410) 786–3354, for laboratory reporting information.

Julia Venanzi, (410) 786–1471, for provisions related to the Hospital Value-Based Purchasing Program.

Erin Patton, (410) 786–2437, for provisions related to the Hospital Readmissions Reduction Program.

Lang Le, (410) 786–5693, for provisions related to the Skilled-Nursing Facility Value-Based Purchasing Program and the Hospital-Acquired Condition Reduction Program.

Delia Houseal, (410) 786–2724, for provisions related to the End-Stage Renal Disease Quality Incentive Program.

Kimberly Long, (410) 786–5702, or *NCDsPublicHealthEmergency@cms.hhs.gov,* for provisions related to NCD Procedural Volumes for Facilities and Practitioners to Maintain Medicare Coverage.

Jennifer Dupee, (410) 786–6537, for provisions related to order requirements for COVID–19 and related testing.

Jaya Ghildiyal, (301) 492–5149, for PPACA risk adjustment requirements.

Christina Whitefield, (301) 492–4172, for PPACA medical loss ratio requirements.

Elizabeth Goldstein, (410) 786–6665, or *PartCandDStarRatings@cms.hhs.gov,* for the modifications to the calculation of the 2022 Part C and D Star Ratings.

Molly MacHarris, (410) 786–4461, for issues related to the Merit-based Incentive Payment System (MIPS).

Kianna Banks, (410) 786–3498, for the LTC resident and staff COVID–19 testing requirements.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://regulations.gov.* Follow the search instructions on that website to view public comments.

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Executive Summary

This interim final rule with comment period (IFC) revises regulations to strengthen CMS' ability to enforce compliance with Medicare and

Medicaid long-term care (LTC) facility requirements for reporting information related to coronavirus disease 2019 (COVID–19), establishes a new requirement for LTC facilities for COVID–19 testing of facility residents and staff, establishes new requirements in the hospital and critical access hospital (CAH) Conditions of Participation (CoPs) for tracking the incidence and impact of COVID–19 to assist public health officials in detecting outbreaks and saving lives, and establishes requirements for all CLIA laboratories to report COVID–19 test results to the Secretary of Health and Human Services (Secretary) in such form and manner, and at such timing and frequency, as the Secretary may prescribe during the Public Health Emergency (PHE). This IFC updates the extraordinary circumstances exceptions granted for the ESRD Quality Incentive Program (QIP), Hospital Acquired Condition (HAC) Reduction Program, Hospital Readmissions Reduction Program (HRRP), and Hospital VBP Program for the PHE for COVID–19, and revises the FY 2022 performance period under the Skilled Nursing Facility (SNF) VBP as a result of the PHE for COVID–19. This IFC also announces that with respect to the Hospital VBP Program, HRRP, HAC Reduction Program, SNF VBP Program and the ESRD QIP, if, as a result of a decision to grant a new nationwide ECE without request or a decision to grant a substantial number of individual ECE requests, we do not have enough data to reliably compare national performance on measures, we may propose to not score facilities, hospitals, or SNFs based on such limited data or make the associated payment adjustments for the affected program year. In addition, this IFC announces that CMS will not enforce certain procedural volume requirements for four national coverage determinations, revises the previous policy outlined in the May 8th COVID–19 IFC by establishing that one single COVID–19 diagnostic test and one of each other applicable related tests without an order from a treating physician or other practitioner is reasonable and necessary, establishes a policy whereby the orders of pharmacists and other practitioners that are allowed to order laboratory tests in accordance with state scope of practice and other pertinent laws can fulfill the requirements related to orders for covered COVID–19 and related tests for Medicare patients, specifies how temporary premium credits for individual and small group health insurance coverage are treated for purposes of the risk adjustment and medical loss ratio programs, modifies the application of the extreme and uncontrollable circumstances policy for calculation of the 2022 Part C and D Star Ratings to address the effects of the PHE for COVID–19, includes in the Merit-Based Incentive Payment System (MIPS) beneficiary assignment methodology for the CMS Web Interface and Consumer Assessment of Healthcare Providers and Systems (CAHPS) for MIPS survey for performance year 2020 and any subsequent performance year that starts during the PHE for COVID–19 certain Current Procedural Terminology (CPT) and Healthcare Common Procedure Coding System (HCPCS) code additions, and modifies IA_ERP_3.

I. Background

The United States is responding to an outbreak of respiratory disease caused by coronavirus disease that was first detected in China and which has now been detected in more than 190 countries internationally, and all 50 States, the District of Columbia, and the U.S. territories. The virus has been named ''severe acute respiratory syndrome coronavirus 2'' (SARS–CoV–2'') and the disease it causes has been named ''coronavirus disease 2019'' (''COVID–19'').

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization (WHO) declared the outbreak a ''Public Health Emergency of International Concern''. On January 31, 2020, pursuant to section 319 of the Public Health Service Act (PHSA) (42 U.S.C. 247d), the Health and Human Services Secretary (the Secretary) determined that a public health emergency (PHE) exists for the United States to aid the nation's healthcare community in responding to COVID–19 (hereafter referred to as the PHE for COVID–19). On March 11, 2020, the WHO publicly declared COVID–19 a pandemic. On March 13, 2020, President Donald J. Trump (the President) declared the COVID–19 pandemic a national emergency. Effective July 25, 2020, the Secretary renewed the January 31, 2020 determination that was previously renewed on April 21, 2020, that a PHE for COVID–19 exists and has existed since January 27, 2020.

The Centers for Disease Control and Prevention (CDC) has reported that some people are at higher risk of severe illness from COVID–19.[1] These higher-risk categories include:

- Older adults, with risk increasing by age.
- People of any age who have certain underlying medical conditions such as:
  - ++ Cancer.
  - ++ Chronic kidney disease.
  - ++ Obesity.
  - ++ Serious heart conditions (for example, heart failure, coronary artery disease, or cardiomyopathies).
  - ++ Sickle cell disease.
  - ++ Diabetes mellitus.
  - ++ Hypertension.
  - ++ Chronic obstructive pulmonary disease (COPD).
  - ++ Neurologic/Neurodevelopmental disability.[2]
  - ++ Immunocompromised state from solid organ transplant.
- Residents of LTC facilities, including nursing homes, Intermediate Care Facilities for Individuals with Intellectual and Developmental Disabilities (ICF/IIDs), inpatient psychiatric and substance abuse treatment facilities including institutions for mental disorders (IMD) and Psychiatric Residential Treatment Facilities (PRTF), assisted living facilities, group homes for individuals with developmental disabilities and board-and-care facilities.

The CDC has developed guidance to help in the risk assessment and management of people with potential exposures to COVID–19, including recommending that healthcare professionals make every effort to interview a person under investigation for infection by telephone, text monitoring system, or video conference.[3]

As the healthcare community establishes and implements recommended infection prevention and control practices, regulatory agencies operating under appropriate waiver authority granted by the PHE for COVID–19 are also working to revise and implement regulations that support these healthcare community infection prevention and treatment practices. Based on the current and projected increases in the COVID–19 incidence rates in the US, observed fatalities in the older adult population, and the impact on health workers who are at increased risk due to treating special populations, it is CMS' belief that certain regulations should be reviewed and revised as appropriate to offer additional flexibilities in furnishing and providing services to combat the PHE for COVID–19 and to address and minimize the

[1] *https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm.*

[2] *https://www.cdc.gov/mmwr/volumes/69/wr/mm6924e2.htm?s_cid=mm6924e2_w.*

[3] *https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html.*

unique impact of the PHE for COVID–19 on other regulatory provisions. We addressed some of these regulations in two previous interim final rules with comment period (IFCs). The ''Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency'' IFC appeared in the April 6, 2020 **Federal Register** (85 FR 19230) with an effective date of March 31, 2020 (hereafter referred to as the ''March 31st COVID–19 IFC''), and the ''Medicare and Medicaid Programs, Basic Health Program, and Exchanges; Additional Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency and Delay of Certain Reporting Requirements for the Skilled Nursing Facility Quality Reporting Program'' IFC appeared in the May 8, 2020 **Federal Register** (85 FR 27550) with an effective date of May 8, 2020 (hereafter referred to as the ''May 8th COVID–19 IFC'').

In this IFC, we are revising regulations to strengthen CMS' ability to enforce new LTC requirements added to 42 CFR part 483 published in the May 8th COVID–19 IFC to report facility data related to COVID–19 and infection control at least weekly. Specifically, we are adding a regulation to specify the civil money penalty (CMP) amounts that may be imposed for the failure to electronically report COVID–19 data each week, which includes, among other things, suspected and confirmed COVID–19 infections among residents and staff, including residents previously treated for COVID–19, total deaths of COVID–19 deaths among residents and staff, and personal protective equipment and hand hygiene supplies in the facility.

We are also requiring hospitals and CAHs to report information in accordance with a frequency, and in a standardized format, as specified by the Secretary during the PHE for COVID–19. We believe that universal reporting by all hospitals and CAHs is and will be an important tool for supporting surveillance of COVID–19 and for future planning to prevent the spread of the virus, especially to those most vulnerable and at risk to its effects.

In this IFC, we also address condition-level noncompliance related to SARS–CoV–2 laboratory reporting and strengthen CMS' ability to enforce new requirements to electronically report SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe during the PHE for COVID–19.

On October 31, 1988, Congress enacted the Clinical Laboratory Improvement Amendments of 1988 (CLIA) (Pub. L. 100–578) (codified as amended at 42 U.S.C. 263a), requiring any laboratory that examines human specimens for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of health, of human beings to be certified by the Secretary for the categories of examinations or procedures performed by the laboratory. The implementing regulations at 42 CFR part 493 specify the conditions and standards that must be met to achieve and maintain CLIA certification. These conditions and standards strengthen federal oversight of clinical laboratories and help ensure the accuracy and reliability of patient test results.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116–136) into law. The CARES Act includes section 18115, which requires every laboratory that performs or analyzes a test that is intended to detect SARS–CoV–2 or to diagnose a possible case of COVID–19 to report the results for such test to the Secretary until the conclusion of the PHE for COVID–19.

Subsequently, on June 4, 2020, the Department of Health and Human Services (HHS) published the COVID–19 Pandemic Response, Laboratory Data Reporting: CARES Act Section 18115 Guidance,[4] implementing the requirement under section 18115 of the CARES Act for laboratories to report COVID-related information to the Secretary.

With regard to laboratory oversight, HHS endeavors to improve consistency in application of laboratory standards, to improve coordination, collaboration, and communication in both routine and emergent situations, and thereby further improve the level of laboratory oversight and ultimately patient care. In order for CMS to ensure laboratories are properly reporting SARS–CoV–2 test results, CMS has determined that modifications to the CLIA regulations must be made. We are requiring all laboratories performing testing related to SARS–CoV–2, to report SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe during the PHE for COVID–19.

In addition, this IFC clarifies the data reporting requirements for issuers of risk adjustment covered plans [5] to specify that, for the purposes of 2020 benefit year risk adjustment data submissions, issuers of risk adjustment covered plans that provide temporary premium credits must report to their distributed data environments (EDGE servers) the adjusted plan premiums that reflect actual premiums billed to enrollees, taking the premium credits into account as a reduction in premiums. In addition, we clarify that, consistent with the reporting of the actual premium amounts billed to enrollees for 2020 benefit year risk adjustment data submissions, HHS's calculation of risk adjustment payment and charges for the 2020 benefit year under the state payment transfer formula will be calculated using the statewide average premium that reflects actual premiums billed, taking into account any temporary premium credits provided as a reduction in premium for the applicable months of 2020 coverage. In this IFC, we similarly clarify the Medical Loss Ratio (MLR) reporting and rebate calculation requirements in 45 CFR part 158 for issuers that elect to provide temporary premium credits in 2020 such that these issuers must report as earned premium the actual premium paid, taking into account any temporary premium credits provided for the applicable months of 2020 coverage.

This IFC also announces that we will not enforce certain procedural volume requirements in order for facilities and practitioners to maintain Medicare coverage under specific national coverage determinations (NCDs). This applies to facilities and practitioners that, prior to the PHE for COVID–19, met the volume requirements for these NCDs.

In this IFC, we are also revising the previous policy outlined in the May 8th COVID–19 IFC, which allowed for broad COVID–19 testing for a single beneficiary without a physician or other practitioner order, by establishing that one single COVID–19 diagnostic test and one of each other related tests (as listed in the May 8th COVID–19 IFC) without a treating physician or other practitioner order is reasonable and necessary. We are also establishing a policy whereby the orders of pharmacists and other practitioners that are allowed to order laboratory tests in accordance with state scope of practice and other pertinent laws can fulfill the requirements related to orders for covered COVID–19 tests for Medicare patients. In addition, this IFC updates the extraordinary circumstances exceptions (ECEs) we granted on March 22, 2020, for the ESRD Quality Incentive Program (QIP), Hospital Acquired Condition (HAC) Reduction Program, HRRP, and Hospital Value-Based

[4] *https://www.hhs.gov/sites/default/files/covid-19-laboratory-data-reporting-guidance.pdf.*

[5] See 45 CFR 153.20 for a definition of ''risk adjustment covered plan''.

Purchasing (VBP) Program in response to the PHE for COVID–19, revises the FY 2022 performance period under the SNF VBP as a result of the PHE for COVID–19, implements a COVID–19 reporting requirement for hospitals and critical access hospitals (CAHs), and modifies the application of the extreme and uncontrollable circumstances policy for calculation of the 2022 Part C and D Star Ratings to address the effects of the PHE for COVID–19.

This IFC also announces that with respect to the Hospital VBP Program, HRRP, HAC Reduction Program, SNF VBP Program and the ESRD QIP, if, as a result of a decision to grant a new nationwide ECE without request or a decision to grant a substantial number of individual ECEs, we do not have enough data to reliably compare national performance on measures, we may propose to not score facilities based on such limited data or make the associated payment adjustments for the affected program year.

In this IFC, for the 2020 performance year and any subsequent performance year that starts during the PHE for COVID–19, we are including in the MIPS beneficiary assignment methodology for the CMS Web Interface and Consumer Assessment of Healthcare Providers and Systems (CAHPS) for MIPS survey the following additions due to the PHE for COVID–19: (1) CPT codes: 99421, 99422, and 99423 (codes for online digital evaluation and management (E/M) service (e-visit)), and 99441, 99442, and 99443 (codes for telephone E/M services); and (2) HCPCS codes: G2010 (code for remote evaluation of patient video/images) and G2012 (code for virtual check-in). In addition, we are: (1) Expanding the improvement activity IA_ERP_3 titled ''COVID–19 Clinical Trial'' to also allow credit for clinicians who participate in the care of patients diagnosed with COVID–19 and simultaneously submit relevant clinical data to a clinical data registry for ongoing or future COVID–19 research; (2) updating the title; and (3) extending it through the CY 2021 performance period.

In an effort to support national efforts to control the spread of COVID–19, we are also revising the LTC facility infection control regulations at § 483.80 to establish a new requirement for LTC facilities to test their facility residents and staff, including individuals providing services under arrangement and volunteers. We are requiring that resident and staff testing in LTC facilities for COVID–19 be conducted based on parameters set forth by the Secretary. We believe these requirements will positively and substantially impact efforts to control the spread of COVID–19 in LTC facilities.

All provisions included in this IFC are effective only for the duration of the PHE for COVID–19, unless otherwise indicated. The provision at § 488.447 is intended to be in effect beyond the expiration of the PHE for COVID–19.

II. Provisions of the Interim Final Rule With Comment Period (IFC)

In this IFC, we use the term, ''Public Health Emergency (PHE),'' as defined at 42 CFR 400.200. The definition identifies the PHE determined to exist nationwide by the Secretary under section 319 of the PHSA on January 31, 2020, and renewed effective July 25, 2020,[6] as a result of confirmed cases of COVID–19.

A. New Enforcement Requirement for LTC Facilities

Under sections 1866 and 1902 of the Social Security Act (the Act), providers of services seeking to participate in the Medicare or Medicaid program, or both, must enter into an agreement with the Secretary or the state Medicaid agency, as appropriate. LTC facilities seeking to be Medicare and Medicaid providers of services must be certified as meeting federal participation requirements. LTC facilities include SNFs for Medicare and nursing facilities (NFs) for Medicaid. The federal participation requirements for these facilities are specified in sections 1819 and 1919 of the Act and in implementing regulations at 42 CFR part 483, subpart B.

Under sections 1819(f)(1) and 1919(f)(1) of the Act, the Secretary must assure that the enforcement of compliance with the participation requirements are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective use of public moneys. The federal requirements related to enforcement of the requirements for SNFs, NFs, or dually-certified facilities, are set forth in sections 1819(h) and 1919(h) of the Act and codified in the regulations at 42 CFR part 488, subpart F. Among the remedies available to be imposed for noncompliance with the requirements is a civil money penalty (CMP), as authorized in sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act, and §§ 488.430 through 488.444.

We are using our authority under this IFC to immediately implement a new enforcement regulation identified below in order to effectively enhance enforcement of the new infection prevention and control reporting requirements at § 483.80(g)(1) and (2) that became effective on May 8, 2020 as discussed in the May 8th COVID–19 IFC.

Prior to the PHE for COVID–19, regulations at § 483.80(a)(2)(ii) required facilities to have written standards, policies and procedures regarding infection control, which must include when and to whom possible incidents of communicable disease or infections should be reported. This includes reporting to local/state health authorities.

In an effort to support ongoing surveillance of COVID–19 cases, we added to the infection control requirements provisions to establish weekly facility reporting of suspected and/or confirmed COVID–19 cases, among other information, at new § 483.80(g) in the May 8th COVID–19 IFC (85 FR 27550, 27601 through 27602). This new regulation requires nursing homes to report COVID–19 related facility data to the CDC National Healthcare Safety Network (NHSN). These new CMS reporting requirements do not preclude a facility from following all state and local public health reporting laws and regulations.

Specifically, we revised our requirements by adding new provisions at §§ 483.80(g)(1) and (2), to require facilities to electronically report information about COVID–19 in a standardized format and at a frequency specified by the Secretary, but not less than weekly to the CDC NHSN. This critical information will provide real-time information on COVID–19 in nursing homes, and will be used to monitor trends in infection rates, and inform public health policies. To coincide with this new reporting requirement, we developed an automated process within the existing ASPEN (Automated Survey Process Environment) survey software application, which uses information received weekly from the CDC to determine whether a provider reported the data as required. We will determine if noncompliance exists through a retrospective review each week to identify the facilities that failed to take the necessary and timely actions to report to CDC. Noncompliance with this requirement for each weekly reporting cycle will be cited at a scope of widespread, and a severity of no actual harm with potential for more than minimal harm that is not immediate jeopardy, which constitutes a level ''F'' deficiency. This is consistent with guidance that was issued in QSO 20–

[6] *https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx.*

29–NH [7] which also included enforcement policies for the imposition of a CMP for the failure to report to the CDC NHSN.

With this IFC, we are furthering enforcement efforts of the recently issued requirements at § 483.80(g)(1) and (2) that facilities report COVID–19 related information to the CDC's NHSN by making revisions to part 488. These revisions codify enforcement policies that are specifically tailored to reviewing compliance with and imposing CMPs for the failure to report. We are enforcing the new reporting requirements through the imposition of CMPs for each time a facility fails to report the required data to the CDC NHSN system. We believe that CMPs are an appropriate enforcement remedy that will facilitate a swift return to compliance with the new reporting requirement. Sections 1819(h)(2)(B)(ii)(I) and 1919(h)(3)(C)(ii)(I) of the Act limit the amount of a CMP to $10,000 [8] for each day of noncompliance. We have determined that a minimum $1,000 initial CMP, with a $500 incremental increase, is within the authorized CMP range and an appropriate amount to deter noncompliance with this requirement. Specifically, we are noting that a minimum $1,000 CMP will be imposed for the first occurrence of noncompliance, that is, the first time the facility fails to submit a timely report as required under § 483.80(g)(1) and (2). For each subsequent time the facility fails to report the requisite COVID–19 related data, the amount of the CMP imposed will be increased by $500, which is consistent with sections 1819(h)(2)(B) and 1919(h)(3)(C) of the Act providing for the imposition of incrementally more severe fines for repeated deficiencies. For example, if a facility fails to report in 1 week, a minimum $1,000 CMP will be imposed for that occurrence of noncompliance. If it fails to report again in the subsequent week that new noncompliance determination will lead to the imposition of another CMP but in the increased amount of $1,500 for that failure to report. In this example, if the facility complies with the reporting requirements by submitting the required report in a 3rd week, but then subsequently fails to report again in a following week, a CMP in the amount of $2,000 for failing to report a third time will be imposed for that missed weekly report (which is $500 more than the last imposed amount). After each CMP is imposed, CMS will place the facility back into compliance, without requiring a Plan of Correction (POC) in accordance with § 488.408(f). A facility may still submit a POC if it chooses to do so; however, because compliance will be imposed each week and facilities will be assessed an increased CMP amount for each subsequent failure to report, a POC will not be necessary. Facilities are offered an opportunity for Independent Informal Dispute Resolution under § 488.431. This may be requested for reasons, such as technical difficulties that should be adequately documented, that may have prevented the facility from submitting its report in a timely manner.

Currently, under § 488.408(d), Category 2 CMP remedies for noncompliance that is not immediate jeopardy, but is widespread deficient practice that does not constitute actual harm with a potential for more than minimal harm, or that constitutes actual harm, are imposed at a daily amount not to exceed $6,695.[9] Similarly, because noncompliance with § 483.80(g)(1) and (2) will be cited at an scope and severity of an ''F'', which would trigger a Category 2 remedy, we will not continue incrementally increasing the CMPamount after 12 occurrences of noncompliance, so that the maximum CMP amount imposed would not exceed $6,500 for each subsequent occurrence of noncompliance. This specific maximum amount imposed for the failure to report was established to be consistent with the existing CMPs within Category 2 noncompliance. We believe imposing CMPs in this manner is a fair and effective penalty for the failure to report, as assessed each week.

To support and further codify these enhanced enforcement efforts, we are adding § 488.447 to impose a minimum CMP amount of $1,000 for the first occurrence of noncompliance with the reporting requirements at § 483.80(g)(1) and (2), and will increase the CMP by $500 for each subsequent time the facility fails to report COVID–19 related data as required. Compliance with the requirements at § 483.80(g)(1) and (2) will be assessed weekly. Facilities found out of compliance with § 483.80(g)(1) and (2) are not required to submit a plan of correction as indicated in § 488.408(f)(1). These CMP amounts are subject to annual adjustments for inflation at 45 CFR 102.3. Under this rule, we will increase the CMP amounts for up to 12 subsequent noncompliance occurrences to the amount specified in § 488.408(d)(1)(iii), which would be $6,500 per occurrence of noncompliance. CMPs imposed in accordance with this rule are subject to the same procedures as all other CMPs imposed under sections 1819(h) and 1919(h) of the Act, including notice, escrow, independent informal dispute resolution, and collections. Also, facilities may appeal the determination leading to a CMP imposed under this rule in accordance with 42 CFR part 498.

As discussed in section III. of this IFC, ''Waiver of Proposed Rulemaking,'' we believe the urgency of this PHE for COVID–19 constitutes good cause to waive the normal notice-and-comment process under Administrative Procedure Act (APA), 5 U.S.C. 533, and section 1871(b)(2)(C) of the Act. Waiving notice and comment is in the public interest because the heightened threat to resident health and safety for, widespread infection control noncompliance necessitates the expedited imposition of enforcement remedies. Additionally, because it is imperative to track the incidence and impact of COVID–19 in nursing homes, it is crucial that a financial penalty be imposed for failure to report. The CMP amounts we codify in this IFC will help deter noncompliance and encourage facilities to establish procedures that result in prompt weekly COVID–19 related data reports for the duration of the PHE for COVID–19. Proper enforcement mechanisms designed to deter noncompliant behavior and prompt corrective actions will help to ensure that residents, staff, and the public are safe, and will help provide critical COVID–19 related data to assist CMS and public health authorities in detecting and expeditiously responding to outbreaks. Furthermore, requiring prior notice and comment is impracticable because the PHE for COVID–19 that the CMP amounts are tailored to address may expire or be nearly over before a proposed rule can be finalized. Finally, we think prior notice and comment is unnecessary because we have broad discretion under the statute and existing CMP regulations to establish a CMP amount, but we are

[7] ''Interim Final Rule Updating Requirements for Notification of Confirmed and Suspected COVID–19 Cases Among Residents and Staff in Nursing Homes.'' QSO–20–29–NH (May 6, 2020) *https://www.cms.gov/files/document/qso-20-29-nh.pdf.*

[8] This amount is adjusted annually under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and listed in 42 CFR 102.3. The 2020 adjusted amount is $22,320 (85 FR 2870, January 17, 2020): *https://www.federalregister.gov/documents/2020/01/17/2020-00738/annual-civil-monetary-penalties-inflation-adjustment.*

[9] Reflects the 2020 annual inflation adjusted amount under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, listed in 42 CFR 102.3 (85 FR 2870, January 17, 2020): *https://www.federalregister.gov/documents/2020/01/17/2020-00738/annual-civil-monetary-penalties-inflation-adjustment.*

choosing to make our policies more transparent. We believe that a completely transparent CMP structure will help deter noncompliance, encourage timely reporting, and eliminate possible gaps in reporting that could hinder the government's response to the PHE for COVID–19 in specific geographic areas. For example, depending on the circumstances, the failure of one facility to report COVID–19 cases on a timely basis could delay our ability to detect and respond to an emerging COVID–19 hot spot.

For similar reasons, we are also waiving the 30-day delay in effective date for these provisions. The effective date for § 488.447 is the date of the publication of this rule (that is, the effective date as noted in the **DATES** section of this IFC). Furthermore, while we would generally expect that the new § 488.447 would no longer be in effect as of the end of the PHE for COVID–19 as defined in § 400.200, enhanced enforcement to ensure facilities continue to comply with infection control reporting requirements to avoid possible spread of COVID–19 will need to temporarily be in effect for a longer period of time. In conjunction with the PHE for COVID–19, these enforcement policies will continue to be in effect for up to one year beyond the end of the PHE.

B. Condition of Participation (CoP) Requirements for Hospitals and CAHs To Report COVID–19 Data As Specified by the Secretary During the PHE for COVID–19

Under sections 1866 and 1902 of the Act, providers of services seeking to participate in the Medicare or Medicaid program, or both, must enter into an agreement with the Secretary or the state Medicaid agency, as appropriate. Hospitals (all hospitals to which the requirements of 42 CFR part 482 apply, including short-term acute care hospitals, LTC hospitals, rehabilitation hospitals, psychiatric hospitals, cancer hospitals, and children's hospitals) and CAHs seeking to be Medicare and Medicaid providers of services must be certified as meeting federal participation requirements. Our conditions of participation (CoPs), conditions for coverage (CfCs), and requirements set out the patient health and safety protections established by the Secretary for various types of providers and suppliers. The specific statutory authority for hospital CoPs is set forth in section 1861(e) of the Act; section 1820(e) of the Act provides similar authority for CAHs. The hospital provision authorizes the Secretary to issue any regulations he or she deems necessary to protect the health and safety of patients receiving services in those facilities; the CAH provision authorizes the Secretary to issue such other criteria as he or she may require. The CoPs are codified in the implementing regulations at part 482 for hospitals, and at 42 CFR part 485, subpart F, for CAHs.

Our CoPs at § 482.42 for hospitals and § 485.640 for CAHs, require that hospitals and CAHs, respectively, have active facility-wide programs, for the surveillance, prevention, and control of healthcare-associated infections (HAIs) and other infectious diseases and for the optimization of antibiotic use through stewardship. Additionally, the programs must demonstrate adherence to nationally recognized infection prevention and control guidelines, as well as to best practices for improving antibiotic use where applicable, and for reducing the development and transmission of HAIs and antibiotic-resistant organisms. Infection prevention and control problems and antibiotic use issues identified in the required hospital and CAH programs must also be addressed in coordination with facility-wide quality assessment and performance improvement (QAPI) programs.

Infection prevention and control is a primary goal of hospitals and CAHs in their normal day-to-day operations, and these programs have been at the center of initiatives taking place in hospitals and CAHs during the PHE for COVID–19. Our regulations at §§ 482.42(a)(3) and 485.640(a)(3) require infection prevention and control program policies to address any infection control issues identified by public health authorities. On March 4, 2020, we issued guidance [10] stating that hospitals should inform infection prevention and control services, local and state public health authorities, and other healthcare facility staff as appropriate about the presence of a person under investigation for COVID–19.

In this IFC, we are now requiring hospitals and CAHs to report information in accordance with a frequency, and in a standardized format, as specified by the Secretary during the PHE for COVID–19. Examples of data elements that may be required to be reported include things such as the number of staffed beds in a hospital and the number of those that are occupied, information about its supplies, and a count of patients currently hospitalized who have laboratory-confirmed COVID–19. This list is not exhaustive of those data items that we may require hospitals and CAHs to submit, as specified by the Secretary (see *https://www.hhs.gov/sites/default/files/covid-19-faqs-hospitals-hospital-laboratory-acute-care-facility-data-reporting.pdf* for the current list of data items specified.).

We believe that universal reporting by all hospitals and CAHs is and will be an important tool for supporting surveillance of COVID–19 and for future planning to prevent the spread of the virus, especially to those most vulnerable and at risk to its effects, and we thank the thousands of hospitals and CAHs that have voluntarily reported this data in support of our efforts. However, while we recognize the important and immeasurable role that the timely and continued delivery of COVID–19 information plays in protecting both individual patients, as well as the overall health of the general public, we also recognize the crucial need for data reporting options that will help eliminate the duplicative and sometimes competing reporting requests that continue to place a significant burden on hospitals and CAHs whose resources are already stressed during this PHE for COVID–19.

We expect that the new reporting requirements that will be specified by the Secretary, would include reporting channel options to make submission of data as user-friendly as possible to reduce the strain and burden hospitals and CAHs are currently experiencing as they face data requests from a multitude of federal, state, local, and private entities. The new standards will require hospitals and CAHs to report information on COVID–19 in a standardized format specified by the Secretary. Also, the information must be reported at a frequency and manner specified by the Secretary.

We believe that a streamlined approach to reporting data will greatly assist the White House Coronavirus Task Force (COVID–19 Task Force) in tracking the movement of the virus and identifying potential problems in the healthcare delivery system. The completeness, accuracy, and timeliness of the data will inform the COVID–19 Task Force decisions on capacity and resource needs to ensure a fully coordinated effort across the nation. Furthermore, we believe that consistent processes and streamlined methods for the reporting of COVID–19 information will possibly reduce future, and urgent, requests for such data.

We note here that the new reporting requirements at §§ 482.42(e) and 485.640(d) do not relieve a hospital or a CAH, respectively, of its obligation to continue to comply with §§ 482.42(a)(3)

[10] *https://www.cms.gov/files/document/qso-20-13-hospitalspdf.pdf-2.*

or 485.640(a)(3), each of which requires a facility to address any infection prevention and control issues identified by public health authorities. We believe that the requirements, as specified in this rule, to collect and transmit these data, will also encourage greater awareness and promotion of best practices in infection prevention and control within these facilities.

This reporting requirement supports our responsibility to protect and ensure the health and safety of hospital and CAH patients by, among other things, ensuring that these facilities follow infection prevention and control protocols based on recognized standards of practice. We believe that these reporting requirements are necessary for CMS to monitor whether individual hospitals and CAHs are appropriately tracking, responding to, and mitigating the spread and impact of COVID–19 on patients, the staff who care for them, and the general public. We believe that this action reaffirms our commitment to protecting the health and safety of all patients who receive care at the approximately 6,200 Medicare- and Medicaid-participating hospitals and CAHs nationwide.

As discussed in section III. of this IFC, ''Waiver of Proposed Rulemaking,'' we believe the urgency of this PHE for COVID–19 constitutes good cause to waive the normal notice-and-comment process under the APA and section 1871(b)(2)(C) of the Act. Waiving notice and comment is in the public interest because time is of the essence in tracking the incidence and impact of COVID–19 in hospitals and CAHs; such information will assist public health officials in detecting outbreaks and saving lives.

The applicability date for § 482.42(e) for hospitals and § 485.640(d) for CAHs is the date of the publication of this rule as noted in the **DATES** section of this IFC.

2. Enforcement of Requirements for Hospitals and Critical Access Hospitals (CAHs) To Report COVID–19 Data

We believe reporting by hospitals and CAHs is an important tool for supporting surveillance of COVID–19 and we will enforce violations of reporting requirements to the extent authorized by the Secretary. Should a hospital or CAH fail to consistently report test results throughout the duration of the PHE for COVID–19, it will be non-compliant with the hospital and the CAH CoPs set forth at §§ 482.42(e) and 485.640(d), respectively, and subject to termination as defined at 42 CFR 489.53(a)(3). We have taken a position on the importance of COVID–19 test results reporting in other provider areas, including use of CMPs for nursing homes that fail to report, and find it prudent to enact penalties for hospitals and CAHs that similarly fail to report COVID–19 test results. CMS currently lacks the statutory authority to impose CMPs against hospitals and CAHs; however, intermediate penalties such as CMPs have been an extremely useful tool in the enforcement of reporting requirements for nursing homes, helping to achieve 98 percent compliance. Therefore, we will continue to utilize all enforcement and payment authorities available to incentivize and promote compliance with all health and safety requirements, as allowed by statute and regulation.

C. Requirements for Laboratories To Report SARS–CoV–2 Test Results During the PHE for COVID–19

Assuring a rapid and thorough public health response to the COVID–19 pandemic relies on having complete and comprehensive laboratory testing data, including standardized test results, relevant demographic details, and additional information that can improve both the response to SARS–CoV–2 and treatment of COVID–19. These data can contribute to understanding disease incidence and trends: Initiating epidemiologic case investigations, assisting with contact tracing, assessing availability and use of testing resources, and identifying supply chain issues for reagents and other material. Laboratory testing data, in conjunction with case reports and other data, also provide vital guidance for mitigation and control activities.

Section 18115(a) of the CARES Act requires every laboratory that performs or analyzes a test that is intended to detect SARS–CoV–2 or to diagnose a possible case of COVID–19 (hereinafter referred to as a ''SARS–CoV–2 test'' or ''COVID–19 diagnostic test'') to report the results from each such test to the Secretary until the end of the PHE for COVID–19. In addition, the statute authorizes the Secretary to prescribe the form and manner, and timing and frequency, of such reporting. As indicated in HHS guidance issued on June 4, 2020,[11] in an effort to receive these data in the most efficient and effective manner, the Secretary has required that all data be reported through existing public health data reporting methods. The June 4, 2020 guidance states that ''as a guiding principle, data should be sent to state or local public health departments using existing reporting channels (in accordance with state law or policies) to ensure rapid initiation of case investigations by those departments, concurrent to laboratory results being shared with an ordering provider, or patient as applicable.'' [12]

The June 4, 2020 guidance further explains that ''all laboratories—including laboratories, testing locations operating as temporary overflow or remote locations for a laboratory, and other facilities or locations performing testing at point of care or with at-home specimen collection related to SARS–CoV–2—shall report data for all testing completed, for each individual tested, within 24 hours of results being known or determined, on a daily basis to the appropriate state or local public health department based on the individual's residence.''

On October 31, 1988, Congress enacted the CLIA (Pub. L. 100–578) (codified as amended at 42 U.S.C. 263a) requiring any laboratory that examines human specimens for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of health, of human beings to be certified by the Secretary for the categories of examinations or procedures performed by the laboratory. The implementing regulations at 42 CFR part 493 specify the conditions and standards that must be met to achieve and maintain CLIA certification. These conditions and standards strengthen federal oversight of clinical laboratories and help ensure the accuracy and reliability of patient test results.

Currently, the CLIA program only collects non-waived testing specialty and subspecialty information from laboratories issued a Certificate of Compliance (CoC), Certificate of Accreditation (CoA), or Certificate of Registration (CoR). Such information is collected for certain specialties, subspecialties, and analytes for proficiency testing purposes and during surveys to ensure that the laboratory is meeting CLIA requirements for the level and specialty/subspecialty of testing performed. CMS does not know the complete universe of laboratories performing SARS–CoV–2 testing, or which tests are being performed as information related to specific test systems is not captured in our database.

While we collect this information when laboratories initially apply for all certificate types, subsequently it is only

[11] COVID–19 Pandemic Response, Laboratory Data Reporting: Section 18115 of the CARES Act, *https://www.hhs.gov/sites/default/files/covid-19-laboratory-data-reporting-guidance.pdf.*

[12] *https://www.hhs.gov/sites/default/files/covid-19-laboratory-data-reporting-guidance.pdf.*

collected for CoC and CoA laboratories during an initial, recertification, validation, or complaint survey, as described above. This data is collected to ensure that such labs are meeting the applicable CLIA test complexity testing quality requirements. Certificate of Waiver (CoW) and Certificate for Provider-Performed Microscopy (PPM) laboratories are not required to submit information related to updating their test menu as long as the new testing falls under their current certificate. During this PHE for COVID–19, the Food and Drug Administration (FDA) is issuing Emergency Use Authorizations for in vitro diagnostics that are categorized to be run by certain CLIA-certified laboratories (which may include laboratories with a CoW or Certificate for PPM), depending on the scope and FDA's categorization of the authorized test. SARS–CoV–2 testing includes molecular, antibody, and antigen methods. Molecular (RT–PCR) tests detect the virus's genetic material and antigen tests detect specific proteins on the surface of the virus. Both types of tests are used to detect active or acute infection with SARS–CoV–2. Serology (antibody) testing is used to look for the presence of antibodies which are proteins produced by the body in response to infections. Due to the variety of COVID–19 testing available, our current informational limitations present a gap in understanding the universe of laboratories performing SARS–CoV–2 testing.

We believe that, by collecting testing information, the CLIA program will be able to identify quality and accuracy issues with laboratories performing SARS–CoV–2 testing during this PHE for COVID–19. Currently we do not have a specific reporting requirement that allows for collection of SARS–CoV–2 testing information. Once we have accurate information on which laboratories are performing SARS–CoV–2 testing, our oversight authority will allow us to survey these laboratories to determine if they are performing testing within their appropriate CLIA certificate and that they are meeting applicable CLIA requirements to perform accurate and reliable testing. For CMS to ensure laboratories are reporting SARS–CoV–2 test results, the CLIA regulations need to be modified to require SARS–CoV–2 test result reporting. In the interest of ensuring quality laboratory testing during the PHE for COVID–19, we are finalizing the requirement for submission of SARS–CoV–2 test results to the Secretary. Specifically, we are finalizing that during the PHE for COVID–19, as defined in § 400.200, each laboratory that performs a SARS–CoV–2 test must report SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe. We are also finalizing that failure to submit SARS–CoV–2 test results to the Secretary will be considered a violation of the new CLIA reporting requirements, resulting in condition level deficiencies for which CMPs or other penalties may apply.

These regulatory amendments at §§ 493.41 and 493.1100(a) will require all laboratories, including, those holding a CoW, to report SARS–CoV–2 test results to the Secretary for the duration of the PHE for COVID–19, and specify that failure to do so will result in a condition level violation of the CLIA regulations. Should a laboratory not report required SARS–CoV–2 test results, we will impose a CMP under §§ 493.1804 and 493.1834.

We are adding or amending the following regulations:

• At § 493.2, Definitions, we are amending the definition of ''Condition level requirements'' to include the requirements in § 493.41. This change is necessary to allow for the imposition of CMPs on CoW laboratories that fail to comply with § 493.41 during the Secretary's PHE declaration for COVID–19 or any extension of such declaration.

• At § 493.41, we are adding a that, for the duration of the PHE for COVID–19, CoW laboratories report SARS–CoV–2 test results to the Secretary.

• At § 493.555, we are amending the provision by adding paragraph (c)(6) requiring that, for the duration of the PHE for COVID–19, CMS-deemed Accreditation Organizations (AO) and State Licensure Programs, Exempt States (ES), notify CMS within 10 days after identifying a laboratory that fails to report SARS–CoV–2 test results as required at §§ 493.41 and 493.1100(a).

• At § 493.1100, we are adding paragraph (a) which requires that, for the duration of the PHE for COVID–19, all laboratories performing non-waived SARS–CoV–2 testing report SARS–CoV–2 test results to the Secretary.

• At § 493.1804, we are revising paragraph (c)(1) to allow us to impose alternative sanctions (including CMPs) on CoW laboratories for failure to comply with §§ 493.41 and 493.1100(a) during the PHE for COVID–19.

• At § 493.1834, we are amending the provision by adding paragraph (d)(2)(iii) to define the per day CMP amounts that may be imposed as a result of SARS–CoV–2 reporting violations. Such CMPs will be $1000 for the first day of noncompliance with the new reporting requirements, and $500 for each subsequent day the laboratory fails to report SARS–CoV–2 test results. The statute allows for the imposition of CMPs in an amount not to exceed $10,000 for each violation (for example, per sample not reported) or for each day of substantial noncompliance. We believe imposing CMPs based on a per day basis is a fairer and more effective penalty for failure to report than a per violation basis. The latter could lead to large CMPs for brief lapses in reporting.

The CLIA regulations at § 493.551(a)(1) require both the AOs and ESs to have requirements that are equal to, or more stringent than, the CLIA condition-level requirements, so we would expect the AOs and ESs to have equivalent reporting requirements to CMS. AOs do not impose CMPs; however, ESs do have the ability to impose CMPs, so we would expect ESs to have an equivalent penalty structure to CMS. The ESs are generally approved by CMS to operate their own oversight programs so we would expect that the two ESs would report these laboratories to CMS, but would then impose the penalties based on their updated CMS-approved standards. In the case of the accredited laboratories, the laboratories identified as not reporting SARS–CoV–2 results as required would result in CMS taking a subsequent enforcement action as described in this section.

D. Quality Reporting: Updates to the Extraordinary Circumstances Exceptions (ECE) Granted for Four Value-Based Purchasing Programs in Response to the PHE for COVID–19, and Update to the Performance Period for the FY 2022 SNF VBP Program

As part of our response to the COVID–19 pandemic, on March 22, 2020, we granted ECEs to ESRD facilities, hospitals, and SNFs to reduce the data collection and reporting burden on these facilities and providers so they could direct their full resources to patient care during the early months of the pandemic. Each of these ECEs relieved these providers and facilities of their obligation to report data for the fourth quarter calendar year (CY) 2019, first quarter CY 2020 and second quarter CY 2020, but we stated that we would score such data if optionally reported.

We continue to believe that the data we have excepted from mandatory reporting under these ECEs serves multiple purposes, including allowing us to understand the impact of the PHE for COVID–19 on quality of care. However, we are concerned about the national comparability of these data due to the geographic differences of COVID–19 incidence rates and hospitalizations, along with different impacts resulting from different state and local laws and policy changes implemented in response to COVID–19.

As a result, we believe it is necessary in this IFC to update the ECEs that we have granted for the following value-based purchasing programs:

- The End-Stage Renal Disease Quality Incentive Program (ESRD QIP);
- The Hospital-Acquired Condition (HAC) Reduction Program;
- The Hospital Readmissions Reduction Program (HRRP); and
- The Hospital Value-Based Purchasing (HVBP) Program.

Under these updated ECEs, we will only score data that was optionally reported for fourth quarter CY 2019. We will also exclude all data that was optionally reported for the first or second quarter of CY 2020 from our calculation of performance. We note that all of the ECEs that have been granted for the time periods discussed above have now ended.

In this IFC, we are also updating the performance period for the FY 2022 SNF VBP Program because we are concerned that using qualifying claims from the two quarters that are not excepted under the ECE for COVID–19 (October 1, 2019 through December 31, 2019 (Q4 2019), and July 1, 2020 through September 30, 2020 (Q3 2020)) for all SNFs nationwide to calculate the SNF Readmission Measure (SNFRM) for the FY 2022 Program will not yield measure scores that reliably reflect SNF quality of care as determined by hospital readmission rates. As explained more fully below, the new performance period will be April 1, 2019 through December 31, 2019 and July 1, 2020 through September 30, 2020.

1. Updates to ESRD QIP: Utilization of Fourth Quarter CY 2019 ESRD QIP Data and the Removal of the Option for Facilities to Opt-Out of the Extraordinary Circumstances Exception (ECE) Granted With Respect to First and Second Quarter (CY) 2020 ESRD QIP Data

a. Background of the ESRD QIP ECE Policy

The ESRD QIP is authorized under section 1881(h) of the Act, and it aims to promote high-quality care in dialysis facilities by linking a portion of their payment under the ESRD prospective payment system (PPS) directly to their performance on quality of care measures. The ESRD QIP assesses facility performance on clinical and reporting measures adopted through the rulemaking process and scores dialysis facilities based on that performance. A facility that does not meet or exceed the minimum total performance score (TPS) set by CMS for the applicable payment year receives up to a 2 percent reduction to its ESRD PPS payment for that year.

In the CY 2015 ESRD PPS final rule (79 FR 66189 through 66190), we adopted an ECE policy for the ESRD QIP, which recognized that there are times when facilities are unable to submit required quality data due to extraordinary circumstances that are not within their control, and that facilities should not be penalized for such circumstances or have their burden unduly increase during these times. This policy was implemented under the authority of section 1881(h)(3)(A)(i) of the Act, which requires the Secretary to develop a methodology for assessing the total performance of each provider of services and renal dialysis facility based on performance standards for the measures selected under section 1881(h)(2) of the Act for a performance period established under section 1881(h)(4)(D) of the Act. We interpreted section 1881(h)(3)(A)(i) of the Act to enable us to configure the methodology for assessing facilities' total performance such that we would not require a facility to submit, nor penalize a facility for failing to submit, data on any ESRD QIP quality measure data from any month in which a facility is granted an ECE.

In the CY 2018 ESRD PPS final rule (82 FR 50761 through 50763), we modified the requirements for the ESRD QIP's ECE policy to further align that policy with the ECE policy adopted by other quality reporting and VBP programs. In the CY 2020 ESRD PPS final rule (84 FR 60714), we codified requirements for the ECE policy at 42 CFR 413.178(d)(3) through (7), including a new option for facilities to reject an ECE granted by CMS under certain circumstances. We stated that this option would provide facilities with flexibility under the ECE policy. We also adopted this provision to provide further guidance to the public on the scope of our ECE policy.

b. Background of the ESRD QIP ECE Granted in Response to the PHE for COVID–19

On March 22, 2020, in response to COVID–19, we announced relief for clinicians, providers, hospitals and facilities participating in Medicare quality reporting programs (QRPs) and VBP programs.[13] On March 27, 2020, we published a supplemental guidance memorandum that described in more detail the scope and duration of the ECE we were granting under each Medicare QRP and VBP program.[14]

Under the ECE for the PHE for COVID–19 that we granted to all facilities participating in the ESRD QIP, such facilities are currently excepted from the following reporting requirements and submission deadlines:

- For the National Healthcare Safety Network (NHSN) blood stream infection (BSI) clinical measure and NHSN Dialysis Event reporting measure:

++ March 31, 2020, June 30, 2020, September 30, 2020 reporting deadlines for encounters during the following periods:

—October 1, 2019 to December 31, 2019 (Q4 2019)—We noted that data from the 4th quarter 2019 would be utilized if submitted.

—January 1, 2020 to March 30, 2020 (Q1 2020).

—April 1, 2020 to June 30, 2020 (Q2 2020).

- For ESRD QIP CROWNWeb reporting deadlines and applicable clinical months:

++ March 31, 2020 (January 2020 clinical month).

++ April 30, 2020 (February 2020 clinical month).

++ June 1, 2020 (March 2020 clinical month).

++ June 30, 2020 (April 2020 clinical month).

++ August 3, 2020 (May 2020 clinical month).

++ August 31, 2020 (June 2020 clinical month).

- For the Consumer Assessment of Healthcare Providers and Systems In-Center Hemodialysis (ICH–CAHPS) Survey:

++ The data collected to fulfill the July 2020 data submission deadline for the Spring 2020 Survey.

++ Data collected May 1, 2020–July 10, 2020.

- For ESRD QIP claims-based measures, claims data during the following times would be excluded from measure calculations:

++ March 1, 2020–June 30, 2020.

With respect to the requirement that facilities selected for validation under one or both ESRD QIP data validation studies (CROWNWeb and NHSN) submit medical records within 60 days of the date identified on the written request letter, we excepted facilities from that requirement as follows:

- NHSN and CROWNWeb record requests for discharge periods:

++ January 1, 2019–March 31, 2019 (Q1 2019).

[13] CMS press release available at *https://www.cms.gov/newsroom/press-releases/cms-announces-relief-clinicians-providers-hospitals-and-facilities-participating-quality-reporting.*

[14] CMS memorandum available at *https://www.cms.gov/files/document/guidance-memo-exceptions-and-extensions-quality-reporting-and-value-based-purchasing-programs.pdf.*

++ April 1, 2019–June 30, 2019 (Q2 2019).

In the March 27, 2020 guidance, we also advised that facilities should be aware of the potential subsequent impact to a facility's TPS when data are excluded from score calculations, and noted that facilities impacted by COVID–19 could elect to opt out of this ECE by emailing their request to the ESRD QIP at *esrdqip@cms.hhs.gov* by June 19, 2020.

c. Update to the ESRD QIP ECE Policy for the PHE for COVID–19

We continue to believe that the ESRD QIP data we have excepted serves multiple purposes, including allowing us to understand the impact of the PHE for COVID–19 on the quality of ESRD care provided to Medicare beneficiaries and supporting the continued analysis and evaluation of ESRD quality data submitted to CROWNWeb. However, we are concerned about the national comparability of these data due to the geographic differences of COVID–19 incidence rates and hospitalizations, along with different impacts resulting from different state and local law and policy changes implemented in response to COVID–19. For these reasons, we are adopting in this IFC two updates to our current ECE policy for the ESRD QIP. First, we are updating our regulations at 42 CFR 413.178(d)(7) to state that a facility has opted out of the ECE for COVID–19 with respect to the reporting of fourth quarter 2019 NHSN data if the facility actually reported the data by the March 31, 2020 deadline but did not notify CMS that it would do so. Additionally, we are removing the ability of facilities to opt-out of the ECE we granted with respect to Q1 and Q2 2020 ESRD QIP data.

i. CY 2019 Fourth Quarter NHSN ESRD QIP Measure Data

As described previously, we excepted facilities from the requirement to report fourth quarter CY 2019 data for the NHSN BSI clinical measure and NHSN Dialysis Event reporting measure to alleviate the reporting burden on facilities responding to the PHE for COVID–19 that would otherwise be required to report these data by the March 31, 2020 submission deadline. However, in both the March 22nd and March 27th guidance we also stated that we would utilize these data if submitted. At the time we announced the ECE for COVID–19, there were approximately 9 days (time period between March 22, 2020 to March 31, 2020) remaining for facilities to submit their fourth quarter 2019 NHSN data, and nearly all facilities (97.6 percent) timely reported fourth quarter 2019 ESRD QIP data on these measures. These data also assess facility performance prior to the start of the PHE for COVID–19. Unlike the first and second quarter 2020 data, we do not have concerns about the national comparability or representativeness of the fourth quarter 2019 NHSN data because those data reflect facility performance prior to the start of the PHE for COVID–19. In addition, nearly all facilities reported these data prior to the announcement of the ECE with the expectation that they would be used for scoring. Accordingly, we are updating our regulations at § 413.178(d)(7) to state that a facility has opted out of the ECE for COVID–19 with respect to the reporting of fourth quarter 2019 NHSN data if the facility actually reported the data by the March 31, 2020 submission deadline but did not notify CMS that it would do so, and we will include these data when we calculate facility TPSs for PY 2021 and performance standards for PY 2023. This change will enable us to use the data which, as we explain above, are reflective of facility performance and were reported with the expectation that they would be used for scoring. This change is also consistent with our statement in the ECE announcement that we would score these data if they were submitted. A facility that did not timely report its fourth quarter 2019 NHSN BSI clinical measure and NHSN Dialysis Event reporting measure data will not be eligible to receive scores on those measures for PY 2021.

ii. CY 2020 First and Second Quarter ESRD QIP Data

Under our current policy, facilities may opt out of the ECE we proactively granted in response to the PHE for COVID–19, and continue to report ESRD QIP data. We implemented this policy to give facilities flexibility to continue to report, in particular where a facility does not believe it has been impacted by the extraordinary circumstance(s). We do not believe that is the case here, as the PHE for COVID–19 is a nationwide PHE and an overwhelming majority of facilities continue to be impacted by COVID–19. For example, regardless of protocols in place at facilities, dialysis patients concerned about being exposed to COVID–19 at a facility may decide to skip their treatment sessions.[15] This could be reflected in quality metrics captured for the facility when the patients return to treatment. Furthermore, due to the national nature of this PHE for COVID–19, we believe performance scores for certain measures could be biased and not reflective of nationally comparable performance. Similarly, we are concerned that there may be indirect and unintended consequences of calculating scores using potentially biased data that may not reflect the facility's overall quality. Due to facilities having the option to submit or not submit data for this period, the data may not provide a nationally comparable assessment of performance. Thus, reporting bias is possible due to the voluntary submission of data; that is, a bias could be potentially introduced because only high performers and/or facilities not impacted or better resourced would choose to submit data, while impacted facilities and/or facilities with fewer resources would choose not to submit data. This would affect comparisons between facilities with different circumstances, and would not be in keeping with the program goal of national comparison. Therefore, we believe that it would be inappropriate to include data submitted regarding care provided during first and second quarter CY 2020 in our calculation of a facility's TPS, which is used to determine each facility's payment adjustment. Therefore, we are revising the opt out policy currently codified at § 413.178(d)(7) to provide that the opt out policy does not apply to data excepted due to the PHE for COVID–19 with—that is, the first quarter and second quarters of CY 2020 ESRD QIP data.

Finally, although the ECE we granted for the ESRD QIP has ended, with data collection and reporting requirements having resumed July 1, 2020, we understand that geographic differences in COVID–19 incidence continue to change during the PHE for COVID–19. To maintain flexibility for addressing the impact of COVID–19 on the ESRD QIP and determine how best to implement the program equitably, we are announcing in this IFC that if, as a result of an extension of the ECE for the whole country that we grant without a request or the submission of individual ECE requests, we do not have enough data to reliably measure national performance under the ESRD QIP, we may propose to not score facilities based on such limited data or make the associated payment adjustments to facilities under the ESRD PPS for the affected program year. For example, if we granted an ECE that excepted facilities from the requirement to report data for 11 of the 12 months of a given performance period, we would consider

[15] See *https://www.kidney.org/coronavirus/dialysis-covid-19.*

not scoring or applying payment adjustments for the associated ESRD QIP payment year because data from the one non-excepted month may not be large enough to calculate reliable measure results for scoring purposes. Although the data themselves may be accurate, the measure(s) might not meet the reliability standards because of the small sample of the remaining non-excepted part of the performance period.[16] In addition, in the scenario we describe above, it is plausible that only larger facilities would be able to meet the required case minimums to be scored in the non-excepted part of the performance period. We may conclude that only scoring remaining facilities would not produce an accurate national comparison of dialysis facilities. Alternatively, if we do not extend the ECE to cover Q3 and Q4 2020, it is possible that a majority of facilities might still submit individual ECE requests for those quarters and it is possible that so many facilities will submit individual ECE requests that we will not be able to produce a reliable national comparison. In both cases, we are concerned about using the measures calculated based on these data to score facilities under the ESRD QIP and base payment adjustments on those scores. If circumstances warrant, we may propose to suspend prospective application of program penalties or payment adjustments through the annual ESRD PPS proposed rule. However, in the interest of time and transparency, we may provide subregulatory advance notice of our intentions to suspend such penalties and adjustments through routine communication channels to facilities, vendors, and Quality Improvement Organizations (QIOs). The communications could include memos, emails, and notices on the public QualityNet website (*https://www.qualitynet.org/*). We welcome public comments on the update to our regulations at § 413.178(d)(7) to consider a facility as having opted out of the ECE with respect to NHSN data reported for Q4 2019 if the facility actually reported the data by the submission deadline, without notifying CMS, and we will include these data when we calculate facility TPSs for PY 2021 and performance standards for PY 2023. We also welcome public comments on the exception we are finalizing to the ECE opt out policy for the ESRD QIP, and we will exclude any ESRD QIP data that facilities optionally reported during Q1 and Q2 2020 from our calculation of Payment Year 2022 TPSs and from the baseline for PY 2023.

2. Updates to the Application of the HAC Reduction Program ECE Policy in Response to the PHE for COVID–19

a. Background of the HAC Reduction Program ECE Policy

The Hospital-Acquired Condition Reduction Program (''HAC Reduction Program'') is authorized under section 1886(p) of the Act and it aims to heighten awareness of HACs and reduce the number of incidences that occur through implementing the payment adjustments authorized under such statute. The HAC Reduction Program began affecting hospitals' Medicare payments with FY 2015 discharges (that is, October 1, 2014). In the FY 2016 Inpatient Prospective Payment System (IPPS)/Long-term Care Hospitals (LTCH) PPS final rule (80 FR 49579 through 49581), we adopted an ECE policy for the HAC Reduction Program, which recognized that there may be periods of time during which a hospital is affected by an extraordinary circumstance beyond its control. We noted that we considered the feasibility and implications of excluding data for certain measures for a limited period of time from the calculations of the hospital's measure results or Total HAC Score for the applicable performance period. We expressed our aim to minimize data excluded from the program to allow affected hospitals to continue to participate in the HAC Reduction Program for a given year if these hospitals continue to meet applicable measure minimum threshold requirements. We further observed that section 1886(p)(4) of the Act permits the Secretary to determine the applicable period for HAC data collection, and we interpreted the statute to allow us to determine that the period not include times when hospitals may encounter extraordinary circumstances. This policy was similar to the ECE policy for the Hospital Inpatient QRP, as initially adopted in the FY 2012 IPPS/LTCH PPS final rule (76 FR 51651), and modified in the FY 2014 IPPS/LTCH PPS final rule (78 FR 50836) and the FY 2015 IPPS/LTCH PPS final rule (79 FR 50277).

In the FY 2016 IPPS/LTCH PPS final rule (80 FR 49580 through 49581), we also stated that this policy would not preclude CMS from granting ECEs to hospitals that do not request them if we determine at our discretion that a disaster or other extraordinary circumstance has affected an entire region or locale. We noted that if CMS makes such a determination to grant an ECE to hospitals in an affected region or locale, we will convey this decision through routine communication channels to hospitals, vendors, and QIOs, including, but not limited to, issuing memos, emails, and notices on the QualityNet website. When time permits we will also communicate such decisions through the annual IPPS/LTCH PPS proposed rule.

In the FY 2018 IPPS/LTCH PPS final rule (82 FR 38276 through 38277), we modified the requirements for the HAC Reduction Program ECE policy to further align with the process used by other QRP and VBP programs for requesting an exception from program reporting due to an extraordinary circumstance not within a provider's control.

b. Background of the HAC Reduction Program ECE Granted for the PHE for COVID–19

On March 22, 2020, in response to COVID–19, we announced relief for clinicians, providers, hospitals, and facilities participating in Medicare QRPs and VBP programs.[17] On March 27, 2020, we published a supplemental guidance memorandum that described in more detail the scope and duration of the ECEs we were granting under each Medicare QRP and VBP program.[18]

Under the ECE granted to all eligible hospitals under the HAC Reduction Program, we stated that qualifying claims would be excluded from the measure calculations for the CMS Patient Safety Indicators (PSI) 90 during the periods January 1, 2020–March 31, 2020 (Q1 2020) and April 1, 2020–June 30, 2020 (Q2 2020). We also provided an exception to reporting for all chart-abstracted HAC Reduction Program measures for the May, August, and November 2020 submission deadlines (for reporting Q4 2019, Q1 2020, and Q2 2020 data, respectively). This exception includes the following NHSN HAI Measures:

++ NHSN Catheter-Associated Urinary Tract Infection (CAUTI) Outcome Measure, National Quality Forum (NQF) #0138.

++ NHSN Central Line-Associated Blood Stream Infection (CLABSI) Outcome Measure, NQF #0139.

++ NHSN Facility-wide Inpatient Hospital-onset *Clostridium difficile*

[16] See *http://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=86453 and* choose the ''Evaluation Guidance'' link.

[17] CMS press release available at *https://www.cms.gov/newsroom/press-releases/cms-announces-relief-clinicians-providers-hospitals-and-facilities-participating-quality-reporting.*

[18] CMS memorandum available at *https://www.cms.gov/files/document/guidance-memo-exceptions-and-extensions-quality-reporting-and-value-based-purchasing-programs.pdf.*

Infection (CDI) Outcome Measure, NQF #1717.

++ NHSN Facility-wide Inpatient Hospital-onset Methicillin-Resistant *Staphylococcus aureus* (MRSA) Bacteremia Outcome Measure, NQF #1716.

++ American College of Surgeons—Centers for Disease Control and Prevention Harmonized Procedure Specific Surgical Site Infection (SSI) Outcome Measure, NQF #0753.

We also advised that hospitals should be aware of the potential subsequent impact to the HAC Reduction Program minimum case threshold counts for inclusion in these programs.

c. Update to the HAC Reduction Program ECE Granted in Response to the PHE for COVID–19

We continue to believe that the HAC Reduction Program data we have excepted serves multiple purposes, including allowing us to understand the impact of the PHE for COVID–19 on quality of care. Furthermore, the chart-abstracted measures in the HAC Reduction Program are calculated based on data submitted to the CDC's NHSN. We recognize that because the CDC uses the same data for epidemiological surveillance, hospitals may have reporting requirements which are not affected by our ECE (for example, state requirements). We are also concerned with the national comparability of these data due to the geographic differences of COVID–19 incidence rates and hospitalizations along with different impacts resulting from different state and local law and policy changes implemented in response to COVID–19.

For data which hospitals optionally report, we believe that the exception granted for those programs with data submission deadlines in April and May 2020 (that is, data from the fourth quarter of CY 2019) is distinct from the exceptions granted because data collected may be greatly impacted by the response to COVID–19 (that is, data from the first and second quarters of CY 2020).

i. CY 2019 Fourth Quarter Data

As described previously, we excepted hospitals from the requirement to report fourth quarter CY 2019 data for the HAC Reduction Program to alleviate the reporting burden on hospitals that were responding to the PHE for COVID–19 during the May 18, 2020 data submission deadline. However, nearly all hospitals (95.3 percent) reported these data by the submission deadline, which reflects care provided prior to January 27, 2020, which is the start of the PHE for COVID–19 under the Secretary's declaration of a PHE under section 319 of the PHSA. Therefore, we determined that it would be appropriate to include data that were optionally reported by hospitals for the fourth quarter of CY 2019 in calculating hospitals' Total HAC Scores, which are used to determine the worst-performing 25 percent of hospitals on HAC performance for assessing the 1 percent HAC Reduction Program penalty. This determination is consistent with the policy stated in the March 27, 2020 guidance memo.[19]

ii. CY 2020 First and Second Quarter Data

In our application of the ECE policy for the PHE for COVID–19, we excepted hospitals from the requirement to report first and second quarter of CY 2020 HAC Reduction Program chart-abstracted measures and stated we would exclude qualifying claims both because we hoped to alleviate the reporting burden on hospitals that were responding to the PHE for COVID–19 and because of our concern that the representativeness of the data collected during this period may be greatly impacted by the response to COVID–19.

We also noted that if hospitals optionally chose to report data, we would use that data for program calculations. While we continue to encourage optional submission of data, we also aim to have the most representative comparison of hospital performance as possible and do not wish to unfairly penalize hospitals that were responding to COVID–19. We believe that using CY 2020 optionally reported data may not provide a nationally comparable assessment of hospital performance for multiple reasons. First, allowing hospitals the option to voluntarily submit for this period may introduce reporting bias; that is, a bias introduced because, for example, only high performers and/or hospitals not impacted or better resourced would choose to submit data, which would render comparisons between hospitals with different circumstances not in keeping with the program goal of national comparison. In addition, a number of other factors could also contribute to our ability to accurately calculate a national comparison. For example, geographic differences in COVID–19 incidence rates and COVID–19 related hospitalizations and differences resulting from changes in referral and hospitalization patterns could both impact the national comparability of optionally submitted data. Because the HAC Reduction Program relies on a relative scoring methodology, we believe that it would be inappropriate and could disparately impact hospitals to include data from quarters excepted under CMS guidance for the PHE for COVID–19 in our calculation of hospitals' performance for the program.

Finally, although the ECE we granted for the HAC Reduction Program has ended, with data collection and reporting requirements resuming July 1, 2020, we understand that geographic differences in COVID–19 incidence continue to change during the PHE for COVID–19. To maintain flexibility for addressing the impact of COVID–19 on the HAC Reduction Program and determine how best to implement the program equitably, we are announcing that if, as a result of the extension of the ECE for the whole country that we grant without a request or the submission of individual ECE requests, we do not have enough HAC Reduction Program data to reliably measure national performance, we may propose to not score hospitals based on such limited data or make the associated payment adjustments to hospitals under the IPPS for the affected program year. If we grant another ECE in the future, we would not require that hospitals report the excepted data for the duration of the ECE. Although a hospital may voluntarily report data during the ECE, we may determine that such data will not be used for scoring purposes. We would still require that hospitals report the non-excepted data. However, we may determine that it would be inappropriate to score such data or base payment adjustments on it because of reliability concerns. For illustrative purposes only, if a PHE excepted enough quarters from the HAC Reduction Program's 24-month performance period to lead to unreliable measure calculations, we might consider not scoring for the fiscal year because the sample may not be large enough to calculate reliable measure results for scoring purposes. Although the data itself may be accurate, the measure(s) may not meet the reliability standards because of the small sample of the remaining non-excepted part of the performance period. In addition, in the scenario we describe above, it is likely that only larger hospitals would be able to meet the required case minimums to be scored in the non-excepted part of the performance period. We may conclude that only scoring those remaining large hospitals will not produce an accurate national

[19] CMS memorandum available at *https://www.cms.gov/files/document/guidance-memo-exceptions-and-extensions-quality-reporting-and-value-based-purchasing-programs.pdf.*

comparison of hospitals. Alternatively, if we do not extend the ECE to cover Q3 and Q4 2020, it is possible that a majority of providers may still submit individual ECE requests for those quarters and it is possible that so many hospitals will submit individual ECE requests that we will not be able to produce a reliable national comparison. In both cases, we are concerned about using the measure calculated based on these data to score hospitals under the HAC Reduction Program and base payment adjustments on those scores. If circumstances warrant, we may propose to suspend prospective application of program penalties or payment adjustments through the annual IPPS/LTCH PPS proposed rule. However, in the interest of time and transparency, we may provide subregulatory advance notice of our intentions to suspend such penalties and adjustments through routine communication channels to hospitals, vendors, and Quality Improvement Organizations (QIOs). The communications could include memos, emails, and notices on the public QualityNet website (*https://www.qualitynet.org/*). We welcome public comments on our policy to exclude any data submitted regarding care provided during the first and second quarter of CY 2020 from our calculation of performance for the FY 2022 and FY 2023 program years.

3. Update to the HRRP ECE Granted in Response to the PHE for COVID–19

a. Background of the Hospital Readmissions Reduction Program ECE Policy

In the FY 2016 IPPS/LTCH PPS final rule (80 FR 49542 through 49543), we adopted an ECE policy for the Hospital Readmissions Reduction Program, which recognized that there may be periods of time during which a hospital is not able to submit all claims (from which readmission measures data are derived) in an accurate or timely fashion due to an extraordinary circumstance beyond its control. We noted that we considered the feasibility and implications of excluding data for certain measures for a limited period of time from the calculations for a hospital's excess readmissions ratios for the applicable performance period. We expressed that we hoped to minimize data excluded from the program to allow affected hospitals to continue to participate in the HRRP for a given year if these hospitals otherwise continue to meet applicable measure minimum threshold requirements. We further observed that section 1886(q)(5)(D) of the Act permits the Secretary to determine the applicable period for readmissions data collection, and we interpreted the statute to allow us to determine that the period not include times when hospitals may encounter extraordinary circumstances. This policy was similar to the ECE policy for the Hospital Inpatient Quality Reporting (IQR) Program, as initially adopted in the FY 2012 IPPS/LTCH PPS final rule (76 FR 51651), and modified in the FY 2014 IPPS/LTCH PPS final rule (78 FR 50836) and the FY 2015 IPPS/LTCH PPS final rule (79 FR 50277).

In the FY 2016 IPPS/LTCH PPS final rule (80 FR 49542), we also stated that this policy would not preclude CMS from granting ECEs to hospitals that do not request them if we determined at our discretion that a disaster or other extraordinary circumstance has affected an entire region or locale. We noted that if CMS made such a determination to grant an ECE to hospitals in an affected region or locale, we would convey this decision through routine communication channels to hospitals, vendors, and QIOs, including, but not limited to, issuing memos, emails, and notices on the QualityNet website.

In the 2018 IPPS/LTCH PPS final rule (82 FR 38239), we modified the requirements for the HRRP ECE policy to further align with the processes used by other QRP and VBP programs for requesting an exception from program reporting due to an extraordinary circumstance not within a provider's control.

b. Background of the HRRP ECE Granted for the PHE for COVID–19

On March 22, 2020, in response to COVID–19, CMS announced relief for clinicians, providers, hospitals and facilities participating in Medicare QRPs and VBP programs.[20] Specifically, we announced that we were granting ECEs for certain data reporting requirements and submission deadlines for the first and second quarters of CY 2020. On March 27, 2020, we published a supplemental guidance memorandum that described the scope and duration of the ECEs we were granting under each Medicare QRP and VBP program.[21]

Under the ECE for the PHE for COVID–19 that we granted to all hospitals subject to the HRRP, qualifying claims from January 1, 2020 through March 31, 2020 (Q1 2020) and April 1, 2020 through June 30, 2020 (Q2 2020) will be excluded from the measure calculations for the readmission measures used in the program. We also advised that hospitals should be aware of the potential subsequent impact to the HRRP minimum case threshold counts for inclusion in this program.

c. Update to the HRRP ECE Granted in Response to the PHE for COVID–19

We continue to believe that the readmissions claims data we have excepted serve multiple purposes, including allowing us to understand the impact of the PHE for COVID–19 on the quality of care provided to Medicare beneficiaries. However, we are concerned that excess readmission ratios calculated using excepted claims data could affect the national comparability of these data due to the geographic differences of COVID–19 incidence rates and hospitalizations along with different impacts resulting from different state and local law and policy changes implemented in response to COVID–19. Thus, the excess readmission ratios and payment adjustments calculated from excepted data during the PHE for COVID–19 may not provide a nationally comparable assessment of performance in keeping with the program goal of national comparison.

i. CY 2019 Fourth Quarter Data

Data were not excepted from the fourth quarter of CY 2019 from the HRRP. The readmissions measures used to evaluate performance are claims-based measures and do not require hospitals to report data to CMS. Additionally, we believe that the quality measure data regarding care provided prior to the PHE would not be affected by the PHE for COVID–19.

ii. CY 2020 First and Second Quarter Data

In our application of the ECE policy for the PHE for COVID–19, we excepted the use of claims data from the first and second quarters of CY 2020 from the HRRP because of our concern that the data collected during this period may be greatly impacted by the response to COVID–19, and therefore, may not be reflective of a hospital's performance during this time due to concerns with national comparability, as described above. Therefore, we believe that it would be inappropriate to include claims data submitted regarding care provided during first and second quarter CY 2020 in our calculation of a hospital's performance that assesses their performance as compared to other

[20] CMS press release available at *https://www.cms.gov/newsroom/press-releases/cms-announces-relief-clinicians-providers-hospitals-and-facilities-participating-quality-reporting.*

[21] CMS memorandum available at *https://www.cms.gov/files/document/guidance-memo-exceptions-and-extensions-quality-reporting-and-value-based-purchasing-programs.pdf.*

hospitals in the nation to determine penalties for excess readmissions.

Finally, although the ECE we granted for HRRP has ended, with data collection and reporting requirements having resumed July 1, 2020, we understand that geographic differences in COVID–19 incidence continue to change during the PHE for COVID–19. To maintain flexibility for addressing the impact of COVID–19 on HRRP and determine how best to implement the program equitably, we are announcing in this IFC that if, as a result of the extension of the ECE for the whole country that we grant without a request or the submission of individual ECE requests, we do not have enough data to reliably measure national performance, we may propose to not score hospitals based on such limited data or make the associated payment adjustments to hospitals under the IPPS for the affected program year. If we grant another ECE in the future, we would not require that hospitals report the excepted data for the duration of the ECE. Although a hospital may report data during the ECE, we may determine that such data will not be used for scoring purposes. We would still require that hospitals report the non-excepted data. However, we may determine that it would be inappropriate to score such data or base payment adjustments on it because of reliability concerns. For illustrative purposes only, if a PHE excepted enough quarters from the HRRP 36-month performance period to lead to unreliable measure calculations, we might consider not scoring for the entire year because the sample may not be large enough to calculate reliable measure results for scoring purposes. Although the data itself may be accurate, the measure(s) may not meet the reliability standards because of the small sample of the remaining non-excepted part of the performance period. In addition, in the scenario we describe above, it is likely that only larger hospitals would be able to meet the required case minimums to be scored in the non-excepted part of the performance period. We may conclude that only scoring those remaining large hospitals will produce an accurate national comparison of hospitals. Alternatively, if we do not extend the ECE to cover Q3 and Q4 2020, it is possible that a majority of providers may still submit individual ECE requests for those quarters and it is possible that so many hospitals will submit individual ECE requests that we will not be able to produce a reliable national comparison. In both cases, we are concerned about using the measures calculated based on these data to score hospitals under the HRRP and base payment adjustments on those scores. If circumstances warrant, we may propose to suspend prospective application of program penalties or payment adjustments through the annual IPPS/LTCH PPS proposed rule. However, in the interest of time and transparency, we may provide subregulatory advance notice of our intentions to suspend such penalties and adjustments through routine communication channels to facilities, vendors, and QIOs). The communications could include memos, emails, and notices on the public QualityNet website (*https://www.qualitynet.org/*).

We welcome public comments on our policy to exclude any data submitted regarding care provided during first and second quarter of CY 2020 from our calculation of performance for FY 2022, FY 2023, and FY 2024.

4. Update to the Hospital VBP Program ECE Granted in Response to the PHE for COVID–19

a. Background of the Hospital VBP ECE Policy

In the FY 2014 IPPS/LTCH final rule (78 FR 50704 through 50707), we finalized a disaster/ECE policy for the Hospital VBP Program. We stated that, upon a hospital's request, we will consider providing an exception from the Hospital VBP Program requirements to hospitals affected by natural disasters or other extraordinary circumstances (78 FR 50704 through 50706). Specifically, we stated that we interpreted the minimum number of cases and measures requirement in sections 1886(o)(1)(C)(ii)(III) and (IV) of the Act to not include any measures or cases for which a hospital has submitted data during a performance period for which the hospital has been granted a Hospital VBP Program ECE.

In the May 8th COVID–19 IFC (85 FR 27550), we modified the Hospital VBP Program's ECE policy to allow us to grant ECE exceptions to hospitals which have not requested them when we determine that an extraordinary circumstance that is out of their control, such as an act of nature (for example, a hurricane) or PHE (for example, the COVID–19 pandemic), affects an entire region or locale, in addition to retaining the individual ECE request policy (85 FR 27597 through 27598). We stated that if we grant an ECE to hospitals located in an entire region or locale under this revised policy and, as a result of granting that ECE, one or more hospitals located in that region or locale does not report the minimum number of cases and measures required to enable us to calculate a TPS for that hospital for the applicable program year, the hospital will be excluded from the Hospital VBP Program for the applicable program year. We also stated that a hospital that does not report the minimum number of cases or measures for a program year will not receive a 2 percent reduction to its base operating diagnosis-related group (DRG) payment amount for each discharge in the applicable program year, and will also not be eligible to receive any value-based incentive payments for the applicable program year. We referred readers to the FY 2020 IPPS/LTCH PPS final rule (84 FR 42399 through 42400) for the minimum number of measures and cases that we currently require hospitals to report in order to receive a TPS for a program year under the Hospital VBP Program.

b. Background of the Hospital VBP Program ECE Granted in Response to the PHE for COVID–19

On March 22, 2020, in response to COVID–19, CMS announced relief for clinicians, providers, hospitals, and facilities participating in Medicare QRPs and VBP programs.[22] On March 27, 2020, CMS published a supplemental guidance memorandum that described in more detail the scope and duration of the ECEs we were granting under each Medicare QRP and VBP program.[23]

Specifically, we granted an ECE for the PHE for COVID–19 to all hospitals participating in the Hospital VBP Program for the following reporting requirements:

• Hospitals will not be required to report data for the NHSN HAI measures and Hospital Consumer Assessment of Healthcare Providers and Systems (HCAHPS) survey for the following quarters: October 1, 2019 through December 31, 2019 (Q4 2019), January 1, 2020 through March 31, 2020 (Q1 2020), and April 1, 2020 through June 30, 2020 (Q2 2020). However, hospitals can optionally submit part or all of these data by the posted submission deadlines on the Hospital VBP Program QualityNet site (available at *https://www.qualitynet.org/inpatient/iqr/participation*). This includes the following specific measures:

++ HCAHPS, NQF #0166.

[22] CMS press release available at *https://www.cms.gov/newsroom/press-releases/cms-announces-relief-clinicians-providers-hospitals-and-facilities-participating-quality-reporting.*

[23] CMS memorandum available at *https://www.cms.gov/files/document/guidance-memo-exceptions-and-extensions-quality-reporting-and-value-based-purchasing-programs.pdf.*

++ NHSN Catheter-Associated Urinary Tract Infection (CAUTI) Outcome Measure, NQF #0138.

++ NHSN CLABSI Outcome Measure, NQF #0139.

++ NHSN Facility-wide Inpatient Hospital-onset CDI Outcome Measure, NQF #1717.

++ NHSN Facility-wide Inpatient Hospital-onset MRSA Bacteremia Outcome Measure, NQF #1716.

++ American College of Surgeons—Centers for Disease Control and Prevention Harmonized Procedure SSI Outcome Measure, NQF #0753.

In the March 27, 2020 guidance, we also advised that hospitals should be aware of the potential subsequent impact to its Hospital VBP Program minimum case threshold counts for inclusion in that program, and that data from the impacted quarters for the HCAHPS survey and HAI measures would be used if submitted voluntarily.

- The ECE also stated that we would exclude qualifying claims data from measure calculations for the following quarters: January 1, 2020 through March 31, 2020 (Q1 2020) and April 1, 2020 through June 30, 2020 (Q2 2020). This exception applies to the following measures:

++ Medicare Spending Per Beneficiary (MSPB)-Hospital, NQF #2158.

++ Hospital 30-Day, All Cause, Risk-Standardized Mortality Rate Following Acute Myocardial Infarction (AMI) 30-Day Mortality Rate, NQF #0230.

++ Hospital 30-Day, All Cause, Risk-Standardized Mortality Rate Following Heart Failure (HF) 30-Day Mortality Rate, NQF #0229.

++ Hospital 30-Day, All Cause, Risk-Standardized Mortality Rate Following Pneumonia (PN) 30-Day Mortality Rate, NQF #0468.

++ Hospital-Level Risk-Standardized Complication Rate Following Total Hip Arthroplasty (THA)/Total Knee Arthroplasty Complication Rate (TKA), NQF #1550.

++ Hospital 30-Day, All Cause, Risk-Standardized Mortality Rate Following Chronic Obstructive Pulmonary Disease (COPD) 30-Day Mortality Rate, NQF #1893.

++ Hospital 30-Day, All Cause, Risk-Standardized Mortality Rate Following Coronary Artery Bypass Grafting (CABG) 30-Day Mortality Rate, NQF #2558.

c. Update to the Hospital VBP ECE Granted in Response to the PHE for COVID–19

We continue to believe that the Hospital VBP Program data we have excepted serves multiple purposes, including allowing us to understand the impact of COVID–19 on quality of care. Furthermore, the HAI measures in the Hospital VBP Program are not abstracted from claims and are calculated based on data submitted to the CDC through the NHSN. We recognize that the CDC separately collects the same data for epidemiological surveillance and that hospitals may have other reporting requirements which are not affected by our ECE (for example, state requirements). We are concerned with the national comparability of these data due to the geographic differences of COVID–19 incidence rates and hospitalizations along with different impacts resulting from different state and local law and policy changes implemented in response to COVID–19. For these reasons, and as discussed more fully below, we are revising the current ECE we granted for the Hospital VBP Program with respect to first and second quarter CY 2020 excepted data. Under the revised ECE, we will not use any first or second quarter CY 2020 excepted Hospital VBP data that hospitals optionally reported to calculate total performance scores for the FY 2022 through FY 2025 program years or baseline scores for the FY 2024 through FY 2030 program years. We will still use optionally reported fourth quarter CY 2019 Hospital VBP Program data to calculate TPSs for those hospitals for the FY 2021 through FY 2024 program years and baseline scores for the FY 2026 through FY 2029 program years because, as explained below, we believe that the exception granted for those programs with data submission deadlines in April and May 2020 (that is, data from the fourth quarter of CY 2019) is distinct from the exceptions granted because data collected may be greatly impacted by the response to COVID–19 (that is, data from the first and second quarters of CY 2020).

i. CY 2019 Fourth Quarter Hospital VBP Program HAI and HCAHPS Data

We excepted hospitals from the requirement to report fourth quarter CY 2019 HAI and HCAHPS data for the HVBP Program to alleviate the reporting burden on hospitals that were responding to the PHE for COVID–19 that would otherwise be required to report these data by the May 18, 2020 and April 1, 2020 submission deadlines, respectively. However, we believe that the quality measure data regarding care provided prior to the PHE for COVID–19 would not be affected. Additionally, as of April 2020, 92.6 percent of hospitals submitted fourth quarter CY 2019 HAI data. Therefore, we are not making changes to the Hospital VBP Program ECE that we granted with respect to these data for the PHE for COVID–19 and will include all voluntarily reported measure data for the HCAHPS survey and the five NHSN HAI measures when we calculate hospital TPSs for the FY 2021 program year, as well as when we calculate baseline data for the FY 2023 program year. Because we did not except fourth quarter CY 2019 claims-based data for the Hospital VBP Program, we will also include those data when we calculate hospital TPSs for the FY 2021 through FY 2024 program years and baseline data for the FY 2026 through FY 2029 program years.

ii. CY 2020 First and Second Quarter Hospital VBP Program Data

We excepted hospitals from the requirement to report all first and second quarter CY 2020 Hospital VBP Program data to alleviate the reporting burden on hospitals that were responding to the PHE for COVID–19 and because we were concerned that the data collected during this period could be greatly impacted by the response to COVID–19. Although we permitted hospitals to voluntarily report these data, we aim to have the most representative comparison of hospital performance as possible and do not wish to unfairly penalize hospitals that were responding to COVID–19. We believe that using first and second quarter CY 2020 optionally reported data may not provide an accurate national assessment of hospital performance for multiple reasons. First, if only the optionally submitted data is used, it may not provide an accurate national comparison as it is possible that there may be reporting bias introduced by voluntary submission. Reporting bias could be introduced if, for example, only high performers and/or hospitals not impacted or better resourced would choose to submit data, hindering comparisons between hospitals with different circumstances and preventing the program from keeping with its goal of national comparison. A number of other factors could also contribute to CMS' ability to generate an accurate national comparison. For example, geographic differences in COVID–19 incidence rates and COVID–19 related hospitalizations and differences resulting from changes in referral and hospitalization patterns could both impact the national comparability of optionally submitted data. We believe that it would be inappropriate to include optionally submitted data regarding care provided during first and second quarter CY 2020 in our calculation of a hospital's TPS.

Accordingly, for these reasons, we will not use any first or second quarter CY 2020 excepted Hospital VBP data to calculate total performance scores for the FY 2022 through FY 2025 program years or baseline scores for the FY 2024 through FY 2030 program years to avoid unfairly penalizing hospitals.

Finally, although the ECE we granted for the Hospital VBP Program has ended, with data collection and reporting requirements having resumed July 1, 2020, we understand that geographic differences in COVID–19 incidence continue to change during the PHE for COVID–19. To maintain flexibility for addressing the impact of COVID–19 on the Hospital VBP Program and determine how best to implement the program equitably, we are announcing in this IFC that if, as a result of the extension of the ECE for the whole country that we grant without a request or the submission of individual ECE requests, we do not have enough data to reliably measure national performance, we may propose to not score hospitals based on such limited data or make the associated payment adjustments to facilities under the Hospital VBP Program for the affected program year. If we grant another ECE in the future, we would not require that hospitals report the excepted data for the duration of the ECE. Although a hospital may voluntarily report data during the ECE, we may determine that it would be inappropriate to use such data for scoring purposes. We would still require that hospitals report the non-excepted data. However, we may determine that it would be inappropriate to score such data or base payment adjustments on it because of reliability concerns. For example, if we granted an ECE that excepted hospitals from the requirement to report data for 11 of the 12 months of a given performance period, we would consider not scoring or applying payment adjustments for the associated program year because data from the one non-excepted month may not be large enough to calculate reliable measure results. Although the data itself may be accurate, the measure(s) may not meet the reliability standards because of the small sample of the remaining non-excepted part of the performance period. In addition, in the scenario we describe above, it is plausible that only larger hospitals would be able to meet the required case minimums to be scored in the non-excepted part of the performance period. We may conclude that only scoring those remaining large hospitals will produce an accurate national comparison of hospitals. Alternatively, if we do not extend the ECE to cover Q3 and Q4 2020, it is possible that a majority of hospitals may still submit individual ECE requests for those quarters and it is possible that so many hospitals will submit individual ECE requests that we will not be able to produce a reliable national comparison. In both cases, we are concerned about using the measures calculated based on these data to score facilities under the Hospital VBP Program and base payment adjustments on those scores. At this time, we are not applying this updated ECE policy to the Hospital VBP Program. If circumstances warrant, we may propose to suspend prospective application of program penalties or payment adjustments through the annual IPPS/LTCH PPS proposed rule. However, in the interest of time and transparency, we may provide subregulatory advance notice of our intentions to suspend such penalties and adjustments through routine communication channels to facilities, vendors, and QIOs. The communications could include memos, emails, and notices on the public QualityNet website (*https://www.qualitynet.org/*). We welcome public comments on our updated Hospital VBP Program ECE policy to exclude any data submitted regarding care provided during the first and second quarter of CY 2020 from our calculation of performance.

5. Revised Performance Period for the FY 2022 SNF VBP Program as a Result of the ECE Granted for the PHE for COVID–19

In this IFC, we are revising the performance period for the FY 2022 SNF VBP Program because, as explained more fully below, we are concerned that using qualifying claims from the two quarters that are not excepted under the ECE for COVID–19 (October 1, 2019 through December 31, 2019 (Q4 2019), and July 1, 2020 through September 30, 2020 (Q3 2020)) for all SNFs nationwide to calculate the SNFRM for the FY 2022 Program will not yield measure scores that reliably reflect quality of care as determined by hospital readmission rates. We are also announcing that we may propose to update the SNF VBP ECE policy for future ECEs that may be granted during the PHE for COVID–19.

a. Background of the SNF VBP ECE Policy

In the FY 2019 SNF PPS final rule (83 FR 39280 through 39281), we finalized an ECE policy for the SNF VBP Program. We stated that a SNF requesting an ECE would indicate the dates and duration of the extraordinary circumstance in its request, along with any available evidence of the extraordinary circumstance, and if approved, we would exclude the corresponding calendar months from that SNF's measure rate for the applicable measurement period and by extension, its SNF performance score for applicable fiscal years. We noted that this policy does not preclude us from granting exceptions to SNFs that have not requested them when we determine that an extraordinary circumstance, such as an act of nature or PHE, affects an entire region or locale.

We also finalized under the SNF VBP Program ECE policy that we would score any SNFs receiving ECEs on achievement and improvement for any remaining months during the performance period, provided the SNF had at least 25 eligible stays during both of those periods. As an example, we stated that if a SNF received an approved ECE for 6 months of the performance period, we would score the SNF on its achievement during the remaining 6 months on the Program's measure as long as the SNF met the 25 eligible stay threshold during the performance period. We also stated that under this example, we would score the SNF on improvement as long as it met the proposed 25 eligible stay threshold during the applicable baseline period.

b. Background of the SNF VBP Program ECE Granted for the PHE for COVID–19

On March 22, 2020, in response to the PHE for COVID–19,[24] we announced relief for clinicians, providers, hospitals and facilities participating in Medicare QRPs and VBP programs. On March 27, 2020, we published a supplemental guidance memorandum that described in more detail the scope and duration of the ECEs we were granting under each Medicare QRP and VBP program.[25]

Under the ECE, SNFs qualifying claims are excepted from the calculation of the SNF 30-Day All-Cause Readmission Measure (SNFRM; NQF #2510) for the following periods:

- January 1, 2020–March 31, 2020 (Q1 2020).
- April 1, 2020–June 30, 2020 (Q2 2020).

We refer readers to the March 22 and March 27, 2020 guidance memos for additional information regarding

[24] CMS press release available at *https://www.cms.gov/newsroom/press-releases/cms-announces-relief-clinicians-providers-hospitals-and-facilities-participating-quality-reporting.*

[25] CMS memorandum available at *https://www.cms.gov/files/document/guidance-memo-exceptions-and-extensions-quality-reporting-and-value-based-purchasing-programs.pdf.*

exceptions related to the PHE for COVID–19.

We continue to believe that the claims data we have excepted serves multiple purposes, including allowing us to understand the impact of the PHE for COVID–19 on the quality of care provided to Medicare beneficiaries. However, we excepted claims data from the first and second quarters of CY 2020 from the SNF VBP Program because of our concern that the data reliability during this period may be greatly impacted by the response to COVID–19. We are also concerned with the national comparability of these data due to the geographic differences of COVID–19 incidence rates and hospitalizations along with different impacts resulting from different state and local law and policy changes implemented in response to COVID–19. Therefore, we believe that it would be inappropriate to include data submitted regarding care provided during first and second quarter CY 2020 in our calculation of a SNF's performance score. However, by excluding 6 months of qualifying claims in CY 2020 (January 1, 2020 through June 30, 2020) for all SNFs nationally, this policy will impact the performance period (October 1, 2019 through September 30, 2020) for the FY 2022 SNF VBP Program Year by reducing the total amount of data available to evaluate SNF performance. Accordingly, as discussed below, we are finalizing in this IFC a new performance period for the FY 2022 SNF VBP that we believe will more reliably reflect SNF performance and quality of care provided to Medicare beneficiaries.

In addition, although the ECE we granted for the SNF VBP Program has ended, and data collection resumed July 1, 2020, we understand that geographic differences in COVID–19 incidence continue to change during the PHE for COVID–19. To maintain flexibility for addressing the impact of COVID–19 on the SNF VBP Program and determine how best to implement the program equitably, we are announcing in this IFC that if, as a result a ECE that we grant for the whole country without a request or the submission of individual ECE requests, we do not have enough SNF VBP Program data to reliably measure national performance, we may propose to not score facilities based on such limited data or make the associated payment adjustments to facilities under the SNF PPS for the affected program year. If we grant another ECE in the future, we would not use claims data submitted to CMS during the ECE for scoring purposes under the SNF VBP program. We may determine that it would be inappropriate to score remaining non-excepted data or base payment adjustments on it because of reliability concerns. For example, if we granted an ECE that excepted, for all facilities nationwide, the use of claims data for 11 of the 12 months of a given performance period, we would consider not scoring or applying payment adjustments for the associated program year because data from the one non-excepted month may not be large enough to calculate reliable measure results for scoring purposes. Although the data itself may be accurate, the measure(s) may not meet the reliability standards because of the small sample of the remaining non-excepted part of the performance period. In addition, in the scenario we describe above, it is likely that only larger facilities would be able to meet the required minimum number of eligible SNF stays to be scored in the non-excepted part of the performance period. We may conclude that only scoring those remaining large facilities will not produce an accurate national comparison of SNFs. Alternatively, if we do not extend the ECE to cover Q3 and Q4 2020, it is possible that a majority of SNFs may still submit individual ECE requests for those quarters and it is possible that so many SNFs will submit individual ECE requests that we will not be able to produce a reliable national comparison. In both cases, we are concerned about using the measures calculated based on these data to score facilities under the SNF VBP Program and base payment adjustments on those scores. At this time, we are not applying this updated ECE policy to the SNF VBP Program. Rather, as described in detail in the next section, we are revising the performance period of the FY 2022 SNF VBP Program to include data from: April 1, 2019 through December 31, 2019 and July 1, 2020 through September 30, 2020. However, if at a future date if circumstances warrant, we may propose to suspend prospective application of program penalties or payment adjustments through the annual SNF PPS proposed rule. However, in the interest of time and transparency, we may provide subregulatory advance notice of our intentions to suspend such penalties and adjustments through routine communication channels to facilities, vendors, and QIOs. The communications could include memos, emails, and notices on the public CMS website (*https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Value-Based-Programs/SNF-VBP/SNF-VBP-Page*) or, if time allows, through the annual SNF PPS proposed rule.

d. Revised Performance Period for the FY 2022 SNF VBP Program

The performance period for the FY 2022 SNF VBP Program is FY 2020 (84 FR 38822). The ECE for the PHE for COVID–19 excepts 6 months of claims data from the calculation of the SNFRM during the performance period of the FY 2022 SNF VBP Program.

We are concerned that using qualifying claims during only the remaining 6 months of FY 2020 (October 1, 2019 through December 31, 2019 (Q4 2019), and July 1, 2020 through September 30, 2020 (Q3 2020)) for all SNFs nationwide to calculate the SNFRM for the FY 2022 Program will not yield measure scores that reliably reflect quality of care as determined by hospital readmission rates because the reliability of the SNFRM rate is related to sample size. We distinguish between ECEs that grant exceptions for a limited number of SNFs on a case-by-case basis (that is, if a SNF submits an ECE form with appropriate supporting evidence), which would yield an acceptable reflection of those SNFs' performance, and blanket ECEs that grant exceptions for all SNFs nationwide, which may decrease the likelihood that measure performance would reflect the quality of care across a large number of SNFs. Furthermore, the NQF endorsed the SNFRM as a one-year measure.[26] In line with NQF endorsement, the performance period and baseline period SNFRM rate for a program year has been calculated based on one year of data since the Program's inception. Our internal analysis indicates that calculating the SNFRM based on 6 months data for all SNFs nationwide would decrease the SNFRM's reliability by approximately one-third compared to calculating the SNFRM based on one year of data, resulting in unacceptably low measure reliability. This situation differs from, for example, calculating the SNFRM based on 6-months of data for only several SNFs, which would not meaningfully impact the SNFRM's reliability and would not impact the vast majority of SNFs whose SNFRM rate would still be calculated based on one year of data. We do not believe it is appropriate to calculate the SNFRM in such a way that does not align with NQF endorsement and may decrease the likelihood that the SNFRM reliably reflects the quality of care provided by those SNFs. Therefore, we are revising the performance period for the FY 2022 SNF VBP Program. The revised

[26] From *https://www.qualityforum.org/Measures_Reports_Tools.aspx,* click ''NQF-Endorsed Measures (QPS)'' under ''Find Measures'' then search ''2510'' to view the SNFRM.

performance period for the FY 2022 SNF VBP program will include data from: April 1, 2019 through December 31, 2019 and July 1, 2020 through September 30, 2020. We note that this 12-month period includes 6 months of FY 2019 data and 6 months FY 2020 data, but does not include the 6 months of data that we excepted for the SNF VBP Program under the ECE for the PHE for COVID–19. Eligible SNF stays with admissions during this revised 12-month period, April 1, 2019 through December 31, 2019 and July 1, 2020 through September 30, 2020, will be included in performance period SNFRM calculations for the FY 2022 SNF VBP Program. We believe using data from these two periods, which combines 9 months of data prior to the start of the PHE for COVID–19 and 3 months of data after the end of the ECE we granted for this program, will provide sufficiently reliable data for evaluating SNF performance that can be used for FY 2022 scoring. We selected this performance period data as it was the most operationally feasible, did not use data from FY 2018 (the baseline period for the SNF VBP FY 2022 program year), and provided the least overlap with performance periods for other program years.

We are aware that the revised performance period for the FY 2022 Program overlaps with the performance period of the FY 2021 Program (FY 2019) by 6 months. However, in order to ensure that 12 months of claims data are used to calculate the SNFRM, we believe that this is the most feasible option. We also note that although April 1, 2019 through September 30, 2019 data would be used for two different program years (FY 2021 and FY 2022), October 1, 2019 through December 31, 2019 and July 1, 2020 through September 30, 2020 data would only be used for the FY 2022 program year. Beginning with the FY 2023 program year, the performance period will be FY 2021, consistent with our previously finalized policy. Furthermore, we note that historically there has been an instance of overlapping data during performance periods of the SNF VBP Program; when the SNF VBP Program transitioned from using CY to FY data for calculating the performance period, the performance period of the FY 2019 SNF VBP Program (CY 2017) overlapped with the performance period of the FY 2020 SNF VBP Program (FY 2018) by 3 months (October 1, 2017 through December 31, 2017). We refer readers to the FY 2018 SNF PPS final rule (82 FR 36613 through 36614) for additional information on those performance periods.

The baseline period of the FY 2022 Program has not been impacted by the PHE for COVID–19 and will remain as FY 2018 (October 1, 2017 through September 30, 2018), and the FY 2022 Program performance standards included in the FY 2020 final rule (84 FR 38822 through 38823) will remain as finalized.

We welcome public comments regarding our policy to revise the FY 2022 SNF VBP Program performance period to April 1, 2019 through December 31, 2019 and July 1, 2020 through September 30, 2020.

E. NCD Procedural Volumes for Facilities and Practitioners To Maintain Medicare Coverage

National Coverage Determinations (NCDs) are determinations by the Secretary with respect to whether or not a particular item or service is covered nationally under title XVIII of the Act. Some NCDs include procedural volume requirements that facilities and/or practitioners must meet as conditions of coverage for specific items and services. If those volume requirements are not satisfied, Medicare payment would not be permitted. On March 18, 2020, CMS encouraged hospitals and practitioners to delay certain non-essential procedures due to the COVID–19 pandemic.[27] On June 9, 2020, as coronavirus disease-related healthcare demand decreased, CMS found it was important to safely resume care to treat ongoing health needs that had been postponed and issued guidance that hospitals could resume providing these services.[28] Even so, as a result of the PHE for COVID–19, hospitals and practitioners have performed fewer non-essential procedures for several months and as a result may not be able to meet certain procedural volume requirements that are set forth in these NCDs.

Four NCDs set forth such procedural volume requirements. These NCDs are:

- NCD 20.34 Percutaneous Left Atrial Appendage Closure (LAAC).
- NCD 20.32 Transcatheter Aortic Valve Replacement (TAVR).
- NCD 20.33 Transcatheter Mitral Valve Repair (TMVR).
- NCD 20.9.1 Ventricular Assist Devices (VADs).

Because of the disruption in the healthcare delivery system, including the delay in non-essential procedures as noted above, we are not enforcing the procedural volume requirements contained in the four NCDs noted above for facilities and practitioners that, prior to the PHE for COVID–19, met the volume requirements. This enforcement discretion applies only during the period of the PHE for COVID–19 and ensures that beneficiaries will continue to have access to the services that are covered under the NCD.

Please note that all other coverage requirements under these NCDs remain in effect.

F. Limits on COVID–19 and Related Testing Without an Order and Expansion of Testing Order Authority

In this IFC, we are establishing that one COVID–19 diagnostic test and one of each other related test (as listed in the May 8th COVID–19 IFC) without an order from a physician or other practitioner is reasonable and necessary for Medicare payment purposes. For the COVID–19 and other related diagnostic tests for which an order is required, we are also establishing a policy whereby tests can be covered when ordered by a pharmacist or other healthcare professional who is authorized to order diagnostic laboratory tests in accordance with state scope of practice and other pertinent laws.

In the May 8th COVID–19 IFC, CMS stated that, given the critical importance of expanding COVID–19 testing to combat the pandemic and the heightened risk that the disease presents to Medicare beneficiaries during the PHE for COVID–19, Medicare would not require an order from a physician or other applicable practitioner for COVID–19 testing. We amended our regulation at 42 CFR 410.32(a) to remove the requirement that otherwise covered COVID–19 diagnostic laboratory tests are covered only based on the order of a treating physician or other practitioner.[29] In addition, we removed the ordering requirement for coverage of a diagnostic laboratory test for influenza virus and respiratory syncytial virus, a type of common respiratory virus, but only when these tests are furnished in conjunction with a COVID–19 diagnostic laboratory test as medically necessary in the course of establishing or ruling out a COVID–19 diagnosis. We also noted that FDA-authorized COVID–19 serology tests are included as covered tests during the PHE for COVID–19, as they are

[27] *https://www.cms.gov/newsroom/press-releases/cms-releases-recommendations-adult-elective-surgeries-non-essential-medical-surgical-and-dental.*

[28] *https://www.cms.gov/files/document/covid-recommendations-reopening-facilities-provide-non-emergent-care.pdf.*

[29] The list of COVID–19, Influenza, and RSV clinical diagnostic laboratory tests is available at *https://www.cms.gov/files/document/covid-ifc-2-flu-rsv-codes.pdf.*

reasonable and necessary under section 1862(a)(1)(A) of the Act for beneficiaries with a known current or known prior COVID–19 infection or a suspected current or suspected prior COVID–19 infection.

In this IFC, we are revising the previous policy adopted in the May 8th COVID–19 IFC, which allowed for broad coverage of multiple instances of COVID–19 testing for a single beneficiary without a physician or other practitioner order, by establishing that one single COVID–19 diagnostic test and one of each other related test (as listed in the May 8th COVID–19 IFC) without an order from a physician or other practitioner is reasonable and necessary. This limitation on tests without a physician/other practitioner order will apply beginning on the effective date of this rule, and any tests furnished prior to the effective date will not be considered for purposes of this limit on tests without a physician or other practitioner order. In other words, if a beneficiary received a test or multiple tests without an order before the effective date of this rule, these tests would not count toward the limit of one test without a physician or other practitioner order under this rule. We believe that this approach will provide sufficient notice for laboratories to set up the systems and processes necessary to require an order beyond one test. For the COVID–19 and other related diagnostic tests for which an order is required, we are also establishing a policy whereby the tests can be covered when ordered by a pharmacist or other healthcare professional who is authorized to order diagnostic laboratory tests in accordance with state scope of practice and other pertinent laws.

Just as the previous policy was developed based on what was known about COVID–19 at the time, as additional information has become available, policies require modification. This approach is consistent with the CDC's introductory statement in its July 2, 2020 testing guidance that ''recommendations for SARS–CoV–2 testing have been developed based on what is currently known about COVID–19 and are subject to change as additional information becomes available.'' [30] Whereas we are committed to reducing impediments to access to COVID–19 testing and the other related tests identified in the May 8th COVID–19 IFC, we believe that it is contrary to the public interest to allow open-ended coverage of COVID–19 testing without an order from a physician, practitioner, or other healthcare professional. Our determination to revise the May 8th IFC policy is due both to the significant potential for fraud, waste, and abuse, as well as public health and safety issues that would arise from beneficiaries being subjected to repeated testing without proper medical attention or oversight, including public health issues with the ongoing spread of COVID–19, as outlined by CDC guidance on specific patient categories [31] that has been published in the May 8th COVID–19 IFC.

First, laboratory testing has been a significant source of fraud and abuse in the Medicare program. In one recent example from September 2019, CMS, along with our law enforcement partners, undertook a landmark investigation and prosecution of fraudulent genetic cancer testing, resulting in charges against 35 defendants associated with dozens of telemedicine companies and cancer genetic testing laboratories for their alleged participation in one of the largest healthcare fraud schemes ever charged. According to the charges, the defendants fraudulently billed Medicare for genetic testing, using telemarketers to make phone calls and other unsolicited contacts with Medicare beneficiaries to fraudulently bill more than $2.1 billion to the Medicare program.[32]

We have already found that similar schemes are occurring whereby fraudulent laboratories and telemarketing companies are directly contacting beneficiaries, oftentimes using stolen identifying information, to solicit items and services payable by Medicare under the guise of COVID–19 treatment or prevention. An HHS Office of Inspector General (HHS–OIG) fraud alert [33] describes situations in which scammers are offering unapproved and illegitimate COVID–19 tests and other services to Medicare beneficiaries in exchange for personal details, including Medicare information. However, the services are unapproved and illegitimate. Fraudsters are targeting beneficiaries in a number of ways, including telemarketing calls, text messages, social media platforms, and door-to-door visits. The personal information collected can be used to fraudulently bill federal healthcare programs and commit medical identity theft. In addition, if Medicare denies the claim for an unapproved test, the beneficiary could be responsible for the cost. The availability of broad COVID–19 and related testing without an order significantly increases the risk and scope of these fraud schemes, leading not only to considerable risk to taxpayer dollars, but also potential physical and financial harm to Medicare beneficiaries.

In addition to our concerns about previous laboratory schemes being applied to COVID–19 testing itself, the risk is exacerbated by the ability of the laboratory to perform add-on tests, such as to confirm or rule-out diagnoses other than COVID–19. The HHS–OIG has recognized that ''[r]elaxation of the [ordering] rules could allow unscrupulous actors more leeway for fraudulent billing of unnecessary add-on testing,'' and announced in June 2020 that it was undertaking a trend analysis for potential fraud and abuse with COVID–19 add-on testing.[34]

In addition to our concerns about potential fraud, we believe that broad COVID–19 testing without the order of any healthcare professional—including testing for the related conditions identified in the May 8th COVID–19 IFC—may result in a beneficiary not receiving the medical attention and oversight required to ensure that diagnosis and treatment is applied consistent with CDC guidelines and other medical standards. Allowing testing to occur without proper medical attention or oversight can lead to direct or indirect harm to beneficiaries, their families and their contacts, from a variety of perspectives, including the fact that the beneficiary may not receive complete and accurate information on how the test results should be interpreted and acted upon (for example, contact tracing and public health precautions) and how the beneficiary should be monitored in the case of a positive test.

Of the nearly 1.9 million beneficiaries who have been tested, approximately 83 percent have had only one test performed. However, claims data from the past 8 months have shown that the number of beneficiaries receiving more than one COVID–19 test has been increasing. While we do not have data to examine whether these tests are being performed without a physician or other practitioner order, we expect the proportion of beneficiaries who are tested more than once to increase over time until a vaccine or other containment strategy is available to

[30] *https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html.*

[31] *https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html.*

[32] *https://oig.hhs.gov/newsroom/media-materials/2019/geneticscam/index.asp.*

[33] *https://oig.hhs.gov/coronavirus/fraud-alert-covid19.asp.*

[34] *https://oig.hhs.gov/reports-and-publications/workplan/summary/wp-summary-0000489.asp.*

meaningfully reduce the risk of COVID–19. We believe that allowing Medicare payment for one test without an order will allow beneficiaries access to urgent testing, as we outlined in the May 8th COVID–19 IFC, yet also provide sufficient opportunity for beneficiaries to seek out the medical care needed to ensure that the test results are interpreted and acted upon appropriately, both from the perspective of the individual beneficiary and also in the context of the area of the country in which the beneficiary is located.

While some areas of the country continue to have minimal impact from the disease or are seeing the COVID–19 infection curve flattening, other areas are seeing a resurgence. Executing an effective, regional response to COVID–19 disease requires coordinated effort and guidance by qualified medical professionals who know how to interpret and react to testing results. Recent experience with this disease has also demonstrated that substantial COVID–19 transmission occurs from infectious individuals both with and without symptoms, and that isolation of infected persons has been identified as a key strategy for preventing further spread of COVID–19. Testing without healthcare oversight can lead to a bypassing of risk-stratified protocols for management of negative COVID–19 test results. A negative test does not rule out the disease; if a physician or other appropriate healthcare professional suspects a patient may have COVID–19 based on symptoms or other factors, infection control measures should be implemented regardless of test results. For example, isolation of persons infected with SARS–CoV–2, the virus that causes COVID–19, is a key strategy for preventing further spread of COVID–19. In fact, when infected individuals are separated from others while awaiting their test results, transmission is reduced much more than when individuals are not separated. By having patients isolated one to two days earlier, spread of COVID–19 can be reduced significantly.[35] When a physician or other health care provider is able to counsel patients who are being tested for COVID–19, beneficiaries may be more likely to isolate or quarantine themselves more quickly, which may reduce transmission in the community. Self-quarantine for those who may be infectious is also a key element to ensuring that health care providers and suppliers are able to continue to safely provide COVID–19-related and non-COVID–19 essential care, patients can resume elective procedures, and that the nation can continue steps to reopen the economy.

We remain committed to ensuring beneficiaries have access to needed testing services, and to the medical oversight required to address this complex pandemic. First, we note that our numerous provisions enhancing access to and use of telehealth and other communications technology-based services (CTBS) have enabled beneficiaries to overcome some of the obstacles associated with seeking care in physician offices and other medical facilities during the PHE for COVID–19. The telehealth and CTBS flexibilities have provided a modernized framework for care delivery, including the ability for clinicians to remotely assess the medical condition of patients and determine the need for COVID–19 testing and perform related clinical oversight, which takes advantage of modern technology while addressing the health needs of the Medicare beneficiary population.

In addition, in our March 31st COVID–19 IFC, we established payment policies to provide specimen collection fees for independent laboratories collecting specimens from beneficiaries who are homebound or non-hospital inpatients for COVID–19 testing during the PHE for COVID–19. In our May 8th COVID–19 IFC, we also established payment mechanisms for specimen collection for COVID–19 testing under the Physician Fee Schedule (PFS) and OPPS during the PHE for COVID–19. To help ensure that laboratories located in the United States wishing to perform COVID–19 testing that are applying for a CLIA certificate are able to begin testing as quickly as possible during the PHE for COVID–19, we have also reviewed our regulations (42 CFR part 493) and our procedures to expedite review of applications for a CLIA certificate. We are committed to taking critical steps to ensure Medicare beneficiaries are able to access safe and reliable COVID–19 and related testing.

CMS and CDC are also taking steps to ensure that physicians and other practitioners who counsel patients on COVID–19 testing are paid for these services. On July 30, 2020, CMS and CDC announced that payment is available to practitioners and suppliers to counsel patients, at the time of COVID–19 testing, about the importance of self-isolation after they are tested and prior to the onset of symptoms.[36] Through counseling, health care providers can discuss with patients: (1) The signs and symptoms of COVID–19; (2) the immediate need to separate from others by isolation, particularly while awaiting test results; (3) the importance of informing close contacts of the person being tested (for example, family members) to separate from the patient awaiting test results; (4) the fact that if the patient tests positive, the patient will be contacted by the public health department to learn the names of the patient's close contacts; and (5) the services that may be available to assist the patient in successfully isolating at home.

We also believe that pharmacists and other healthcare professionals play an important role in the response to the PHE for COVID–19, and we explicitly clarified in the May 8th COVID–19 IFC that pharmacists fall within the regulatory definition of auxiliary personnel under our regulation at § 410.26. As such, pharmacists may provide services incident-to the professional services, and under the appropriate level of supervision, of the billing physician or practitioner, if payment for the services is not made under the Medicare Part D benefit. This includes providing the services incident to the services of the billing physician or practitioner and in accordance with the pharmacist's state scope of practice and applicable state law. We believe this clarification may encourage pharmacists to work with physicians and other applicable practitioners in new ways that expand the availability of health care services during the PHE for COVID–19. One service that may be rendered in accordance with these authorities is an assessment and specimen collection for COVID–19 testing. Specifically, we stated in the May 8th COVID–19 IFC that CPT code 99211 can be billed for both new and established patients for the duration of the PHE for COVID–19, when the services described by that code for a level 1 E/M visit are furnished for the purpose of a COVID–19 assessment and specimen collection. These services can be billed as services provided by auxiliary clinical staff, including pharmacists, if those staff meet all of the requirements to furnish services as ''incident to,'' as described in § 410.26 of our regulations and in our frequently asked questions document discussing virtual supervision.[37]

To further ensure that beneficiaries continue to have access to appropriate COVID–19 testing even when some

[35] *https://www.cms.gov/files/document/se20011.pdf.*

[36] *https://www.cms.gov/newsroom/press-releases/cms-and-cdc-announce-provider-reimbursement-available-counseling-patients-self-isolate-time-covid-19.*

[37] *https://www.cms.gov/files/document/03092020-covid-19-faqs-508.pdf.*

professional care is not separately billable under Medicare, we are establishing a policy whereby otherwise covered COVID–19 and specified related tests ordered by pharmacists and other healthcare professionals who are authorized to order diagnostic laboratory tests in accordance with state scope of practice and other pertinent laws are covered for the duration of the PHE for COVID–19. Under this policy, an otherwise covered COVID–19 test (and other related tests, as specified on the CMS website) is considered reasonable and necessary during the PHE for COVID–19 if ordered by a pharmacist or other healthcare professional who is practicing in accordance with applicable state scope of practice laws. Because pharmacists and certain other healthcare professionals are not considered to be physicians or practitioners under the Medicare statute, they cannot be paid directly under the Medicare program; therefore, pharmacists and other auxiliary personnel still need to be functioning in an incident-to arrangement with a physician or non-physician practitioner for the services they provide to be paid by Medicare under Part B for the front-end assessment and specimen collection associated with the order, as described above. However, we believe this interim ordering policy is appropriate during the duration of the PHE for COVID–19 to ensure adequate access to testing as permitted under state scope of practice and other applicable laws.

With this IFC, we are amending our regulation at § 410.32(a)(3) to state that, starting with the effective date of the revision and carrying forward for the remaining duration of the PHE for COVID–19, the order of a physician or other practitioner is not required for one otherwise covered diagnostic laboratory test for COVID–19 and for one otherwise covered diagnostic laboratory test each for influenza virus or similar respiratory condition needed to obtain a final COVID–19 diagnosis, when performed in conjunction with a COVID–19 diagnostic laboratory test in order to discount influenza virus or related diagnosis.[38] This includes FDA-authorized COVID–19 serology tests, as they are reasonable and necessary under section 1862(a)(1)(A) of the Act for beneficiaries with known current or known prior COVID–19 infection or suspected current or suspected prior COVID–19 infection. We are also amending the regulation so the orders of pharmacists and other practitioners that are allowed to order laboratory tests in accordance with state scope of practice and other pertinent laws can fulfill the requirements related to orders for covered COVID–19 tests for Medicare patients. We note that Medicare continues to cover other medically necessary clinical diagnostic laboratory tests when a treating physician or other practitioner orders them, and that other Medicare conditions of coverage and payment continue to apply, including any applicable local coverage determinations.

The policies described in this section apply to the Medicare program only. Coverage policies for COVID–19 testing for group health plans and health insurance issuers offering group and individual health insurance coverage are generally governed by other rules of other federal agencies and/or HHS and states. States administer the Medicaid program and the Children's Health Insurance Program (CHIP) subject to federal requirements, and therefore, have significant responsibility for establishing coverage and payment policies for those programs, within federal parameters.

G. Recognizing Temporary Premium Credits as Premium Reductions

1. Background

Title I of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104–191, enacted on August 21, 1996) added a new title XXVII to the PHSA to establish various reforms to the group and individual health insurance markets. These provisions of the PHSA have also been augmented by later laws, including the Patient Protection and Affordable Care Act (PPACA).[39] Subtitles A and C of title I of the PPACA reorganized, amended, and added to the provisions of part A of title XXVII of the PHSA relating to group health plans and health insurance issuers in the group and individual markets.

Section 1321(a) of the PPACA provides broad authority for the Secretary to establish standards and regulations to implement the statutory requirements related to Exchanges,[40] qualified health plans (QHPs), and other components of title I of the PPACA. Section 1321(a)(1) of the PPACA directs the Secretary to issue regulations that set standards for meeting the requirements of title I of the PPACA for, among other things, the establishment and operation of Exchanges.

Section 1321(d) of the PPACA provides that nothing in title I of the PPACA must be construed to preempt any state law that does not prevent the application of title I of the PPACA. Section 1311(k) of the PPACA specifies that Exchanges may not establish rules that conflict with or prevent the application of regulations issued by the Secretary.

Section 1343 of the PPACA establishes an annual permanent risk adjustment program to provide payments to health insurance issuers that attract higher-than-average risk populations, such as those with chronic conditions, funded by payments from those that attract lower-than-average risk populations, thereby reducing incentives for issuers to avoid higher-risk enrollees. Consistent with section 1321(c)(1) of the PPACA, the Secretary is responsible for operating the risk adjustment program on behalf of any state that does not elect to do so. We established the framework for the risk adjustment program in a final rule, published in the March 23, 2012 **Federal Register** (77 FR 17219) (Premium Stabilization Rule), and first established the federally-certified risk adjustment methodologies and other parameters related to the risk adjustment program applicable to the 2014 benefit year in the 2014 Payment Notice final rule in the March 11, 2013 **Federal Register** (78 FR 15409). In the October 30, 2013 **Federal Register** (78 FR 65046), we finalized the proposed modification to the HHS methodology related to community rating states. We published a correcting amendment to the 2014 Payment Notice final rule in the November 6, 2013 (78 FR 66653) to address how an enrollee's age for the risk score calculation would be determined under the HHS methodology. We have generally published the parameters and methodology for the applicable risk adjustment benefit year in each subsequent HHS annual notice of benefit and payment parameters.[41] In

[38] The list of COVID–19, Influenza, and RSV clinical diagnostic laboratory tests is available at *https://www.cms.gov/files/document/covid-ifc-2-flu-rsv-codes.pdf.*

[39] The Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted on March 23, 2010. The Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152), which amended and revised several provisions of the Patient Protection and Affordable Care Act, was enacted on March 30, 2010. In this IFC, we refer to the two statutes collectively as the ''Patient Protection and Affordable Care Act'' or ''PPACA''.

[40] American Health Benefit Exchanges, or ''Exchanges,'' are entities established under the PPACA through which qualified individuals and qualified employers can purchase health insurance coverage in qualified health plans (QHPs).

[41] See the 2015 Payment Notice final rule published in the March 11, 2014 **Federal Register** (79 FR 13743); the 2016 Payment Notice final rule published in the February 27, 2015 **Federal Register** (80 FR 10749); the 2017 Payment Notice final rule

the July 30, 2018 **Federal Register** (83 FR 36456), we published a final rule that adopted the 2017 benefit year risk adjustment methodology as established in the final rules published in the March 23, 2012 (77 FR 17220 through 17252) and in the March 8, 2016 editions of the **Federal Register** (81 FR 12204 through 12352). The final rule sets forth additional explanation of the rationale supporting the use of the statewide average premium in the HHS-operated risk adjustment state payment transfer formula for the 2017 benefit year, including the reasons why the program is operated in a budget-neutral manner. The final rule permitted HHS to resume 2017 benefit year risk adjustment payments and charges. HHS also provided guidance as to the operation of the HHS-operated risk adjustment program for the 2017 benefit year in light of publication of this IFC.[42]

In the August 10, 2018 **Federal Register** (83 FR 39644), we published a proposed rule seeking comment on adopting the 2018 benefit year risk adjustment methodology in the final rules published in the March 23, 2012 (77 FR 17219) and in the December 22, 2016 editions of the **Federal Register** (81 FR 94058). The proposed rule set forth additional explanation of the rationale supporting use of statewide average premium in the HHS-operated risk adjustment state payment transfer formula for the 2018 benefit year, including the reasons why the program is operated in a budget-neutral manner. In the December 10, 2018 **Federal Register** (83 FR 63419), we issued a final rule adopting the 2018 benefit year HHS-operated risk adjustment methodology as established in the final rules published in the March 23, 2012 (77 FR 17219) and the December 22, 2016 (81 FR 94058) editions of the **Federal Register**. That final rule sets forth additional explanation of the rationale supporting use of statewide average premium in the HHS-operated risk adjustment state payment transfer formula for the 2018 benefit year, including the reasons why the program is operated in a budget-neutral manner. We adopted the risk adjustment methodology and parameters for the 2020 benefit year in the 2020 Payment Notice final rule in the April 25, 2019, **Federal Register** (84 FR 17454). On May 14, 2020, we adopted the risk adjustment methodology and parameters for the 2021 benefit year in the 2021 Payment Notice final rule in the **Federal Register** (85 FR 29164).

Section 2718 of the PHSA, as added by the PPACA, generally requires health insurance issuers to submit an annual report to the Secretary that details the percentage of premium revenue (after certain adjustments) expended on reimbursement for clinical services provided to enrollees under health insurance coverage and on activities that improve healthcare quality. The ratio of premium revenue spent on clinical services and quality improvement activities is called the medical loss ratio (MLR). Section 2718(b) of the PHSA requires an issuer to provide rebates to enrollees if its MLR falls below specified MLR standards (generally 80 percent for the individual and small group markets, and 85 percent for the large group market). We published an interim final rule in the December 1, 2010 **Federal Register** (75 FR 74863). A final rule was published in the December 7, 2011 **Federal Register** (76 FR 76573). The MLR program requirements were amended in final rules published in the December 7, 2011 **Federal Register** (76 FR 76595), the May 16, 2012 **Federal Register** (77 FR 28790), the March 11, 2014 **Federal Register** (79 FR 13743), the May 27, 2014 **Federal Register** (79 FR 30339), the February 27, 2015 **Federal Register** (80 FR 10749), the March 8, 2016 **Federal Register** (81 FR 12203), the December 22, 2016 **Federal Register** (81 FR 94183), the April 17, 2018 **Federal Register** (83 FR 16930), and the April 25, 2019 **Federal Register** (84 FR 17454).

Due to the urgent need to help facilitate the nation's response to the COVID–19 pandemic, CMS announced the adoption of certain temporary policies of relaxed enforcement for all issuers offering health insurance coverage in the individual and small group markets to support continuity of coverage for individuals, families, and small employers who may struggle to pay premiums because of illness or loss of incomes or revenue resulting from the PHE for COVID–19. On August 4, 2020, CMS issued a memo, ''Temporary Policy on 2020 Premium Credits Associated with the COVID–19 Public Health Emergency,'' wherein CMS adopted certain temporary policies of relaxed enforcement for the premium rules set forth at 45 CFR 147.102, 155.200(f)(4), 155.400(e) and (g), 155.706(b)(6)(1)(A), 156.80(d), 156.210(a), and 156.286(a)(2) through (4) to allow issuers in the individual and small group markets the flexibility, when consistent with state law, to temporarily offer premium credits for 2020 coverage.[43] The memo also advised of our intention to pursue future rulemaking to address risk adjustment data submissions and MLR reporting requirements for issuers that elect to provide these credits to ensure that issuers accurately report premium amounts actually billed for months in 2020 for which issuers are providing these credits.

This IFC clarifies the data reporting requirements for issuers of risk adjustment covered plans[44] to specify that, for the purposes of 2020 benefit year risk adjustment data submissions, issuers of risk adjustment-covered plans that provide temporary premium credits must report to their dedicated distributed data environment (EDGE server) adjusted plan premiums that reflect actual premiums billed to enrollees, taking the premium credits into account as a reduction in premiums. In addition, this IFC clarifies, consistent with the reporting of the actual premium amounts billed to enrollees for 2020 benefit year risk adjustment data submissions, HHS's calculation of risk adjustment payment and charges for the 2020 benefit year under the state payment transfer formula[45] will be calculated using the statewide average premium that reflects actual premiums billed, taking into account any temporary premium credits provided as a reduction in premium for the applicable months of 2020 coverage.

This IFC similarly clarifies the MLR reporting and rebate requirements in 45 CFR part 158 for issuers that elect to provide temporary premium credits such that these issuers must report as earned premium the actual premium paid, taking into account any temporary premium credits as a reduction in premium for the applicable months of 2020 coverage.

These interim final provisions are effective as of the date of finalization of this IFC and apply to temporary

published in the March 8, 2016 **Federal Register** (81 FR 12203); the 2018 Payment Notice final rule published in the December 22, 2016 **Federal Register** (81 FR 94058); the 2019 Payment Notice final rule published in the April 17, 2018 **Federal Register** (83 FR 16930); and the 2019 Payment Notice final rule correction published in the May 11, 2018 **Federal Register** (83 FR 21925).

[42] ''Update on the HHS-operated Risk Adjustment Program for the 2017 Benefit Year.'' July 27, 2018. Available at *https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2017-RA-Final-Rule-Resumption-RAOps.pdf.*

[43] See *https://www.cms.hhs.ov/CCIIO/Programs-and-Initiative/Health-Insurance-Marketplaces/Downloads/Premium-Credit-Guidance.pdf.*

[44] See 45 CFR 153.20 for a definition of ''risk adjustment covered plan''.

[45] The state payment transfer formula refers to the part of the HHS risk adjustment methodology established consistent with 45 CFR 153.320 that calculates payments and charges at the state market risk pool level. See, for example, the 2020 Payment Notice final rule, 84 FR at 17485. The state payment transfer calculations are performed prior to the calculation of the high-cost risk pool payment and charge terms.

premium credits provided for 2020 coverage.

2. Standards Related to Reinsurance, Risk Corridors, and Risk Adjustment (45 CFR Part 153)

This IFC addresses changes necessary to align the 2020 benefit year data submission requirements and state payment transfer formula calculations under the HHS-operated risk adjustment program with guidance published by CMS allowing temporary premium credits due to the PHE for COVID–19.

a. Provisions and Parameters for the Risk Adjustment Program

In subparts A, B, D, G, and H of part 153, we established standards for the administration of the PPACA risk adjustment program. The risk adjustment program is a permanent program created by section 1343 of the PPACA that transfers funds from lower-than-average risk, risk adjustment covered plans to higher-than-average risk, risk adjustment covered plans in the individual and small group markets (including merged markets), inside and outside the Exchanges. HHS is responsible for operating risk adjustment in any state that does not elect to do so.[46] HHS did not receive any requests from states seeking to operate their own risk adjustment program for the 2020 benefit year.[47] Therefore, HHS is responsible for operating the risk adjustment program established under section 1343 of the PPACA in all 50 states and the District of Columbia for the 2020 benefit year.[48]

i. Calculation of Plan Average Premium and State Average Premium Under the Federally-Certified Risk Adjustment Methodology (§ 153.320)

The HHS risk adjustment methodology applicable to the 2020 benefit year includes the state payment transfer formula and the high-cost risk pool parameters.[49] The state payment transfer formula includes a set of cost adjustment terms that require transfers to be calculated at the geographic rating area level for each plan (that is, we calculate separate transfer amounts for each rating area in which a risk adjustment covered plan operates). It also includes a 14 percent administrative cost reduction to the statewide average premium. The state payment transfer formula generally calculates the difference between the revenues required by a plan, based on the health risk of the plan's enrollees, and the revenues that the plan can generate for those enrollees. These differences are then compared across plans in the state market risk pool[50] and converted to a dollar amount based on the statewide average premium. The difference between the two premium estimates determines whether a plan pays a risk adjustment charge or receives a risk adjustment payment.[51]

HHS chose to use statewide average premium and normalize the risk adjustment state payment transfer formula to reflect state average factors so that each plan's enrollment characteristics are compared to the state average and the calculated payment amounts equal calculated charges in each state market risk pool.[52] Thus, the state payment transfer formula provides a per member per month (PMPM) transfer amount for a plan within a rating area. This resulting PMPM plan payment or charge is multiplied by the number of billable member months to determine the plan payment or charge based on plan liability risk scores for a plan's geographic rating area for the applicable state market risk pool. The payment or charge under the state payment transfer formula is thus calculated to balance the state market risk pool in question.

In prior rulemaking,[53] CMS finalized the calculation of plan average premium as equal to the actual premiums charged to plan enrollees, weighted by the number of months enrolled, and finalized the calculation of the state average premium as equal to the average of individual plan average premiums, weighted by each plan's share of statewide enrollment in the risk pool market, based on billable member months.

This IFC sets forth how HHS will treat temporary premium credits provided for purposes of applying the state payment transfer formula for the 2020 benefit year.[54] For states where issuers of risk adjustment covered plans have provided temporary premium credits, the plan average premium and statewide average premium used in the state payment transfer formula will be calculated using issuers' adjusted premium amounts—that is, the actual premiums billed to plan enrollees will be the amounts used in the calculations under the state payment transfer formula. We clarify that HHS will use adjusted plan premiums for all enrollees whom the issuer has actually provided premium credits as a reduction to 2020 benefit year premiums, even if the credits were not provided in a manner consistent with the August 4, 2020 memo, when calculating transfers under the state payment transfer formula for the 2020 benefit year. As detailed further below, issuers providing these temporary premium credits must report the lower, actual premium amounts billed to plan enrollees to their respective EDGE servers. We believe that the applicable definitions of plan average premium and state average premium retain the meaning previously finalized by reflecting the actual monthly premium billed to enrollees. In addition, the recognition of temporary premium credits for 2020 coverage as a reduction in premium for purposes of the risk adjustment program is a necessary and appropriate step to align risk adjustment charges and payments under the state payment transfer formula with the flexibilities provided to issuers and states elsewhere in this rulemaking to respond to the PHE for COVID–19. This approach also provides necessary clarity to issuers as they evaluate whether and in what amount to offer premium relief to enrollees to assist those adversely affected financially by the PHE for COVID–19 to maintain continuous health insurance coverage. This IFC does not change any other aspect of the state payment transfer formula or the method for calculating payments and charges under the HHS risk adjustment methodology (inclusive of the state payment transfer formula and high-cost risk pool parameters).[55]

In the 2019 Payment Notice, we provided states the flexibility to request

[46] See section 1321(c)(1) of the PPACA. Also see 45 CFR 153.310(a).

[47] See the 2020 Payment Notice final rule, 84 FR at 17463 (April 25, 2019).

[48] Ibid.

[49] See the 2020 Payment Notice final rule, 84 FR at 17466 through 17468 and 17480 through 17486.

[50] Risk adjustment transfer under the state payment transfer formula are calculated at the risk pool level, and catastrophic plans are treated as a separate risk pool for purpose of these calculations.

[51] The value of the plan average risk score by itself does not determine whether a plan would be assessed a charge or receive a payment—even if the risk score is greater than 1.0, it is possible that the plan would be assessed a charge if the premium compensation that the plan may receive through its rating (as measured through the allowable rating factor) exceeds the plan's predicated liability associated with risk selection.

[52] See the 2020 Payment Notice final rule for further details on other reasons why statewide average premium is the cost-scaling factor in the state payment transfer formula. See 84 FR at 17480 through 17484.

[53] See, for example, the 2014 Payment Notice final rule, 78 FR 15409, available at *https://www.govinfo.gov/content/pkg/FR-2013-03-11/pdf/2013-04902.pdf* (March 11, 2013). Also see the 2020 Payment Notice final rule, 84 FR 17454, available at *https://www.govinfo.gov/content/pkg/FR-2019-04-25/pdf/2019-08017.pdf.*

[54] CMS intends to consider adopting a similar approach for the 2021 benefit year, as may be appropriate (for example, if similar temporary premium credits are permitted for 2021 coverage).

[55] See the 2020 Payment Notice final rule, 84 FR at 17466 through 17468 and 17480 through 17486.

a reduction to the otherwise applicable risk adjustment transfers calculated under the HHS-operated risk adjustment methodology's state payment transfer formula, which is calibrated on a national dataset, for the state's individual, small group, or merged markets, by up to 50 percent to more precisely account for differences in actuarial risk in the applicable state's market(s).[56] For the 2020 benefit year, HHS approved a request from Alabama state insurance regulators to reduce risk adjustment transfers for the Alabama small group market by 50 percent.[57] Consistent with this IFC, the state payment transfer formula will incorporate calculations using issuers' adjusted premium amounts—that is, the lower actual premiums billed to plan enrollees will be the amounts used in the calculations under the state payment transfer formula to reflect these temporary premium credits. As such, if an issuer in the Alabama small group market chooses to provide temporary premium credits, the state average premium will decrease, and HHS will apply the 50 percent transfer reduction to the lower PMPM payment or charge transfer amount calculated under the state payment transfer formula for the Alabama small group market.

ii. Data Requirements for Risk Adjustment Covered Issuers (§ 153.610 and § 153.710)

Section 153.610 requires an issuer of a risk adjustment covered plan to submit or make accessible risk adjustment data for all risk adjustment covered plans in accordance with the risk adjustment data collection approach established by a state, or HHS on behalf of a state. The HHS-operated risk adjustment program uses a distributed data collection approach, and issuers of risk adjustment covered plans must provide HHS with access to plan enrollment data, enrollee claims data, and enrollee encounter data through their respective EDGE server, pursuant to the requirements of § 153.710 and applicable technical guidance.[58] Issuers are required to report to their EDGE server subscriber-level premium information that is used by HHS to calculate each plan's total premium revenue for the state payment transfer formula. We clarify in this IFC that, for purposes of 2020 benefit year data submissions,[59] the subscriber-level premium information that issuers upload to their EDGE servers must reflect the adjusted (that is, lower) monthly premium reflecting the amounts actually billed to their enrollees, inclusive of any premium credits provided. We clarify in this IFC that CMS will require issuers to submit adjusted plan premiums to their EDGE servers for all enrollees whom the issuer has actually provided premium credits as a reduction to 2020 benefit year premiums, even if these premium credits were not provided in a manner consistent with the August 4, 2020 memo. Issuers should continue to submit the full, unadjusted premium amounts for any coverage for which they did not provide temporary premium credits. This IFC does not change any other aspect of the 2020 benefit year data submission requirements for the HHS-operated risk adjustment program. As such, any temporary premium credits that are reported as a reduction in premium for risk adjustment purposes are subject to the applicable regulations at part 153, the EDGE server business rules, and applicable CMS guidance.

3. Issuer Use of Premium Revenue: Reporting Requirements (45 CFR Part 158)

In this IFC, we also address changes necessary to align the reporting and data submission requirements under the PPACA MLR program with the temporary premium credits that issuers may provide to enrollees in 2020.[60]

a. Premium Revenue (§ 158.130)

Section 2718(a) of the PHSA requires health insurance issuers to report to the Secretary the percentage of premium revenue (after certain adjustments) expended on reimbursement for clinical services provided to enrollees under health insurance coverage and on activities that improve healthcare quality. Section 158.130 specifies the reporting requirements with regard to earned premium, which must include all monies paid by a policyholder or subscriber as a condition of receiving coverage from the issuer, with certain adjustments.

This IFC sets forth how CMS will treat temporary premium credits for purposes of MLR reporting and rebate requirements of these amounts for 2020 coverage.[61] During 2020, a number of issuers are expected to provide premium relief to enrollees, which will result in policyholders and subscribers paying a reduced amount of premium for coverage in 2020 in the months for which the credits are provided. The recognition of temporary premium credits as a reduction in premium for purposes of the MLR program is a necessary and appropriate step to align MLR calculations with the flexibilities provided to issuers and states elsewhere in this rulemaking to respond to the PHE for COVID–19. This approach also provides necessary clarity to issuers as they evaluate whether and in what amount to offer temporary premium credits to assist enrollees in maintaining continuous health insurance coverage during the PHE for COVID–19.

To ensure that an issuer's MLR accurately reflects the amounts actually paid by their enrollees as the issuer's premium revenue, we clarify that for purposes of § 158.130, issuers must account for temporary premium credits as reductions in earned premium in the individual and small group (or merged) markets,[62] consistent with any technical guidance set forth in the applicable MLR Annual Reporting Form Instructions.[63] Specifically, we clarify that the amount of temporary premium credits[64] constitutes neither collected premium nor due and unpaid premium described in the MLR Annual Reporting Form Instructions for purposes of reporting written premium (which is a component of earned premium). As a result of this flexibility, issuers who offer temporary premium credits should

[56] See the 2019 Payment Notice final rule, 83 FR at 6955 to 16960. Also see 45 CFR 153.320(d).

[57] See the 2020 Payment Notice final rule, 84 FR at 17484 through 17485. HHS approved a similar request to reduce 2021 benefit year Alabama small group market transfers by 50 percent. See the 2021 Payment Notice final rule, 85 FR at 29193 through 29194.

[58] See EDGE Server Business Rules (ESBR) v16.0 *Section 5.8 Premium Amounts,* at *https://www.regtap.info/uploads/library/DDC_ESBR_V16.0_052920_5CR_052920.pdf.*

[59] As noted above, CMS intends to consider adopting a similar approach for the 2021 benefit year, as may be appropriate.

[60] The MLR reporting year means a calendar year during which group or individual health insurance coverage is provided by an issuer. See 45 CFR 158.103. The 2020 MLR reporting year refers to the MLR reports that issuers must submit for the 2020 benefit year by July 31, 2021. See 45 CFR 158.110(b).

[61] CMS intends to consider adopting a similar approach if temporary premium credits are permitted for 2021 coverage, if appropriate.

[62] While this IFC and the August 4, 2020 memo focus on the individual and small group markets, to remove the barriers in support of issuers offering these premium credits to enrollees impacted by PHE for COVID–19, we note that issuers in the large group market may also, when consistent with state law, offer premium credits and should similarly report the lower, adjusted amount that accounts for the premium credits for MLR purposes.

[63] Available from *https://www.cms.gov/cciio/Resources/Forms-Reports-and-Other-Resources/index#Medical_Loss_Ratio*.

[64] MLR rebates provided in the form of premium credits are different than the temporary premium credits such as those outlined in the August 4, 2020 guidance issued by CMS. When MLR rebates are provided in the form of premium credits, issuers must continue to report the full amount of earned premium and may not reduce it by the amount of MLR rebates provided in form of premium credits, as required by § 158.130(b)(3).

report as earned premium for MLR and rebate calculation purposes the actual, reduced premium paid. We clarify that issuers must report the actual, reduced premium amount for all enrollees whom the issuer has actually provided premium credits for 2020 coverage, even if these premium credits were not provided in a manner consistent with the August 4, 2020 memo. This IFC does not change any other aspect of the MLR reporting or rebate calculation requirements.

H. Addressing the Impact of COVID–19 on Part C and Part D Quality Rating Systems

1. Background

CMS develops and publicly posts a 5-star rating system for Medicare Advantage (MA) and Part D plans based on its authority to disseminate comparative information, including about quality, to beneficiaries under sections 1851(d) and 1860D–1(c) of the Act and authority to collect various types of quality data under section 1852(e) of the Act. The Star Rating system for MA and Part D plans is also the basis for determining quality bonus payment (QBP) status for MA plans under section 1853(o) of the Act and the amount of beneficiary rebates under section 1854(b) of the Act. As background, approximately $12 billion for 2020 will be paid as part of QBPs in the form of higher benchmarks for both Individual and Employer Group Waiver Plans, which represent about 4.35 percent of the total MA benchmarks. Cost plans under section 1876 of the Act are also included in the MA and Part D Star Rating system, as codified at 42 CFR 417.472(k).

The Star Ratings are generally based on measures of performance during a period that is 2 calendar years before the year for which the Star Ratings are issued; for example, 2022 Star Ratings will generally be based on performance during 2020. We use a variety of data sources to measure quality and performance of contracts, such as CMS administrative data, surveys of enrollees, information from health and drug plans, and data collected by CMS contractors. Various regulations require plans to report on quality improvement and quality assurance and to provide data which we can use to help beneficiaries compare plans (for example, §§ 417.472(j) and (k), 422.152(b), 423.153(c), and 423.156). In addition, we can require plans to report statistics and other information in specific categories (§§ 422.516 and 423.514). Data from these sources and other sources are used to calculate measures of plan sponsor performance each year, as provided in §§ 422.162 and 423.182. The Star Ratings are central in providing comparative information to enrollees and are also used to determine whether an MA plan is eligible for a QBP and the amount of beneficiary rebates.

Sections 1853(o) and 1854(b)(1)(c) of the Act provide for quality ratings, based on a 5-star rating system and the information collected under section 1852(e) of the Act, to be used in calculating payment to MA organizations beginning in 2012. Specifically, these provisions provide, respectively, for an increase in the benchmark against which MA organizations bid and in the portion of the savings between the bid and the benchmark available to the MA organization to use as a rebate. In addition, CMS assigns both low and high performing icons, which are displayed on *https://www.medicare.gov/plan-compare/,* to help Medicare beneficiaries make plan decisions, based on either consistently low performance (2.5 or fewer stars at the summary rating level) for 3 or more years or receipt of 5 stars for the highest rating in any given year.

There are other regulations, regarding marketing authority, special enrollment periods, and contract terminations, that are tied to the Star Ratings, demonstrating how the Star Ratings are important to the MA and Part D programs as a whole. Because the Star Ratings serve a variety of purposes for CMS, cost plans, and MA and Part D plans, we assume plans engage in multiple activities during the measurement period to improve their Star Ratings. Therefore, it is necessary to adopt rules for, and provide information about how performance in 2020—during the PHE for COVID–19—will be used in the Star Ratings program as quickly as possible. Without adopting these rules immediately, plans will believe that, based on current rules, CMS will be unable to assign Star Ratings for Contract Year 2022 and be unable to pay QBPs for Contract Year 2023. Given the significant impact of QBPs on overall plan payments, described above, without immediate action, plans would not have a clear incentive to focus on providing high quality care for enrollees impacted by COVID–19, and instead either spend time and effort trying to ensure that future Star Ratings and QBP ratings are not impacted by the PHE for COVID–19, or shift focus from providing quality care to cost containment. Delaying these changes would limit (or eliminate) the time left in the 2020 measurement period for plans to manage their performance based on these changes.

In the March 31st COVID–19 IFC, we adopted a series of changes to the 2021 and 2022 Star Ratings to accommodate the disruption to data collection and impact on performance posed by the PHE for COVID–19. The Star Ratings changes adopted in that rule addressed the need of health and drug plans and their providers to curtail certain data collections and to adapt their current practices in light of the PHE for COVID–19 and the need to care for the most vulnerable patients, such as the elderly and those with chronic health conditions. As explained in the March 31st COVID–19 IFC, we believe that there will be changes in measure-level scores because of increased healthcare utilization due to COVID–19, reduced or delayed non-COVID–19 care due to advice to patients to delay routine and/or elective care, and changes in non-COVID–19 inpatient utilization. We realize that this will impact the data collected during the 2020 measurement year which will impact the 2022 Part C and D Star Ratings. Thus, as part of the March 31st COVID–19 IFC, we made some adjustments to account for the potential decreases in measure-level scores so health and drug plans can have some degree of certainty knowing that the Star Ratings will be adjusted and can continue their focus on patients who are most in need right now.

Specifically, the March 31st COVID–19 IFC:

- Eliminates the requirement to collect and submit Healthcare Effectiveness Data and Information Set (HEDIS) and Medicare CAHPS data otherwise collected in 2020, and replaces the 2021 Star Ratings measures calculated based on those HEDIS and CAHPS data collections with earlier values from the 2020 Star Ratings (which are not affected by the public health threats posed by COVID–19);
- Establishes how we will calculate or assign the 2021 Star Ratings in the event that CMS' functions become focused on only continued performance of essential agency operations and the agency and/or its contractors do not have the ability to calculate the 2021 Star Ratings;
- Modifies the current rules for the 2021 Star Ratings to replace any measure that has a systemic data quality issue for all plans due to the COVID–19 outbreak with the measure-level Star Ratings and scores from the 2020 Star Ratings;
- Replaces the measures calculated based on Health Outcomes Survey (HOS) data collections with earlier values that are not affected by the public

health threats posed by COVID–19 for the 2022 Star Ratings in the event that we are unable to complete HOS data collection in 2020 (for the 2022 Star Ratings) due to the PHE for COVID–19;

• Removes guardrails for the 2022 Star Ratings by delaying their application to the 2023 Star Ratings;

• Expands the existing hold harmless provision for the Part C and D Improvement measures to include all contracts for the 2022 Star Ratings; and

• Revises the definition of ''new MA plan'' so that, for purposes of 2022 QBPs based on 2021 Star Ratings only, new MA plan means an MA contract offered by a parent organization that has not had another MA contract in the previous 4 years, in order to address how the 2021 Star Ratings will be based in part on data for the 2018 performance period.

Please see the March 31st COVID–19 IFC for further information on these changes for the 2021 and 2022 Star Ratings.

2. Impact of COVID–19 on the Extreme and Uncontrollable Circumstance Policy for the 2022 Star Ratings

The March 31st COVID–19 IFC amended, as necessary, certain calculations for the 2021 and 2022 Part C and D Star Ratings to incorporate changes to address the expected impact of the PHE for COVID–19 on data collection and performance in 2020 that were immediately apparent. As the PHE for COVID–19 has progressed and various federal and state agencies have taken steps to address the PHE, we have become aware that application of the current Star Ratings disaster policy for extreme and uncontrollable circumstances (§§ 422.166(i) and 423.186(i)) will cause unintended and unworkable consequences for the 2022 Star Ratings, which will be based on the 2020 measurement period for cost, MA, and Part D plans. The Star Ratings disaster policy for extreme and uncontrollable circumstances was developed with natural disasters such as hurricanes and wildfires in mind. Those types of emergencies typically impact well-defined geographic areas. The policy uses declarations by the Federal Emergency Management Agency (FEMA) of counties or county-equivalents as Individual Assistance areas that make up all or part of a contract's service area, as well as whether the contract's service area is within an ''emergency area'' during an ''emergency period'' as defined in section 1135(g) of the Act, as a condition for applying an adjustment to how the Star Ratings are calculated for the contract. Contracts with a certain minimum percentage of enrollees residing in an area declared as an Individual Assistance area are eligible for Star Ratings adjustments for extreme and uncontrollable circumstances. The disaster policy was not designed to address global pandemics. In the past several years that we have used the extreme and uncontrollable circumstance adjustment for the Part C and D Star Ratings, the FEMA declarations have only been to county/county-equivalents and the declarations have only resulted in adjustments for a limited number of contracts.

At the time of writing the March 31st COVID–19 IFC to adopt a series of changes for the 2021 and 2022 Star Ratings as a result of the PHE for COVID–19, no counties or county-equivalents had been declared Individual Assistance areas as a result of COVID–19. As of July 28, 2020, 51 out of 55 states/territories [65] covering all counties or county-equivalents within these states and territories have been designated as Individual Assistance areas due to COVID–19 with an incident period starting in 2020 (thus affecting the 2020 measurement year), and this number could continue to grow throughout 2020 as the PHE for COVID–19 evolves. This means that the PHE for COVID–19 now meets the Star Ratings criteria for an extreme and uncontrollable circumstance in nearly all states/territories (and service areas), and most contracts would be eligible for the extreme and uncontrollable circumstance adjustments to their 2022 Star Ratings as a result of the PHE for COVID–19.

Under the current disaster policy, for all non-CAHPS measures, the numeric scores for contracts with 60 percent or more of their enrollees living in a FEMA-designated Individual Assistance area at the time of the extreme and uncontrollable circumstance are excluded from: (1) The measure-level cut point calculations for non-CAHPS measures; and (2) the performance summary and variance thresholds for the Reward Factor as described at §§ 422.166(i)(9)(i) and (i)(10)(i), and 423.186(i)(7)(i) and (i)(8)(i). When only a small number of counties are designated as Individual Assistance areas, application of these exclusions means that the performance from other contracts serving larger or other service areas are used to establish the necessary thresholds for Star Ratings. Up until now, disasters have been localized, and the 60 percent rule has removed only a small fraction of contracts (that is, less than 5 percent of contracts on average).

The unprecedented impact of COVID–19 creates a new methodological issue where, without a revision to our current disaster policy rules for calculating the measure-level cut points for the 2022 Star Ratings, we will not have enough contracts to reliably calculate the non-CAHPS measure-level cut points. Consequently, CMS will not be able to assign Star Ratings for all non-CAHPS measures. Similarly, we will not have enough contracts to reliably calculate the performance summary and variance thresholds for the Reward Factor. Applying the 60 percent rule for extreme and uncontrollable circumstances to the 2022 Star Ratings would result in removal of a large proportion of contracts (close to 98 percent) from threshold calculations, resulting in too few contracts to reliably calculate cut points using the clustering methodology for the non-CAHPS measures and too few contracts to reliably calculate the weighted means and variance used to calculate the Reward Factor. Due to the unprecedented way the PHE for COVID–19 has affected all contracts in 2020, and the fact that a majority of the country has been designated as Individual Assistance areas, we are creating special rules for the 2022 Star Ratings to remove the 60 percent rule to avoid having to exclude the vast majority of contracts from the methodology used to assign Star Ratings which would result in unreliable ratings or missing data for all contracts in the 2022 Star Ratings.

Under our current regulation, the 60 percent rule would remove nearly all values from the calculation of cut points and the Reward Factor for the 2022 Star Ratings and, if we are unable to calculate non-CAHPS measure-level cut points for the 2022 Star Ratings (such as because of the application of the 60 percent rule), all contracts will have missing measure-level Star Ratings for all non-CAHPS measures. In that circumstance, we will not have enough measures with Star Ratings to calculate either the 2022 overall or summary Star Ratings or 2023 QBPs. In addition to the 60 percent rule, for contracts that have 25 percent or more of their enrollees living in FEMA-designated Individual Assistance areas, our current regulations at §§ 422.166(i) and 423.186(i) apply various rules including permitting use of the previous year's measure-level rating and corresponding measure score if it is higher on most Star Rating measures. However, §§ 422.166(i)(8) and 423.186(i)(6) state that if the measure-level rating is missing for most measures

[65] This includes the 50 states, Washington, DC, Guam, Northern Mariana Islands, Puerto Rico and Virgin Islands.

in the current or prior year and a comparison cannot be done, the contract gets the current year's measure-level rating. Therefore, under our current regulations, without a change to the 60 percent rule to ensure that contracts receive measure-level ratings for the 2022 Star Ratings, we would not be able to apply the 25 percent rule to compare the 2022 measure-level Star Ratings to the 2021 measure-level Star Ratings, and nearly all contracts would have missing 2022 overall and summary Star Ratings and 2023 QBPs.

The change adopted by this IFC will remove application of the 60 percent rule and avoid the exclusion of contracts with 60 percent or more of their enrollees living in FEMA-designated Individual Assistance areas from calculation of the non-CAHPS measure-level cut points and calculation of the Reward Factor for the 2022 Star Ratings. By removing application of this particular exclusion, the performance of contracts in 2020 in these service areas will be used to calculate the cut points for all non-CAHPS measures and to calculate the Reward Factor; subject to these changes, all other Star Ratings rules (as revised in the March 31st COVID–19 IFC) will apply. This change will ensure that CMS can: calculate measure-level cut points for the 2022 Star Ratings; calculate measure-level ratings for the 2022 Star Ratings; apply the ''higher of'' policy for non-CAHPS measures, as described at §§ 422.166(i)(3)(iv), 422.166(i)(4)(v) and 423.186(i)(4)(i); calculate the Reward Factor; and ultimately calculate overall and summary ratings for 2022 Star Ratings and 2023 QBPs. It is critical to adopt the change in this IFC to avoid an unworkable result from the current policy in these extraordinary circumstances and so that CMS can measure actual performance for the 2020 measurement period so plans have an opportunity to demonstrate how they are tailoring care in innovative ways to meet the needs of their enrollees during the PHE for COVID–19. Given the unprecedented impacts of the PHE for COVID–19, it is important to be able to calculate the 2022 Star Ratings to help to continue to drive quality improvement for plans and providers.

3. Provisions of IFC

In this IFC, we are adopting a change to tailor the existing disaster policy described at §§ 422.166(i) and 423.186(i) to address the impact of the PHE for COVID–19 and in calculating the 2022 Part C and D Star Ratings. As the current rules are written, we will not be able to calculate the 2022 overall or summary Star Ratings or 2023 QBP ratings, and the change adopted in this IFC will avoid that outcome and preserve the ability to calculate and issue 2022 Star Ratings.

Furthermore, plans need to know this change so they have certainty about how their ratings will be calculated which will allow them to focus on providing the best care possible to beneficiaries during the remainder of the 2020 measurement period. Without knowing the changes made by this IFC to the methodology for calculating the 2022 Star Ratings, plans could have conflicting priorities between continued focus on caring for enrollees impacted by COVID–19 and keeping Medicare beneficiaries safe, while at the same time wanting to ensure that future Star Ratings and QBP ratings are not impacted by the PHE for COVID–19 which could negatively impact future benefits offered by MA organizations. The changes to the calculations for 2022 Star Ratings are designed to avoid inadvertently creating incentives for plans to place cost considerations above efforts to address the care of patients during the PHE for COVID–19, which they may do if they believe that quality performance in 2020 would not factor into their 2022 Star Rating or potential 2023 QBP.

This IFC modifies the calculation of the 2022 Part C and D Star Ratings to address the application of the extreme and uncontrollable circumstances policy for the PHE for COVID–19. Specifically, for the 2022 Star Ratings, CMS will not exclude the numeric values (that is, the performance data) for affected contracts with 60 percent or more of their enrollees in FEMA-designated Individual Assistance areas during the 2020 performance and measurement period: (1) From the clustering algorithms; or (2) from the determination of the performance summary and variance thresholds for the Reward Factor. This means that CMS will use the performance scores for contracts for the 2020 performance and measurement period to establish cut points for non-CAHPS measures and the Reward Factor for the 2022 Star Ratings, subject to the other rules in the Star Ratings methodology, including the specific rules adopted in the March 31st COVID–19 IFC. We are not modifying the 25 percent rules, even though it is clear that the 25 percent rules will result in nearly all contracts being ''affected contracts'' and eligible for adjustment to their measure-level ratings for the 2022 Star Ratings because the PHE for COVID–19 was an extreme and uncontrollable circumstance that may have negatively impacted contracts' performance on Star Ratings measures. Under the 25 percent rules at §§ 422.166(i)(2) through (6) and 423.186(i)(2) through (5), contracts with at least 25 percent of their service area in a FEMA-designated Individual Assistance area in 2020 will receive the higher of their measure-level rating from the current and prior Star Ratings years for purposes of calculating the 2022 Star Ratings (thus, for 2022 Star Ratings, contracts will receive the higher of their measure-level rating from 2021 or 2022).

For the 2022 Star Ratings, we expect data collection and submission of HEDIS and CAHPS data to continue as usual; those data will be collected during spring and summer 2021. The majority of measures for the 2022 Star Ratings are based on the 2020 measurement year, during which the PHE for COVID–19 continues. The March 31st COVID–19 IFC made some changes to the methodology for the 2022 Star Ratings so as not to inappropriately incentivize actions by plans and healthcare providers that are not directly related to the PHE for COVID–19 and to provide assurances to Medicare health and drug plans about how performance changes driven or caused by the PHE for COVID–19 will be addressed in the 2022 Star Ratings. The significant number of declarations of Individual Assistance areas makes it impossible to calculate the cut points of non-CAHPS measures for the 2022 Star Ratings since almost all contracts will be excluded from the calculations as a result of the 60 percent exclusion rule. In this IFC, at §§ 422.166(i)(11) and 423.186(i)(9), we are revising, for 2022 Star Ratings only, the current disaster policy codified at §§ 422.166(i) and 423.186(i) to: (1) Remove the 60 percent exclusion rule for cut point calculations for non-CAHPS measures; and (2) remove the 60 percent exclusion rule for the determination of the performance summary and variance thresholds for the Reward Factor. The new regulation for MA Star Ratings specifically provides that CMS will not apply the provisions §§ 422.166(i)(9) or (i)(10) in calculating the 2022 Star Ratings, and the new regulation for the Part D Star Ratings provides that CMS will not apply the provisions of §§ 423.186(i)(7) or (i)(8) in calculating the 2022 Star Ratings. This change will ensure that CMS can: (1) Calculate measure-level cut points for the 2022 Star Ratings; (2) calculate measure-level Star Ratings for the 2022 Star Ratings; (3) apply the ''higher of'' policy for non-CAHPS measures, as described at §§ 422.166(i)(3)(iv), 422.166(i)(4)(v), and 423.186(i)(4)(i) for all contracts with 25 percent or more of their enrollees living in FEMA-designated Individual Assistance areas which will include almost all Part C and D contracts for the 2020 measurement period; and (4) ultimately calculate overall and summary ratings for 2022 Star Ratings and 2023 QBPs.

I. Merit-Based Incentive Payment System (MIPS) Updates

1. Quality Performance Category: Expansion of Telehealth Codes Used in Beneficiary Assignment for the CMS Web Interface and CAHPS for MIPS Survey

a. Background

On March 17, 2020, we announced (*https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet*) the expansion of payment for telehealth services on a temporary and emergency basis pursuant to waiver authority added under section 1135(b)(8) of the Act by the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (Pub. L. 116–123, enacted March 6, 2020) such that Medicare can pay for telehealth services, including office, hospital, and other visits furnished by physicians and other practitioners to patients located anywhere in the country, including in a patient's place of residence, starting March 6, 2020. In the context of the PHE for COVID–19, we recognize that physicians and other healthcare professionals are faced with new challenges regarding potential exposure risks, including for Medicare beneficiaries, for healthcare providers, and for members of the community at large. For example, the CDC has urged healthcare professionals to make every effort to interview persons under investigation for infection by telephone, text messaging system, or video conference instead of in-person (85 FR 27582). In the March 31st COVID–19 IFC, to facilitate the use of telecommunications technology as a safe substitute for in-person services, CMS added on an interim basis many services to the list of eligible Medicare telehealth services, eliminating frequency limitations and other requirements associated with particular services furnished via telehealth, and clarifying several payment rules that apply to other services that are furnished using telecommunications technologies that can reduce exposure risks (85 FR 19232).

Section 1834(m) of the Act specifies the payment amounts and circumstances under which Medicare makes payment for a discrete set of services, all of which must ordinarily be furnished in-person, when they are instead furnished using interactive, real-time telecommunication technology. When furnished under the telehealth rules, these specified Medicare telehealth services are reported using the same codes used for the ''face-to-face'' services, but are furnished using audio/video, real-time, interactive communications technology instead of in person. As such, the majority of the codes for primary care services included in the additional telehealth services added in the March 31st COVID–19 IFC for purposes of the PHE for COVID–19 are already included in the definition of primary care services for purposes of the MIPS beneficiary assignment methodology for the CMS Web Interface and CAHPS for MIPS survey (81 FR 77168 through 77169; and 82 FR 53646 through 53647).

In the March 31st COVID–19 IFC, we also established flexibilities and separate payment for certain services that are furnished virtually using communication technologies, but that are not considered Medicare telehealth services such as virtual check-ins and e-visits. Additionally, we established separate payment for telephone E/M and other services codes during the PHE for COVID–19. The communications technology-based services (CTBS) and the telephone E/M services are not currently included in the definition of primary care services that is used for purposes of the MIPS beneficiary assignment methodology for the CMS Web Interface and CAHPS for MIPS survey.

We believe it is critical to include the codes for CTBS and telephone E/M services, as identified and discussed later in this section, in the definition of primary care services to ensure these services are included in our determination of where beneficiaries receive the plurality of their primary care for purposes of beneficiary assignment. Including these codes will ensure that the assignment methodology appropriately reflects the expanded use of technology that is helping people who need routine care during the PHE for COVID–19 and allowing vulnerable beneficiaries and beneficiaries with mild symptoms to remain in their homes, while maintaining access to the care they need. By including services provided virtually, either through telehealth or other uses of communications technology, we ensure that this care is appropriately reflected in our consideration of where beneficiaries receive the plurality of their primary care, for purposes of assigning beneficiaries to groups and virtual groups.

b. Use of Codes for Virtual Check-ins, Remote Evaluations, E-Visits, and Telephone E/M Services in MIPS Beneficiary Assignment for the CMS Web Interface and CAHPS for MIPS Survey

We have added new services to the separately billable CTBS under the PFS over the past several years and as a result of the PHE for COVID–19, we expect that the utilization of CTBS will substantially increase during the PHE for COVID–19 and thereafter. We believe that clinicians are increasingly using such services as a key component of their ongoing primary care. At § 414.1305, we are codifying the definition of primary care services for purposes of MIPS beneficiary assignment methodology for the CMS Web Interface and CAHPS for MIPS survey. The included codes consist of previously finalized codes that are already considered primary care services and additional codes that CMS will be treating as primary care services for the duration of the PHE for COVID–19. The previously finalized codes are as follows:

- *CPT codes*: 99201 through 99215 (codes for office or other outpatient visit for the E/M of a patient); 99304 through 99318 (codes for professional services furnished in a nursing facility, excluding professional services furnished in a SNF for claims identified by place of service (POS) modifier 31) (81 FR 77168); 99319 through 99340 (codes for patient domiciliary, rest home, or custodial care visit); 99341 through 99350 (codes for E/M services furnished in a patients' home for claims identified by POS modifier 12); 99487, 99489, and 99490 (codes for chronic care management); and 99495 and 99496 (codes for transitional care management services); and
- *HCPCS codes:* G0402 (code for the Welcome to Medicare visit); and G0438 and G0439 (codes for the annual wellness visits).

The additional codes we are adding through this IFC are as follows: (1) CPT codes: 99421, 99422, and 99423 (codes for online digital E/M service (e-visit)), and 99441, 99442, and 99443 (codes for telephone E/M services); and (2) HCPCS codes: G2010 (code for remote evaluation of patient video/images) and G2012 (code for virtual check-in).

We note that including these codes in the MIPS beneficiary assignment methodology for the CMS Web Interface and CAHPS for MIPS survey aligns with the revision that was made in the May 8th COVID–19 IFC (85 FR 27583) to the definition of primary care services used for purposes of beneficiary assignment under the Medicare Shared Savings Program to include the same codes in determining beneficiary assignment for performance year 2020 and any subsequent performance year that starts during the PHE for COVID–19.

The services listed above are an important component of primary care and as a result, we believe it is appropriate to include these codes in the definition of primary care services used for assignment for the CMS Web Interface and CAHPS for MIPS survey because the services represented by these codes are being used during the PHE for COVID–19 in place of similar E/M services, the codes for which are already included in the list of codes used for assignment. It should be noted that the remote evaluation of patient video/images and virtual check-in codes, and the online digital E/M service (e-visit) codes are not separately billable by a clinician if they are related to a visit within the past 7 days or lead to a visit within the following 24 hours or next available appointment. The only codes that are newly billable during the PHE for COVID–19 pertain to the telephone E/M services.

We are including these codes in the definition of primary care services for the 2020 MIPS performance year and any subsequent performance year that starts during the PHE for COVID–19. We recognize that the application of this policy for the 2020 MIPS performance period is retroactive. Section 1871(e)(1)(A)(ii) of the Act provides for retroactive application of a substantive change to an existing policy when the Secretary determines that failure to apply the policy change retroactively would be contrary to the public interest. Without the inclusion of these codes in the MIPS beneficiary assignment methodology for the CMS Web Interface and CAHPS for MIPS survey for the 2020 MIPS performance year during the PHE for COVID–19, we would not be able to adequately account for the ways in which beneficiaries are receiving primary care services during the PHE for COVID–19 and as a result, the process to derive assignment and sampling of beneficiaries for the CMS Web Interface and CAHPS for MIPS survey would not be able to comprehensively capture how primary care services are being furnished to beneficiaries, which may cause many groups and virtual groups to have insufficient sample sizes to be able to administer the 2020 CAHPS for MIPS survey or report data for the quality performance category using the CMS Web Interface measures.

In regard to the CMS Web Interface, such groups and virtual groups may not have sufficient time to select an alternate collection type and prepare their systems to report on measures from a different collection type before the submission period begins for the 2020 MIPS performance period and as a result, they would not be able to meet the quality performance category reporting requirements, which could negatively impact their MIPS final score and MIPS payment adjustment. We believe it is important to include these codes in our assignment methodology because we determine assignment based upon where beneficiaries receive the plurality of their primary care services and whether beneficiaries have designated a MIPS eligible clinician as their primary clinician, responsible for their overall care, and hold groups and virtual groups accountable for the resulting assigned beneficiary population. Including these codes in the definition of primary care services used in MIPS beneficiary assignment during the PHE for COVID–19 will result in a more accurate identification of where beneficiaries have received the plurality of their primary care services.

2. Improvement Activities Performance Category: Improvement Activities Inventory Update

a. Background

The CY 2018 Quality Payment Program final rule (82 FR 53660) finalized that we would add new improvement activities or make modifications to existing improvement activities in the Improvement Activities Inventory through notice-and-comment rulemaking. An improvement activity means an activity that relevant MIPS eligible clinician, organizations and other relevant stakeholders identify as improving clinical practice or care delivery and that the Secretary determines, when effectively executed, is likely to result in improved outcomes. We refer readers to Table H in the Appendix of the CY 2017 Quality Payment Program final rule (81 FR 77177 through 77199), Tables F and G in the Appendix of the CY 2018 Quality Payment Program final rule (82 FR 54175 through 54229), Tables A and B in the Appendix 2 of the CY 2019 PFS final rule (83 FR 60286 through 60303), and Tables A, B, and C in the Appendix 2 of the CY 2020 PFS final rule (84 FR 63514 through 63538) for our previously finalized Improvement Activities Inventory. We also refer readers to the Quality Payment Program website at *https://qpp.cms.gov/* for a complete list of the most current list of improvement activities.

The COVID–19 pandemic has been deemed a PHE[66] by the Secretary of the Department of HHS. In response, in the March 31st IFC for COVID–19 (85 FR 19276 through 19277), we added one new improvement activity to the Improvement Activities Inventory for the CY 2020 performance period in response to the PHE titled ''COVID–19 Clinical Trials.'' As described in the March 31st IFC for COVID–19, this improvement activity promotes clinician participation in a COVID–19 clinical trial utilizing a drug or biological product to treat a patient with a COVID–19 infection.[67] We stated that to receive credit for this improvement activity, a clinician must attest to participation in a COVID–19 clinical trial utilizing a drug or biological product to treat a patient with a COVID–19 infection and report their findings through a clinical data repository or clinical data registry (85 FR 19276). In that IFC, we also stated that we believe that participation in this activity would likely result in improved outcomes by improving the collection of data clinicians use for the care of their patients as they monitor and manage COVID–19 and drive care improvements (85 FR 19277). We stated that we believe that encouraging clinicians to utilize an open source clinical data repository or clinical data registry for data reporting will bring the results of their research to the forefront of healthcare far quicker than if it goes through the cycle of peer review and publishing (85 FR 19277). In addition, we stated that we believe that centralized data could improve clinical practice and care delivery (85 FR 19277).

b. Modification

Following the publication of the March 31st IFC for COVID–19, we received several inquiries through meetings, email correspondence, and Quality Payment Program help desk requesting further information on whether a clinician working with COVID–19 patients who provides their data to a clinical data registry, without participating in a clinical trial, may get credit for this activity. The Quality Payment Program help desk tracks, documents, and resolves inquiries submitted by MIPS eligible clinicians and groups. Stakeholders may submit inquiries to the help desk via 1–866–288–8292 (Monday–Friday 8 a.m.–8

[66] Information regarding the PHE for COVID–19 is available at *https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx.*

[67] For more information on the COVID–19 clinical trials, we refer readers to the U.S. National Library of Medicine website at *https://clinicaltrials.gov/ct2/results?cond=COVID-19.*

p.m. ET) or email *QPP@cms.hhs.gov*mailto: *QPP@cms.hhs.gov*. Some stakeholders believed that clinicians providing care to patients with COVID–19 outside of a clinical trial that report that data through a clinical data registry should receive credit for this activity. It has come to our attention that clinical data registries not only collect data as part of clinical trials, but also collect data from clinicians not participating in clinical trials. The improvement activity as written was causing confusion for clinicians and groups attempting to meet the needs of patients and address gaps in research. Since IA_ERP_3 titled ''COVID–19 Clinical Trials'' was established, this improvement activity has been the subject of approximately 30 percent of the inquiries to the Quality Payment Program help desk, demonstrating the desire for clinicians to improve clinical care and overall outcomes for patients diagnosed with COVID–19 by conducting this improvement activity, but also indicating the need for further clarity in its activity description.

As a result, we are expanding the improvement activity to include clinicians participating in the care of a patient diagnosed with COVID–19 who simultaneously submit their clinical patient data to a clinical data registry for research. Thus, in order to receive credit for this improvement activity, a MIPS eligible clinician or group must: (1) Participate in a COVID–19 clinical trial utilizing a drug or biological product to treat a patient with a COVID–19 infection and report their findings through a clinical data repository or clinical data registry for the duration of their study; or (2) participate in the care of patients diagnosed with COVID–19 and simultaneously submit relevant clinical data [68] to a clinical data registry for ongoing or future COVID–19 research.[69] Data would be submitted to the extent permitted by applicable privacy and security laws. We are also modifying the improvement activity title to reflect this change.

For purposes of this improvement activity, clinical data registries must meet the following requirements: (1) The receiving entity must declare that they are ready to accept data as a clinical registry; and (2) be using the data to improve population health outcomes. Most public health agencies and clinical data registries declare readiness to accept data from clinicians via a public online posting. Clinical data registries should make publicly available specific information on what data the registry gathers, technical requirements or specifications for how the registry can receive the data, and how the registry may use, re-use, or disclose individually identifiable data it receives. For purposes of credit toward this improvement activity, any data should be sent to the clinical data registry in a structured format, which the registry is capable of receiving. A MIPS-eligible clinician may submit the data using any standard or format that is supported by the clinician's health IT systems, including but not limited to, certified functions within those systems. Such methods may include, but are not limited to, a secure upload function on a web portal, or submission via an intermediary, such as a health information exchange. To ensure interoperability and versatility of the data submitted, any electronic data should be submitted to the clinical data registry using appropriate vocabulary standards for the specific data elements, such as those identified in the United States Core Data for Interoperability (USCDI) standard adopted in 45 CFR 170.213.

As stated in the March 31st COVID–19 IFC, we continue to believe that participation in this activity is likely to result in improved outcomes by improving the collection of data clinicians use for the care of their patients. We believe that all clinical data gathered in the treatment of patients diagnosed with COVID–19 may be helpful in finding a solution to end this pandemic. We believe encouraging clinicians collectively to utilize a clinical data registry for data reporting could facilitate sharing of data for use in additional clinical studies with larger sample sizes. These additional and larger clinical studies are likely to identify efficacy of certain treatments, which in turn could result in wider improvements in health outcomes, including reduced severity and mortality due to COVID–19 across the nation. This could benefit patients nationwide as well as improve clinical practice and care delivery for the patients of the clinician attesting to this improvement activity. We would like to encourage all clinicians to provide data through an open source clinical data repository or clinical data registry, meaning that the results of research are made public, including via publications and scientific data sources, which enables reuse, increases transparency, and facilitates reproducibility of research results. Furthermore, a clinical data registry may allow such data to be publicly available which may be used for research.

We believe that this improvement activity would incentivize clinicians to submit COVID–19 data to clinical data registries, which is imperative to help combat the PHE for COVID–19 because the data could be used to inform research and treatment options and potentially save lives. We recognize that under the Promoting Interoperability performance category there is the required Public Health and Clinical Data Exchange Objective that includes the reporting of data to two different public health agencies or clinical data registries.

We note that under the Promoting Interoperability performance category there are five specific types of public health agencies and clinical data registries that clinicians may submit data to, including an immunization registry or public health registry. The submission requirements for the Promoting Interoperability performance category would not be changed by this improvement activity. Thus a clinician could report COVID–19 data to a public health agency or clinical data registry as part of fulfilling one of the required Public Health and Clinical Data Exchange Objective reporting options under the Promoting Interoperability performance category and include it in their Promoting Interoperability performance category data submission. They could also receive credit for this improvement activity if they fulfill the requirements of the improvement activity and include it in their improvement activity performance category data submission.

We refer readers to section IV.H.3.h.(4)(d)(i)(C) of CY 2019 PFS final rule (83 FR 59776 through 59777) where we discussed that high-weighting should be used for activities that directly address areas with the greatest impact on beneficiary care, safety, health, and well-being and/or is of high intensity, requiring significant investment of time and resources. We believe this modified improvement activity should still be high-weighted because it directly addresses an area with the greatest impact on beneficiary care, safety, health, and well-being particularly under this PHE for COVID–19 and participation in a clinical trial and/or collection and submission of patient data to a clinical data registry or repository requires a significant investment of time and resources.

[68] We refer readers to the U.S. National Library of Medicine website at *https://clinicaltrials.gov/ct2/results?cond=COVID-19* for more information on the COVID–19 clinical trials.

[69] We also refer readers to the National Institute of Health website at *https://search.nih.gov/search?utf8=%E2%9C%93&affiliate=nih&query=COVID-19+registries&commit=Search* for more information on COVID–19 clinical data registries.

In the CY 2019 PFS final rule (83 FR 59778 through 59782), we provided details regarding the Annual Call for Activities and how stakeholders submit potential improvement activities. In general, to nominate a new activity or request a modification to an existing improvement activity, a stakeholder must submit a nomination form available at *www.qpp.cms.gov* during the Annual Call for Activities. For this improvement activity, we made a one-time exception from our established Annual Call for Activities timeframe and processes due to the PHE for COVID–19 (85 FR 19277). In this IFC, we are again making an exception from our established Annual Call for Activities timeframe and processes due to the ongoing PHE for COVID–19. We believe the modifications to the improvement activity should be established as soon as possible because the PHE for COVID–19 continues to require considerable effort by clinicians and researchers. As discussed above, we want to allow clinicians treating patients with COVID–19 and providing that data to a clinical data registry receive credit for this improvement activity.

c. Continuation Through CY 2021 Performance Period

As stated above, we previously added the improvement activity to the Inventory for the CY 2020 performance period only in response to the PHE for COVID–19. In this IFC, we are extending the newly modified COVID–19 Clinical Data Reporting with or without Clinical Trial improvement activity through the CY 2021 performance period due to the increased rate of COVID–19 infection we are experiencing nationwide. We anticipate the need for COVID–19 clinical trials and data collection/sharing through registries to continue through CY 2021 at which time we will reassess whether there remains a need for additional data sharing or if preventive measures and clinical treatments have advanced to the point where these type of data are not needed. We would like eligible clinicians to be able to attest to this improvement activity if it is still pertinent. We believe that participation in this improvement activity is likely to result in improved outcomes by improving the collection of data clinicians use for the care of their patients as they monitor and manage COVID–19.

Table 1 displays a full description of the modified improvement activity.

TABLE 1—CONTINUATION WITH MODIFICATION OF IMPROVEMENT ACTIVITY FOR THE MIPS CY 2020–2021 PERFORMANCE PERIODS

Improvement Activity	
Current Activity ID:	IA_ERP_3.
Current Subcategory:	Emergency Response and Preparedness.
Current Activity Title:	COVID–19 Clinical Trials.
Current Activity Description:	To receive credit for this activity, a MIPS-eligible clinician must participate in a COVID–19 clinical trial utilizing a drug or biological product to treat a patient with a COVID–19 infection and report their findings through a clinical data repository or clinical data registry for the duration of their study. For more information on the COVID–19 clinical trials, we refer readers to the U.S. National Library of Medicine website at *https://clinicaltrials.gov/ct2/results?cond=COVID-19*.
Current Weighting:	High.
Change and Rationale:	This improvement activity addresses the COVID–19 pandemic, which has been deemed a public health emergency (PHE) by the Secretary of the Department of Health and Human Services.* While this improvement activity was finalized in the interim final rule in response to the PHE for the CY 2020 performance period only (85 FR 19230), we believe it should be continued for the CY 2021 performance period because the COVID–19 pandemic may extend into CY 2021, and we would like eligible clinicians to be able to attest to this improvement activity if it is still pertinent. We believe that clinicians who treat patients diagnosed with COVID–19 and simultaneously submit relevant data regarding that patient to a clinical data registry for COVID–19 research should also receive credit. We believe that all clinical data gathered in the treatment of patients diagnosed with COVID–19 may be helpful in finding a solution to end this pandemic. Encouraging clinicians collectively to utilize a clinical data registry for data reporting could facilitate sharing of data for use in additional clinical studies with larger sample sizes. These additional and larger clinical studies are likely to identify efficacy of certain treatments, which in turn could result in wider improvements in health outcomes, including reduced severity and mortality due to COVID–19 across the nation. This could benefit patients nationwide as well as improve clinical practice and care delivery for the patients of the clinician attesting to this improvement activity. We refer readers to section IV.H.3.h.(4)(d)(i)(C) of CY 2019 PFS final rule (83 FR 59776 through 59777) where we discussed that high-weighting should be used for activities that directly address areas with the greatest impact on beneficiary care, safety, health, and well-being and/or is of high intensity, requiring significant investment of time and resources. We believe this modified improvement activity should still be high-weighted because it directly addresses an area with the greatest impact on beneficiary care, safety, health, and well-being particularly under this PHE and participation in a clinical trial and/or clinical data registry requires a significant investment of time and resources.
New Activity Title:	COVID–19 Clinical Data Reporting with or without Clinical Trial.

TABLE 1—CONTINUATION WITH MODIFICATION OF IMPROVEMENT ACTIVITY FOR THE MIPS CY 2020–2021 PERFORMANCE PERIODS—Continued

New Activity Description:	In order to receive credit for this improvement activity, a MIPS eligible clinician or group must: (1) Participate in a COVID–19 clinical trial utilizing a drug or biological product to treat a patient with a COVID–19 infection and report their findings through a clinical data repository or clinical data registry for the duration of their study; or (2) participate in the care of patients diagnosed with COVID–19 and simultaneously submit relevant clinical data to a clinical data registry for ongoing or future COVID–19 research. Data would be submitted to the extent permitted by applicable privacy and security laws. Examples of COVID–19 clinical trials may be found on the U.S. National Library of Medicine website at *https://clinicaltrials.gov/ct2/results?cond=COVID-19*. In addition, examples of COVID–19 clinical data registries may be found on the National Institute of Health website at *https://search.nih.gov/search?utf8=%E2%9C%93&affiliate=nih&query=COVID-19+registries&commit=Search*. For purposes of this improvement activity, clinical data registries must meet the following requirements: (1) The receiving entity must declare that they are ready to accept data as a clinical registry; and (2) be using the data to improve population health outcomes. Most public health agencies and clinical data registries declare readiness to accept data from clinicians via a public online posting. Clinical data registries should make publically available specific information on what data the registry gathers, technical requirements or specifications for how the registry can receive the data, and how the registry may use, re-use, or disclose individually identifiable data it receives. For purposes of credit toward this improvement activity, any data should be sent to the clinical data registry in a structured format, which the registry is capable of receiving. A MIPS-eligible clinician may submit the data using any standard or format that is supported by the clinician's health IT systems, including but not limited to, certified functions within those systems. Such methods may include, but are not limited to, a secure upload function on a web portal, or submission via an intermediary, such as a health information exchange. To ensure interoperability and versatility of the data submitted, any electronic data should be submitted to the clinical data registry using appropriate vocabulary standards for the specific data elements, such as those identified in the United States Core Data for Interoperability (USCDI) standard adopted in 45 CFR 170.213.
New Weighting:	High.

* For more information, see *https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx*.

J. Requirement for Long-Term Care (LTC) Facilities To Test Facility Residents and Staff for COVID–19

Under sections 1866 and 1902 of the Act, providers of services seeking to participate in the Medicare or Medicaid program, or both, must enter into an agreement with the Secretary or the state Medicaid agency, as appropriate. LTC facilities seeking to be Medicare and Medicaid providers of services must be certified as meeting federal participation requirements. LTC facilities include skilled nursing facilities (SNFs) for Medicare and nursing facilities (NFs) for Medicaid. The federal participation requirements for SNFs, NFs, and dually certified facilities, are set forth in sections 1819 and 1919 of the Act and codified in the implementing regulations at 42 CFR part 483, subpart B.

Sections 1819(d)(4)(B) and 1919(d)(4)(B) of the Act explicitly authorize the Secretary to issue any regulations deemed necessary to protect the health and safety of residents. Sections 1819(d)(3) and 1919(d)(3) of the Act authorize the Secretary to establish criteria for assessing a facility's compliance with such regulations with respect to infection control. Under the explicit instructions of Congress, existing regulations at § 483.80 require facilities to establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment in which residents reside and to help prevent the development and transmission of disease and infection.

After several months facing the effects of COVID–19, we believe there exists a need to strengthen the requirements for LTC facilities to better protect residents, members of a high-risk population. As demonstrated by the PHE for COVID–19, a strong infection control program is critical to protect the health and safety of both residents and healthcare personnel of LTC facilities. The CDC has developed guidance identifying those who are ''. . . more likely than others to become severely ill . . .'' if they become infected with COVID–19 titled, *People Who Are at Increased Risk for Severe Illness* (*https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html*).[70] Based on this guidance, given the congregate nature of LTC facilities and the high-risk nature of the population served, LTC facilities are at greater risk of COVID–19 outbreaks as well as higher rates of incidence, morbidity, and mortality. To support national efforts to control the spread of COVID–19, we are revising the LTC facility infection control regulations at § 483.80 to establish a new requirement for LTC facilities to test their facility residents and staff, including individuals providing services under arrangement and volunteers. We believe these requirements will positively and substantially impact efforts to control the spread of COVID–19 in LTC facilities.

1. LTC Facility Resident and Staff Testing

The CDC published guidelines titled, *Testing Guidelines for Nursing Homes,* which note that, ''Nursing home residents are at high risk for infection, serious illness, and death from COVID–19. Testing for [COVID–19] . . . can detect current infections . . . among residents in nursing homes. Testing is an important addition to other infection prevention and control recommendations aimed at preventing [COVID–19] from entering nursing homes, detecting cases quickly, and stopping transmission.'' [71] CMS recognizes the need for facilities to protect LTC facility staff while preventing the spread of COVID–19 within the facility. As a result, we are amending the current infection control requirements for LTC facilities at § 483.80 by adding a paragraph (h) that requires a facility to test all of its residents and facility staff for COVID–19. Under this requirement, ''staff'' are considered any individuals employed

[70] The Centers for Disease Control and Prevention, (2020). People Who Are at Increased Risk for Severe Illness. Retrieved from: *https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html*.

[71] The Centers for Disease Control and Prevention, (2020). Testing Guidelines for Nursing Homes. Retrieved from: *https://www.cdc.gov/coronavirus/2019-ncov/hcp/nursing-homes-testing.html*.

by the facility, any individuals that have arrangements to provide services for the facility, and any individuals volunteering at the facility. An example of individuals providing services under arrangement include a hospice that may have an agreement in accordance with the requirements for the use of outside resources under § 483.70(g) and (o) to provide hospice care for residents in the facility. We expect that only those individuals that are physically working on-site at the facility be required to be tested for COVID–19. The facility may have staff, including individuals providing services under arrangement and volunteers, who provide services for the facility from an off-site location that is not physically located within the facility, and such staff would not be required to be tested for COVID–19.

Other individuals may require access to the facility, such as state surveyors and ombudsmen. Sections 1819(c)(3)(A) and 1919(c)(3)(A) of the Act, and implementing regulations at § 483.10(f)(4)(i)(C), require that LTC facilities provide representatives of the State LTC Ombudsman with immediate access to any resident. In accordance with the guidance published in a CMS Quality, Safety, and Oversight Memorandum on April 24, 2020 (and revised on July 9, 2020), during the PHE for COVID–19, in-person access to residents may be restricted. If in-person access is not advisable due to infection control concerns and transmission of COVID–19, facilities must facilitate resident communication (for example, by phone or through use of other technology) with the ombudsman (QSO–20–28–NH, *https://www.cms.gov/files/document/qso-20-28-nh-revised.pdf*). Regarding state surveyors, facilities have a statutory obligation to allow facility access to the surveyors. In accordance with the requirements at 42 CFR part 488, state agencies are responsible for ensuring that surveyors are following CDC guidance for infection prevention and refraining or returning to work.

At § 483.80(h)(1), we are requiring that resident and staff testing for COVID–19 be conducted based on parameters set forth by the Secretary. These parameters may include, but are not limited to:

- Testing frequency;
- The identification of any facility resident or staff diagnosed with COVID–19 in the facility;
- The identification of any facility resident or staff with symptoms consistent with COVID–19 or with known or suspected exposure to COVID–19;
- The criteria for conducting testing of asymptomatic individuals specified in this paragraph, such as the positivity rate of COVID–19 in a county;
- The response time for test results; and
- Other factors specified by the Secretary that help identify and prevent the transmission of COVID–19.

We recognize that there may be additional factors that may be useful in developing parameters for COVID–19 testing. As a result, we are soliciting comments on other factors the Secretary should consider for LTC facility resident and staff testing for COVID–19. The testing guidelines that have been specified by the Secretary will be made available to LTC facilities via CMS memoranda, and CMS and CDC websites.

We are requiring at § 483.80(h)(2) that all resident and staff testing be conducted in a manner that is consistent with current professional standards of practice for conducting COVID–19 tests. Current ''professional standards of practice'' refers to those professional standards that apply at the time that the care or service is delivered. Given that COVID–19 is caused by a newly discovered coronavirus, the standards of practice for testing for the virus may continue to change or evolve as more is learned about the virus and as technological advances are developed. Testing residents and staff for COVID–19 in a manner that is consistent with current professional standards of practice is important to ensure accurate and effective testing. A key factor in the effectiveness of testing is the turnaround time for results of the tests that are being used. There are many different tests available and facilities have the flexibility and discretion to select the test that best suits their needs so long as the tests are conducted in accordance with nationally recognized standards and meet the response time for test results as specified by the Secretary. The CDC provides detailed recommendations for testing both residents and healthcare personnel for COVID–19 at *https://www.cdc.gov/coronavirus/2019-ncov/hcp/nursing-homes-testing.html*. These recommendations provide information about the use of specific testing methods and focus on how testing can be added to other infection prevention and control practices to keep COVID–19 out of facilities, detect cases quickly, and stop its transmission.

We are requiring at § 483.80(h)(3)(i) that for each instance of resident or staff COVID–19 testing, which includes testing of individuals providing services under arrangement and volunteers, the facility document that testing was completed and the results of each staff test. We expect that this documentation would be located in the staff personnel record for all staff. In the case of individuals who are providing services under arrangement at the facility, we expect that this documentation be located in the record or file that the facility maintains for the individual. In the event that no such record or file is maintained, we expect that the agreement for the services that are being provided under arrangement include a process for documenting these results. Consistent with the documentation requirements we are adding for LTC facility staff, we are requiring at § 483.80(h)(3)(ii) that the facility document in the resident's medical record that testing was offered, completed (as appropriate to the resident's testing status), and the results of each test.

According the CDC, ''The virus that causes COVID–19 is spreading very easily and sustainably between people. Information from the ongoing COVID–19 pandemic suggests that this virus is spreading more efficiently than influenza. . . . In general, the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID–19 spread.'' [72] The nature of LTC facilities make outbreaks of COVID–19 difficult to control. To address the transmissibility of COVID–19 in LTC facilities, we are requiring at § 483.80(h)(4) that the facility take actions to prevent the transmission of COVID–19 when a resident or staff member, including individuals providing services under arrangement and volunteers, present with symptoms consistent with COVID–19 or who test positive for COVID–19.

In accordance with the current regulatory requirements for LTC facilities at § 483.80(g), facilities are required to electronically report information about COVID–19 in a standardized format specified by the Secretary, which includes reporting suspected and confirmed COVID–19 infections among residents and staff.

For facility staff, we expect facilities to restrict the access to the facility for any staff member, including individuals providing services under arrangement and volunteers, who presents with symptoms consistent with COVID–19 or who tests positive for COVID–19 until he or she is deemed to be safe to return to work. The testing guidelines specified

[72] The Centers for Disease Control and Prevention (2020). How COVID–19 Spreads. Retreived from: *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html*.

by the Secretary include specified return to work criteria. Following the return to work criteria established by the Secretary will ensure that staff, including individuals providing services under arrangement and volunteers, who are still capable of spreading the virus do not have access to the facility, thus increasing resident safety by removing any potential threats of exposure. These proactive efforts support a facility's ability to prevent outbreaks, create opportunities for early intervention, and mitigate the transmission of the virus between healthcare personnel and facility residents.

For facility residents who present with symptoms consistent with COVID–19 or who test positive for COVID–19, we expect the facility to take measures to mitigate the transmission of the virus within the facility that may include resident cohorting, consistent with CDC's guidance, *Responding to Coronavirus (COVID–19) in Nursing Homes*.[73] Cohorting involves preventing the spread of COVID–19 in the facility by confining residents who are known or suspected to have COVID–19 to a specified area to prevent contact with other residents who do not have (or suspected to have) COVID–19. The CDC's current recommendations include avoiding the sharing of staff between residents that are COVID–19 positive and residents that have not tested positive.

We acknowledge that not all residents and staff will consent to COVID–19 testing. In accordance with the requirements at § 483.10(c)(6), residents have the right to refuse and/or discontinue treatment. In addition, staff retain the right to refuse COVID–19 testing. There may also be instances in which facility residents or staff are not able to be tested, such as the presence of anatomical or other medical contraindications. At § 483.80(h)(5), we are requiring that the facility have procedures for addressing residents and staff, including individuals providing services under arrangement and volunteers, who refuse or are unable to be tested. In these instance, we also expect facilities to take steps to maintain the health and safety of its staff and residents who have not been diagnosed with COVID–19 that may include limiting the staff's access to the facility and cohorting residents.

We are requiring at § 483.80(h)(6) that the LTC facility must coordinate with state and local health departments on the availability of testing supplies, obtaining testing supplies, and processing test results when necessary. As appropriate, facilities should also coordintate with their tribal representatives and authorities for these resources as well. Facilities may also coordinate with their local certified laboratories covered under Clinical Laboratory Improvement Amendments (CLIA) on the availability of testing supplies, obtaining testing suppliers, and processing test results. Considerations such as access to adequate testing supplies and arrangements for acquiring testing supplies must be addressed by a facility's infection prevention and control plan. Additionally, the testing plan must include any arrangements that may be necessary to conduct, process, and receive test results prior to the administration of the required tests.

LTC facilities are currently required to have policies and procedures in place to address the use of volunteers in an emergency under the emergency preparedness requirements at § 483.73(b)(6). During this pandemic, the use of volunteers and other emergency staffing strategies, including the use of state and federal healthcare professionals, is important in addressing staff shortages. Facilities are expected to assess their ability to replace workers who can no longer work, either on a short term basis or permanently, with personnel trained for the vacant positions. The LTC facility should maintain an appropriate staffing level at all times to provide a safe work environment for healthcare personnel (HCP) and safe resident care. As the COVID–19 pandemic continues, staffing shortages will likely occur due to HCP exposures and illness. Due to the unique challenges in managing the mitigation of COVID–19, facilities should assess their staffing needs and the minimum number of staff needed to provide a safe work environment and care for residents. In addition, facilities should be prepared to make various adjustments such as using volunteers, and adjusting work and time-off schedules. Facilities should also be prepared to contact ''The Emergency System for Advance Registration of Volunteer Health Professionals'' (*https://www.phe.gov/esarvhp*), their local healthcare coalition, federal, state and local healthcare partners for assistance with staffing shortages. Further resources and guidelines, such as those provided by the CDC at *https://www.cdc.gov/coronavirus/2019-ncov/hcp/mitigating-staff-shortages.html,* can provide additional suggestions for managing staff shortages.

We believe that these new regulatory actions strengthen CMS' response to the PHE for COVID–19, and reaffirms our commitment to transparency and protecting the health and safety of LTC residents. As discussed in section III. of this IFC, ''Waiver of Proposed Rulemaking'', we believe the urgency of this PHE for COVID–19 constitutes good cause to waive the normal notice-and-comment process under the APA and section 1871(b)(2)(C) of the Act. Waiving notice and comment is in the public interest, because time is of the essence in controlling the spread of COVID–19, and universal resident and staff testing will assist public health officials in detecting outbreaks and saving lives.

III. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule before the provisions of the rule are finalized, either as proposed or as amended in response to public comments, and take effect, in accordance with the Administrative Procedure Act (APA) (Pub. L. 79–404), 5 U.S.C. 553, and, where applicable, section 1871 of the Act. Specifically, 5 U.S.C. 553 requires the agency to publish a notice of the proposed rule in the **Federal Register** that includes a reference to the legal authority under which the rule is proposed, and the terms and substance of the proposed rule or a description of the subjects and issues involved. Further, 5 U.S.C. 553 requires the agency to give interested parties the opportunity to participate in the rulemaking through public comment before the provisions of the rule take effect. Similarly, section 1871(b)(1) of the Act requires the Secretary to provide for notice of the proposed rule in the **Federal Register** and a period of not less than 60 days for public comment for rulemaking carrying out the administration of the insurance programs under title XVIII of the Act. Section 1871(b)(2)(C) of the Act and 5 U.S.C. 553 authorize the agency to waive these procedures, however, if the agency for good cause finds that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

Section 553(b)(B) of title 5 of the U.S. Code ordinarily requires a 30-day delay in the effective date of a final rule from the date of its publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an

[73] The Centers for Disease Control and Prevention, (2020). *Responding to Coronavirus (COVID–19) in Nursing Homes*. Retrieved from: *https://www.cdc.gov/coronavirus/2019-ncov/hcp/nursing-homes-responding.html*.

agency finds good cause to support an earlier effective date. Section 1871(e)(1)(B)(i) of the Act also prohibits a substantive rule from taking effect before the end of the 30-day period beginning on the date the rule is issued or published. However, section 1871(e)(1)(B)(ii) of the Act permits a substantive rule to take effect before 30 days if the Secretary finds that a waiver of the 30-day period is necessary to comply with statutory requirements or that the 30-day delay would be contrary to the public interest. Furthermore, section 1871(e)(1)(A)(ii) of the Act permits a substantive change in regulations, manual instructions, interpretive rules, statements of policy, or guidelines of general applicability under Title XVIII of the Act to be applied retroactively to items and services furnished before the effective date of the change if the failure to apply the change retroactively would be contrary to the public interest. Finally, the Congressional Review Act (CRA) (Pub. L. 104–121, Title II) requires a delay in the effective date for major rules unless an agency finds good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, in which case the rule shall take effect at such time as the agency determines. 5 U.S.C. 801(a)(3), 808(2).

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization (WHO) declared the outbreak a ''Public Health Emergency of international concern''. On January 31, 2020, pursuant to section 319 of the PHSA, the Secretary determined that a PHE exists for the United States to aid the nation's healthcare community in responding to COVID–19. On March 11, 2020, the WHO publicly declared COVID–19 a pandemic. On March 13, 2020, the President declared the COVID–19 pandemic a national emergency. Effective July 25, 2020, the Secretary renewed the January 31, 2020 determination that was previously renewed on April 21, 2020, that a PHE exists and has existed since January 27, 2020. This declaration, along with the Secretary's January 30, 2020 declaration of a PHE, conferred on the Secretary certain waiver authorities under section 1135 of the Act. On March 13, 2020, the Secretary authorized waivers under section 1135 of the Act, effective March 1, 2020.[74]

Ensuring the health and safety of all Americans, including Medicare beneficiaries, Medicaid recipients, and healthcare workers is of primary importance. This IFC directly supports that goal by requiring COVID–19 reporting by hospitals, CAHs, and CLIA laboratories; by requiring testing of nursing home staff and residents; and by strengthening enforcement of important nursing home infection prevention and control requirements related to COVID–19 reporting. It is critically important that we implement the policies in this IFC as quickly as possible. As we are in the midst of the PHE for COVID–19, we find good cause to waive notice and comment rulemaking as we believe it would be impracticable and contrary to the public interest for us to undertake normal notice and comment rulemaking procedures. For the same reasons, because we cannot afford any delay in effectuating this IFC, we find good cause to waive the 30-day delay in the effective date and, moreover, to establish these policies in this IFC applicable as of the date this rule is published.

In this IFC, we are revising the previous policy outlined in the May 8th COVID–19 IFC, which allowed for broad COVID–19 testing for a single beneficiary without a physician order, by establishing that only a single COVID–19 test and one of each other related test (as listed in the May 8th COVID–19 IFC) without a treating physician or NPP order is reasonable and necessary. We are also establishing a policy whereby the orders of pharmacists and other practitioners that are allowed to order laboratory tests in accordance with state scope of practice and other pertinent laws can fulfill the requirements related to orders for covered COVID–19 tests for Medicare patients.

Just as the previous policy was developed based on what was known about COVID–19 at the time, as additional information has become available, policies require modification. Whereas we are committed to reducing impediments to access to COVID–19 testing and the other related tests identified in the May 8th COVID–19 IFC, we believe that it is contrary to the public interest to allow open-ended coverage of COVID–19 testing without an order from a physician, practitioner, or other healthcare professional. Our determination to revise the May 8th IFC policy is due both to the significant potential for fraud, waste, and abuse, as well as public health and safety issues that would arise from beneficiaries being subjected to repeated testing without proper medical attention or oversight, including public health issues with the ongoing spread of COVID–19.

Laboratory testing has been a significant source of fraud and abuse in the Medicare program. We have already found that schemes are occurring whereby fraudulent laboratories and telemarketing companies are directly contacting beneficiaries, oftentimes using stolen identifying information, to solicit items and services payable by Medicare under the guise of COVID–19 treatment or prevention. In fact, an HHS Office of Inspector General (HHS–OIG) fraud alert[75] describes situations in which scammers are offering unapproved and illegitimate COVID–19 tests and other services to Medicare beneficiaries in exchange for personal details, including Medicare information. The financial impact of this fraud risk is exacerbated by the ability of the laboratory to perform expensive add-on tests, such as to confirm or rule-out diagnoses other than COVID–19, that are not medically necessary.

We also believe that allowing Medicare payment for one test without an order will allow beneficiaries access to urgent testing, as we outlined in the May 8th COVID–19 IFC, yet also provide sufficient opportunity for beneficiaries to seek out the medical care needed to ensure that the test results are interpreted and acted upon appropriately, both from the perspective of the individual beneficiary and also in the context of the area of the country in which the beneficiary is located. Executing an effective, regional response to COVID–19 disease requires coordinated effort and guidance by qualified medical professionals who know how to interpret and react to testing results. When a physician or other healthcare provider is able to counsel patients who are being tested for COVID–19, beneficiaries may be more likely to isolate themselves more quickly, which may reduce transmission in the community. Consistent with this information, CMS and CDC recently announced that they are taking steps to ensure that physicians and other practitioners who counsel patients on COVID–19 testing are paid for these services.[76]

We also believe that pharmacists and other healthcare professionals play an important role in the response to the PHE for COVID–19, and to further ensure that beneficiaries continue to have access to appropriate COVID–19 testing even when some professional care is not separately billable under

[74] *https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx.*

[75] *https://oig.hhs.gov/coronavirus/fraud-alert-covid19.asp.*

[76] *https://www.cms.gov/newsroom/press-releases/cms-and-cdc-announce-provider-reimbursement-available-counseling-patients-self-isolate-time-covid-19.*

Medicare, we are establishing a policy whereby otherwise covered COVID–19 and specified related tests ordered by pharmacists and other healthcare professionals who are authorized to order diagnostic laboratory tests in accordance with state scope of practice and other pertinent laws are covered for the duration of the PHE for COVID–19.

In this IFC, we are updating the extraordinary circumstances exceptions (ECEs) we granted on March 22, 2020, for the ESRD QIP, HAC Reduction Program, HRRP, and Hospital VBP Program in response to the PHE for COVID–19. We are also revising the FY 2022 performance period under the SNF VBP Program.

We believe that these policy updates are immediately necessary to provide clarification to hospitals, dialysis facilities, and SNFs on which reporting requirements under the ESRD QIP, HAC Reduction Program, HRRP, Hospital VBP Program, and SNF VBP Program are excepted and how the exceptions will impact program scoring. These updates will also clarify how optionally submitted data for excepted reporting periods will be used. Since existing Q1 and Q2 2020 deadlines are upcoming in August, October and November 2020, providing this clarification now will allow hospitals, facilities and SNFs to have the information they need and the flexibility to determine how best to direct their resources during the PHE for COVID–19. Therefore, we believe that it would be impracticable and contrary to the public interest to undertake full notice and comment rulemaking to implement these policies.

The IFC also modifies the calculation of the 2022 Part C and D Star Ratings to address the application of the extreme and uncontrollable circumstances policy for the PHE for COVID–19. Applying the 60 percent rule to 2022 Star Ratings would result in removal of a large fraction of contracts from threshold calculations, resulting in too few contracts to reliably calculate cut points for non-CAHPS measures using the clustering methodology and too few contracts to reliably calculate and apply Reward Factors for 2022 Star Ratings; failure to adopt the change would result in CMS' inability to calculate 2022 Star Ratings. This change to the calculation methodology for the 2022 Star Ratings is urgently necessary to ensure that MA organizations, cost plans, and Part D plan sponsors are aware during the 2020 measurement period how their performance in the 2020 measurement period will be used in calculating the Star Ratings.

We believe that the clarifications are immediately necessary to address both program integrity and clinical issues that have arisen since the publication of the May 8th COVID–19 IFC. We believe that it is contrary to the public interest to allow open-ended coverage of COVID–19 testing without an order due to the significant potential for fraud, waste, and abuse, as well as public health and safety issues that would arise from beneficiaries being subjected to testing without proper medical necessity or oversight.

In this IFC, we clarify the data reporting requirements for issuers of risk adjustment covered plans to specify that, for the purposes of 2020 benefit year risk adjustment data submissions, issuers of risk adjustment-covered plans that provide temporary premium credits must report to their EDGE server the adjusted plan premiums that reflect actual premiums billed to enrollees, taking the premium credits into account as a reduction in premiums. In addition, we clarify that, consistent with the reporting of the actual premium amounts billed to enrollees for 2020 benefit year risk adjustment data submissions, HHS's calculation of risk adjustment payment and charges for the 2020 benefit year under the state payment transfer formula [77] will be calculated using the statewide average premium that reflects actual premiums billed, taking into account any temporary premium credits provided as a reduction in premium for the applicable months of 2020 coverage, including premium credits that were not provided in a manner consistent with the August 4, 2020 memo. We believe that, in light of the temporary premium credits authorized in CMS guidance during the PHE for COVID–19, immediate clarification on risk adjustment reporting requirements are necessary in order to maintain confidence in the risk adjustment program and stability in the individual and small group (or merged) insurance markets, as issuers have already begun to prepare for 2020 benefit year risk adjustment data submission. These clarifications are also immediately necessary to enable issuers to move quickly to evaluate the impact of these policies and, for those that elect to do so, to begin providing this premium relief to support continuity of coverage for those enrollees adversely affected financially by the PHE for COVID–19. We believe that it is contrary to the public interest to require full notice and comment because delayed clarification may prevent some issuers from offering temporary premium credits and may lead some enrollees who have been adversely affected financially by COVID–19 to lose health insurance coverage.

In this IFC, we similarly clarify the MLR reporting and rebate requirements in 45 CFR part 158 for issuers that elect to provide temporary premium credits in 2020 such that these issuers must report as earned premium the actual premium billed to enrollees, taking into account any temporary premium credits as a reduction in premium for the applicable months of 2020 coverage. These changes are necessary to align MLR calculations with the flexibilities provided to issuers and states elsewhere in this rulemaking to respond to the PHE for COVID–19. HHS believes that these clarifications are immediately necessary to enable issuers to quickly and accurately evaluate the financial impact of offering temporary premium credits to enrollees to support continuity of coverage during the PHE for COVID–19. We believe that it is contrary to the public interest to require full notice and comment because delayed clarification may prevent some issuers from offering temporary premium credits and may lead some enrollees who have been adversely affected financially by COVID–19 to lose health insurance coverage.

In this IFC, we are including CPT and HCPCS codes for CTBS and telephone E/M services to the definition of primary care services that is used for purposes of the MIPS beneficiary assignment methodology for the CMS Web Interface and the CAHPS for MIPS survey in order to ensure these services are included in determining where beneficiaries receive the plurality of their primary care for purposes of beneficiary assignment. Without the inclusion of these codes in the MIPS beneficiary assignment methodology for the CMS Web Interface and CAHPS for MIPS survey for the 2020 MIPS performance year and any subsequent performance year that starts during the PHE for COVID–19, we would not be able to adequately account for the ways in which beneficiaries are receiving primary care services during the PHE for COVID–19 and as a result, the process to derive assignment and sampling of beneficiaries for the CMS Web Interface and CAHPS for MIPS survey would not be able to comprehensively capture how primary care services are being furnished to beneficiaries, which may

[77] The state payment transfer formula refers to the part of the HHS risk adjustment methodology established consistent with 45 CFR 153.320 that calculates payments and charges at the state market risk pool level. See, for example, the 2020 Payment Notice final rule, 84 FR at 17485. The state payment transfer calculations are performed prior to the calculation of the high-cost risk pool payment and charge terms.

cause many groups and virtual groups to have insufficient sample sizes to be able to administer the 2020 CAHPS for MIPS survey or report data for the quality performance category using the CMS Web Interface measures. Therefore, these codes are necessary to ensure a comprehensive assessment of MIPS quality performance and avoid imposing undue burden on clinicians during the PHE for COVID–19.

Lastly, under the MIPS Program in this IFC, we are also: (1) Expanding IA_ERP_3 to include clinicians participating in the care of a patient diagnosed with COVID–19 who simultaneously submit their clinical patient data to a clinical data registry for research; (2) updating the title; and (3) extending the activity through the CY 2021 performance period. For this improvement activity, we are making a one-time exception from our established Annual Call for Activities timeframe and processes due to the ongoing PHE for COVID–19. The modifications to the improvement activity should be established as soon as possible because the PHE for COVID–19 continues to require considerable effort by clinicians and researchers and this modified improvement activity would allow clinicians who treat patients with COVID–19 and provide data to a clinical data registry to receive credit under MIPS. We believe that this improvement activity as modified would incentive clinicians to submit COVID–19 data to clinical data registries, which is imperative to help combat the PHE for COVID–19 as the data could be used to inform research and treatment options and potentially save lives. We believe that all clinical data gathered in the treatment of patients diagnosed with COVID–19 may be helpful in finding a solution to end this pandemic, and the earlier the data is collected and shared, the sooner clinical treatment can evolve and a solution may be found. In this IFC, we are also extending the newly modified COVID–19 Clinical Data Reporting with or without Clinical Trial improvement activity through the CY 2021 performance period due to the increased rate of COVID–19 infection we are experiencing nationwide. We believe that the continued and increasing need for a solution to the PHE for COVID–19 indicates that we should encourage both participation in clinical trials, as well as data collection and sharing through clinical data registries as soon as practicable and at least through CY 2021.

For this IFC, we believe it would be impracticable and contrary to the public interest for us to undertake normal notice and comment procedures and to thereby delay the effective date of this IFC. We find good cause to waive notice of proposed rulemaking under the APA, 5 U.S.C. 553(b)(B), and section 1871(b)(2)(C) of the Act. For those same reasons, as authorized by the CRA, 5 U.S.C. 808(2), we find it is impracticable and contrary to the public interest not to waive the delay in effective date of this IFC under the CRA, 5 U.S.C. 801(a)(3). Therefore, we find there is good cause to waive the CRA's delay in effective date pursuant to the CRA, 5 U.S.C. 808(2).

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (PRA) requires that we solicit comment on the following issues:

• The need for the information collection and its usefulness in carrying out the proper functions of our agency.
• The accuracy of our estimate of the information collection burden.
• The quality, utility, and clarity of the information to be collected.
• Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Collection of Information for Clinical Laboratories

We are soliciting public comment on each of the section 3506(c)(2)(A)-required issues for the following information collection requirements (ICRs). The requirements and burden related to laboratory test result reporting is covered under OMB Control Number 0920–1299. CDC will be collecting the test results and other information related to SARS–CoV–2 testing. CDC will then provide the information to CMS to ensure that CLIA-certified laboratories are reporting as required under the CLIA regulations.

A. Laboratory Costs To Develop a Mechanism to Track SARS–CoV–2 Test Results

As discussed in section II. of this IFC, we are adding §§ 493.41 and 493.1100(a) to require that, during the PHE for COVID–19, each CLIA-certified laboratory that performs a test that is intended to detect SARS–CoV–2 or to diagnose a possible case of COVID–19 must report SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe. We estimate that approximately 30 percent (n (number) =77,024) of the total CLIA-certified laboratories [78] could potentially be performing SARS–CoV–2 testing. We are soliciting public comments related to the number of laboratories performing SARS–CoV–2 testing. Each of these laboratories would incur a one-time cost for the time needed to develop a mechanism to track and collect SARS–CoV–2 test results to be in compliance with this new requirement. We estimate it would take each laboratory 5 to 7 hours to develop such a mechanism. The burden hours range from 385,120 to 539,168 (77,024 laboratories × 5 or 7 hours). A management level employee (11–9111) would perform this task at an hourly wage of $55.37 per hour as published by the Bureau of Labor Statistics (BLS) in 2019).[79] The wage rate would be doubled to $110.74 to include overhead and fringe benefits. In addition, a database administrator/architect (15–1245) would be needed to perform this task at an hourly wage of $46.21 per hour as published by the BLS in 2019.[80] The wage rate would be doubled to $92.42 to include overhead and fringe benefits. The total hourly wage would be $203.16 ($110.74+ $92.42). The total cost would range from $78,240,979 to $109,537,371 (385,120 to 539,168 × $203.16).

B. Laboratory Costs To Collect SARS–CoV–2 Test Results for Reporting

As discussed in section II. of this IFC, we are adding §§ 493.41 and 493.1100(a) to require that, during the PHE for COVID–19, each laboratory that performs a SARS–CoV–2 test must report SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe. We estimate that the approximately 30 percent (n=77,024) of the total CLIA-certified laboratories could potentially be performing SARS–CoV–2 and need to collect and report test results in accordance with §§ 493.41 and 493.1100(a). For purposes of this IFC, we are estimating a wide range of

[78] Includes Certificate of Waiver (CoW), Certificate of Provider-Performed Microscopy (PPM), Certificate of Compliance (CoC) and Certificate of Accreditation (CoA). Based on the CLIA web page the total number of laboratories as of March 2020 are as follows: CoW, n=193,474; PPM n=30,120; CoC n=17,432; CoA n=15,721; total =256,747.

[79] *https://www.bls.gov/oes/current/oes_nat.htm.* (11–9111).

[80] *https://www.bls.gov/oes/current/oes_nat.htm.* (15–1245).

test volumes to approximate a range from low volume laboratory to a laboratory using high throughput technology. We estimate that a low volume laboratory may report out 20 test results in a 24-hour period and a high throughput laboratory may report out 500 test results during the same period. We estimate it would take each laboratory approximately 0.5 hours for low volume laboratories and approximately 3 hours per day for a high throughput laboratory to collect this information to be in compliance with this new requirement. The burden hours range from 38,512 to 231,072 (77,024 laboratories × 0.5 or 3 hours). A clinical laboratory technician would perform this task at an hourly wage of $26.34 per hour as published by the BLS in 2019.[81] The wage rate would be doubled to $52.68 to include overhead and fringe benefits. The total cost would range from $2,028,812 to $12,172,873 (38,512 to 231,072 × $52.68) *per day* to collect the required information. Collection of test results would be an ongoing burden for each laboratory performing this type of testing.

C. Laboratory Costs To Report SARS–CoV–2 Test Results

As discussed in section II. of this IFC, we are adding §§ 493.41 and 493.1100(a) to require that, during the PHE for COVID–19, each laboratory that performs a SARS–CoV–2 test must report SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe. We estimated the number of laboratories as outlined in section IV.A. of this IFC. We estimate that the approximately 30 percent (n=77,024) of the total CLIA-certified laboratories could potentially be performing SARS–CoV–2 and need to report test results in accordance with §§ 493.41 and 493.1100(a).

For purposes of this IFC, we are estimating a wide range of test volumes to approximate a range from low volume laboratory to a laboratory using high throughput technology. We estimate that a low volume laboratory may report out 20 test results in a 24-hour period and a high throughput laboratory may report out 500 test results during the same period. We estimate it would take each laboratory approximately 0.5 hours for low volume laboratories and approximately 3 hours for a high throughput laboratory to report this information to be in compliance with this new requirement. The burden hours range from 38,512 to 231,072 (77,024 laboratories × 0.5 or 3 hours). A healthcare support worker (31–9099) would perform this task at an hourly wage of $19.24 per hour as published by the BLS in 2019.[82] The wage rate would be doubled to $38.48 to include overhead and fringe benefits. The total cost would range from $1,481,942 to $8,891,651 (38,512 to 231,072 × $38.48) *per day* to collect the required information. Reporting of test results would be an ongoing burden for each laboratory performing this type of testing.

D. Laboratory Costs to Update Policies and Procedures

We expect that the approximately 77,024 laboratories performing SARS–CoV–2 testing would incur costs for the time needed to review the revised reporting regulations and update their policies and procedures to be in compliance. We estimate the total one-time burden per laboratory to review and update affected policies and procedures is 5 hours. The burden hours are 385,120 (77,024 laboratories × 5 hours). A management level employee would perform this task at an hourly wage of $55.37 per hour as published by the BLS in 2019.[83] The wage rate would be $110.74 to include overhead and fringe benefits. The total estimated cost would be $42,648,189 (385,120 hours × $110.74).

E. Accreditation Organization (AO) and Exempt State (ES) Costs To Update Standards for Reporting SARS–CoV–2 Test Results

We would expect the seven approved AOs and two ESs would have to review their standards, provide updates and submit the changes to CMS related to SARS–CoV–2 test reporting for approval (9 organizations/exempt states × 25 or 30 hours). The CLIA regulations require both the AOs and ESs to have requirements that are equal to, or more stringent than the CLIA condition-level requirements, and the laboratory would meet the condition-level requirements if it were inspected against these requirements.[84] We assume a one-time cost of 25 to 30 hours to identify the applicable legal obligations and to develop the updated standards needed to reflect the new requirements for SARS–CoV–2 testing. The burden hours range from 225 to 270 (9 AO/ESs × 25 or 30 hours). A management level employee (11–9111) would perform this task at an hourly wage of $55.37 per hour as published by the BLS in 2019.[85] The wage rate would be doubled to $110.74 to include overhead and fringe benefits. The total cost would range from would range from $24,917 to $29,900 (225 to 270 hours × $110.74).

F. Accreditation Organization (AO) and Exempt State (ES) Costs To Update Policies and Procedures Related to Reporting Laboratories Performing SARS–CoV–2 Testing That Do Not Report Results as Required

We would expect the seven approved AOs and two ESs would have to develop policies and procedures related to identifying laboratories that do not report SARS–CoV–2 test results in order to report these laboratories to CMS. In the case of the accredited laboratories, the laboratories identified as not reporting SARS–CoV–2 results as required would result in CMS taking an enforcement action as described in section II. of this IFC. As stated in section IV.G. of this IFC, the CLIA regulations require both the AOs and ESs to have requirements that are equal to, or more stringent, the CLIA condition-level requirements, so we would expect the AOs and ESs to have equivalent reporting requirements to CMS. AOs do not impose CMPs; however, ESs do have the ability to impose CMPs so we would expect ESs to have an equivalent penalty structure to CMS. The ES are generally approved by CMS to operate their own oversight programs so we would expect that the two ESs would report these laboratories to CMS, but would then impose the penalties based on their CMS-approved updated standards. We are requiring the AOs/ESs to report this information to CMS no later than 10 days from identifying a laboratory that has failed to report SARS–CoV–2 test results as required. We assume a one-time cost of 10 to 15 hours to develop the policy and procedures needed to reflect the new requirements for reporting of SARS–CoV–2 test results. The burden hours range from 90 to 135 (9 AO/ESs × 10 or 15 hours). A management level employee (11–9111) would perform this task at an hourly wage of $55.37 per hour as published by the BLS in 2019. The wage rate would be doubled to $110.74 to include overhead and fringe benefits. The total cost would range from $9,967 to $14,950 (90 to 135 hours × $110.74). In addition, the AOs and ESs would be required to report to CMS

[81] *https://www.bls.gov/oes/current/oes_nat.htm.* (29–2010).

[82] *https://www.bls.gov/oes/current/oes_nat.htm. (31–9099).*

[83] *https://www.bls.gov/oes/current/oes_nat.htm.* (11–9111).

[84] CLIA Requirements at 42 CFR 493.551 (*https://www.ecfr.gov/cgi-bin/text-idx?SID=1248e3189da5e5f936e55315402bc38b&node=pt42.5.493&rgn=div5%23se42.5.493_1551*).

[85] *https://www.bls.gov/oes/current/oes_nat.htm.* (11–9111).

every 10 days those laboratories that have not reported test results as required. The annual total number of times each AO and ES is required to report to CMS is 36.5. We assume a weekly cost of 2 to 4 hours to identify the laboratories and submit the information to CMS. The total burden hours range from 18 to 36 (9 AO/ESs × 2 or 4 hours). A computer network support specialist (15–1231) would perform this task at an hourly wage of $33.10 per hour as published by the BLS in 2019.[86] The wage rate would be doubled to $66.20 to include overhead and fringe benefits. The total cost would range from would range from $1,192 to $2,383 (18 to 36 hours × $66.20) per 10 days for an annual total of $43,508 to $86,980 ($1,192 to $2,383 × 36.5).

G. Condition of Participation (CoP) Requirements for Hospitals and Critical Access Hospitals (CAHs) To Report COVID–19 Data as Specified by the Secretary During the PHE for COVID–19

We are revising the regulations by adding provisions to the CoPs (§ 482.42 for hospitals and § 485.640 for CAHs), requiring hospitals and CAHs to electronically report information related to confirmed or suspected COVID–19 cases in a standardized format, and at a frequency, specified by the Secretary. Our preliminary estimates for these reporting activities can be found in Tables 2 and 3.

TABLE 2—ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Hospitals and CAHs	HHS Teletracking COVID–19 Portal	5500	365	1.5	3,011,250
Total					3,011,250

TABLE 3—ESTIMATED ANNUALIZED RESPONDENT BURDEN COSTS

Type of respondent	Total burden hours	Hourly wage rate	Total respondent costs
Hospital Staff—Registered Nurses	3,011,250	* $70.48	$212,232,900
Total			212,232,900

* The wage rate includes overhead and fringe benefits.

The burden associated with these reporting activities will be submitted under OMB Control Number 0990–NEW.

H. Requirements for Long-Term Care (LTC) Facilities To Test Facility Residents and Staff for COVID–19

As discussed in section II.J. of this IFC, we are revising the regulations at § 483.80(h) to require LTC facilities to test residents and facility staff, including individuals providing services under arrangement and volunteers, for COVID–19. We are also requiring at § 483.80(h)(3)(i) that for each instance of resident and staff COVID–19 testing (which includes testing of individuals providing services under arrangement and volunteers), the facility document that testing was completed and the results of each test. We expect that this documentation would be located in the staff personnel record for all staff. In the case of individuals who are providing services under arrangement at the facility, we expect that this documentation be located in the record or file that the facility maintains for such individuals. In the event that no such record or file is maintained, we expect that the agreement for the services that are being provided under arrangement include a process for documenting these results. Consistent with the documentation requirements we are adding for LTC facility staff, we are requiring at § 483.80(h)(3)(ii) that the facility document in the resident's medical record that testing was offered, completed (as appropriate to the resident's testing status), and the results of each test.

Based on data from the Kaiser Family Foundation's report on coronavirus statistics (*https://www.kff.org/report-section/covid-19-and-workers-at-risk-examining-the-long-term-care-workforce-tables*), we estimate that 1.8 million LTC facility staff would be tested for COVID–19 initially for each facility. We also estimate that 1.3 million residents would be tested. We have estimated that it will take approximately 2 minutes to locate a staff's file and document the result of a COVID–19 test. Furthermore, we estimate that, based on the guidelines given regarding testing frequency, the criteria for conducting a test, and the response time for test result, not all staff will be tested on the same frequency. For example, a third of the staff population could be tested weekly and two thirds of the staff population could receive a test every ten days or monthly. However, with variables that are not knowable at this time, we have provided an estimate based on an average schedule of all staff receiving a test every 14 days and residents to be tested monthly during the PHE for COVID–19. We estimate that it would take 2 minutes to provide documentation in 1.8 million records of staff members for 30 weeks (from September 2020 to March 2021) to record the test was administered and to record the test results. We also estimate that it would take 2 minutes to provide the same documentation in 1.3 million medical records of residents for the same period of time. The annual and ongoing cost to comply with this requirement can be further assessed based on guidelines established by the Secretary. The ongoing burden associated with these reporting activities will, if necessary, be

[86] *https://www.bls.gov/oes/current/oes_nat.htm.* (15-1231).

submitted under OMB Control Number 0938–New.

For the purpose of this analysis, we estimate that it would take 2 minutes to document the initial test and that a healthcare support worker (31–9099) would perform this task at an hourly wage of $19.24 per hour as published by the BLS in 2019.[87] The wage rate would be doubled to $38.48 to include overhead and fringe benefits. Based on our assumptions, we estimate that the total cost to document the testing results for staff and LTC residents over the estimated course of the PHE for COVID–19 would be $48,158,193. See Table 4.

TABLE 4—TOTAL COST TO DOCUMENT THE TESTING RESULTS FOR STAFF AND LTC RESIDENTS OVER THE ESTIMATED COURSE OF THE PHE FOR COVID–19

	Time to document	Staff	Resident	Testing frequency	Testing duration	Wage for health staff worker	Total
Staff	2 minutes	[88] 1,899,000		14 days	30 weeks	* $38.48	$36,344,360
Resident	2 minutes		1,315,757	30 days	7 months	$38.48	11,813,833
							48,158,193

* The wage rate includes overhead and fringe benefits.

I. Quality Reporting: Updates to the Extraordinary Circumstances Exceptions (ECE) Granted for Four Value-Based Purchasing Programs in Response to the PHE for COVID–19, and Update to the Performance Period for the FY 2022 SNF VBP Program

1. Updates to ESRD QIP: Utilization of Fourth Quarter CY 2019 ESRD QIP Data and the Removal of the Option for Facilities To Opt-Out of the Extraordinary Circumstances Exception (ECE) Granted With Respect to First and Second Quarter (CY) 2020 ESRD QIP Data

In section II.D.1. of this IFC, we are updating our regulations at § 413.178(d)(7) to state that a facility has opted out of the ECE for COVID–19 with respect to the reporting of fourth quarter 2019 NHSN data if the facility actually reported the data by the March 31, 2020 deadline but did not notify CMS that it would do so. Additionally, we are removing the ability of facilities to opt-out of the ECE we granted with respect to Q1 and Q2 2020 ESRD QIP data. These updates do does not require facilities to complete any forms or submit any additional information to receive an ECE, and therefore, the program does not anticipate any change in burden associated with this IFC.

2. Updates to the Application of the HAC Reduction Program ECE Policy in Response to the PHE for COVID–19

In section II.D.2. of this IFC, we are updating the ECE granted for the HAC Reduction Program to not use Q1 and Q2 2020 data that were made optional under the Guidance memo for scoring in the HAC Reduction Program for scoring calculations in future program years (that is, the FY 2022 and FY 2023 program years). This policy does not require hospitals to complete any forms or submit any additional information to receive an ECE, and therefore, the program does not anticipate any change in burden associated with this IFC.

3. Update to the HRRP ECE Granted in Response to the PHE for COVID–19

In section II.D.3. of this IFC, we excepted the use of claims data from the first and second quarters of CY 2020 from the HRRP because of our concern that the data collected during this period may be greatly impacted by the response to COVID–19, and therefore, may not be reflective of a hospital's performance during this time due to concerns with national comparability of the data. This update does not require hospitals to complete any forms or submit any additional information, and therefore, the program does not anticipate any change in burden associated with this IFC.

4. Update to the Hospital VBP Program ECE Granted in Response to the PHE for COVID–19

In section II.D.4. of this IFC, we are updating the ECE granted for the Hospital VBP Program to not use Q1 and Q2 2020 data that was made optional under the Guidance memo for scoring in the Hospital VBP Program for the FY 2022 payment year. This change to the ECE policy does not require hospitals to complete any forms or submit any additional information, and therefore, the program does not anticipate any change in burden associated with this IFC.

5. Revised Performance Period for the FY 2022 SNF VBP Program as a Result of the ECE Granted for the PHE for COVID–19

As described in section II.D.5. of this IFC, we granted an ECE for the PHE for COVID–19 to exclude qualifying claims from the claims-based SNF 30-Day All-Cause Readmission Measure (SNFRM; NQF #2510) calculation for the following periods: January 1, 2020 through March 31, 2020 (Q1 2020); and April 1, 2020 through June 30, 2020 (Q2 2020).

Because we are excluding qualifying claims from January 1, 2020 through June 30, 2020, we are adopting a revised performance period for the FY 2022 SNF VBP Program Year in section II.D.5. of this IFC. The revised performance period for the FY 2022 SNF VBP program will be from: April 1, 2019 through December 31, 2019, and July 1, 2020 through September 30, 2020.

Changing the performance period for a SNF VBP Program Year does not require SNFs to complete any forms or submit any additional information. Accordingly, the SNF VBP Program does not anticipate any change in burden associated with this IFC.

J. Submission of Adjusted Premium Amounts for PPACA Risk Adjustment

Sections 153.610 and 153.710 provide that issuers of a risk adjustment covered plan must provide HHS with access to risk adjustment data through a dedicated distributed data environment, in a manner and timeframe specified by HHS. In section II.G.2. of this IFC, we clarify that, for purposes of 2020 benefit year risk adjustment data submissions, issuers that choose to provide temporary premium credits must submit the adjusted (that is, lower) plan premiums for those months, instead of the

[87] *https://www.bls.gov/oes/current/oes_nat.htm.* (31–9099).

[88] *https://www.kff.org/report-section/covid-19-and-workers-at-risk-examining-the-long-term-care-workforce-tables/.*

unadjusted plan premiums. We also clarify that CMS will require issuers to submit adjusted plan premiums to their EDGE servers for all enrollees whom the issuer has actually provided premium credits as a reduction to 2020 benefit year premiums, even if these premium credits were not provided in a manner consistent with the August 4, 2020 memo. This IFC does not change any other aspect of the 2020 benefit year data submission requirements for the HHS-operated risk adjustment program.

We do not believe that issuers who elect to provide these temporary premium credits will incur additional operational burden associated with EDGE server data submissions as a result of these requirements because we expect issuers' premium reporting systems will already be configured to enable issuers to upload the billable premiums actually charged to enrollees for the applicable benefit year to the EDGE server. Additionally, the current EDGE server operational guidance for the risk adjustment program allows issuers to submit billable premium changes so there will be no changes to the data submission rules.[89] Therefore, the burden related to this information collection is currently approved under OMB control number 0938–1155 (Standards Related to Reinsurance, Risk Corridors, Risk Adjustment, and Payment Appeals). The information collection request expires on February 23, 2021.

K. Medical Loss Ratio Premium Reporting Requirements

In section II.G.3. of this IFC, we are clarifying that issuers that elect to provide temporary premium credits to consumers in 2020 must account for these credits as reductions to premium for the applicable months during 2020 when reporting earned premium for the applicable MLR reporting year.[90] We do not anticipate that this clarification will require changes to the MLR Annual Reporting Form or change the associated burden for issuers. As noted above, we expect issuers' premium reporting systems will already be configured to enable issuers to track the premiums actually charged to enrollees for the applicable benefit year, enabling issuers that offer temporary premium credits to accurately report the adjusted (that is, lower) amounts actually billed to their enrollees on their respective MLR Annual Reporting Forms. The burden related to this information collection is currently approved under OMB control number 0938–1164 (Medical Loss Ratio Annual Reports, MLR Notices, and Recordkeeping Requirements (CMS–10418)). The information collection request expires on October 31, 2020.

L. Merit-Based Incentive Payment System (MIPS) Updates

In section II.I. of this IFC, for the 2020 performance year, we are proposing to include in the MIPS assignment methodology for the CMS Web Interface and CAHPS for MIPS survey the following additions due to the PHE for COVID–19: (1) CPT codes: 99421, 99422, and 99423 (codes for online digital E/M service (e-visit)), and 99441, 99442, and 99443 (codes for telephone E/M services); and (2) HCPCS codes: G2010 (code for remote evaluation of patient video/images) and G2012 (code for virtual check-in). We do not believe this proposal will impact the number of beneficiaries selected for sampling, which will be used to complete quality reporting via the CMS Web Interface or administer the CAHPS for MIPS survey; however, this proposal could impact the number of beneficiaries eligible to be sampled. Therefore, we do not anticipate any change in burden or impact on clinicians.

In addition, we are: (1) Expanding the improvement activity IA_ERP_3 titled ''COVID–19 Clinical Trial'' to also allow credit for clinicians who participate in the care of patients diagnosed with COVID–19 and simultaneously submit relevant clinical data to a clinical data registry for ongoing or future COVID–19 research; (2) updating the title; and (3) extending it through the CY 2021 performance period. Because MIPS eligible clinicians are still required to submit the same number of activities and the per response time for each activity is uniform, we do not expect this proposal to affect our currently approved information collection burden estimates in terms of neither the number of estimated respondents nor the burden per response.

M. Summary of Burden in This IFC

Table 5 shows the burden and associated costs for sections IV.A. through F. in this IFC.

TABLE 5—BURDEN AND ASSOCIATED COSTS FOR THE PROVISIONS INCLUDED IN THIS IFC

Information collection requests	Burden hours increase/ decrease (+/−) *	Cost (+/−) *
A. Laboratory Costs to Develop Mechanism to Track Results (*one time cost*)	+539,168	+109,537,371
B. Laboratory Costs to Collect Results for Reporting (*per day cost**)	+231,072	+12,172,873
C. Laboratory Costs to Report Results (*per day cost**)	+231,072	+8,891,651
D. Laboratory Costs to Update Policies/Procedures (*one time cost*)	+385,120	+42,648,189
E. AO/ES Costs to Update Standards (*one time cost*)	+270	+29,900
F. (a) AO/ES Costs to Update Policies/Procedures (*one time cost*)	+135	+15,971
F. (b) AO/ES Costs to Report Laboratories to CMS for not Reporting Results	+36	+86,980
Total	+1,386,873	+173,382,935

* Note that these are per day costs. For annual costs, see Table 9.

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed

[89] See EDGE Server Business Rules (ESBR) v16.0 *Section 5.8 Premium Amounts,* at *https://www.regtap.info/uploads/library/DDC_ESBR_V16.0_052920_5CR_052920.pdf.*

[90] Because the MLR and rebate calculations are based on 3 years of data, reporting earned premium for the 2020 benefit year will impact the MLR and rebate calculations for the 2020 through 2022 reporting years. See section 2718(b)(1)(B)(ii) of the PHSA. Also see 45 CFR 158.220(b).

with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Analysis

A. Statement of Need

Throughout this IFC, we discuss several changes to payment and coverage policies intended to allow healthcare providers and health insurance issuers maximum flexibility to minimize the spread of COVID–19 among Medicare and Medicaid beneficiaries, consumers of health insurance coverage in the individual and small group insurance markets, healthcare personnel, and the community at large, and increase capacity to address the needs of their patients. The flexibilities and changes contained within this IFC are responsive to this developing pandemic emergency and to recent legislation that gives us additional authority. Given the potentially catastrophic impact to public health, it is difficult to estimate the economic impact of the spread of COVID–19 under current payment rules compared to the rules issued in this IFC.

We believe that the needs of Medicare and Medicaid beneficiaries and consumers of health insurance coverage in the individual and small group insurance markets suffering from COVID–19 will likely test the capacity of the healthcare system over the coming months. Our policies implemented in this IFC will provide flexibilities, during the PHE for COVID–19, to physicians and other practitioners, and clinical laboratories. Additionally, the policies and regulatory updates implemented in this IFC will increase the affordability and support continuity of health insurance coverage for consumers in the individual and small group (or merged) market during the PHE for COVID–19.

B. Overall Impact

We have examined the potential impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96 354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 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). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) (Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. For CLIA purposes, no regulatory alternatives were considered as the CARES Act requires all laboratories to reports SARS–CoV–2 test results. Only CLIA regulations requiring laboratories to report SARS–CoV–2 test results were added/revised.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). As described in section IV. of this IFC (Collection of Information Requirements) and this section, this IFC would be economically significant within the meaning of section 3(f)(1) of the Executive Order. We are adding §§ 493.41 and 493.1100(a) to require that, during the PHE for COVID–19, as defined in § 400.200, each laboratory that performs a test that is intended to detect SARS–CoV–2 or to diagnose a possible case of COVID–19 must report SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe. These anticipated costs would result from laboratories needing to develop a mechanism to collect and report SARS–CoV–2 test results, update policies and procedures, update software, and train personnel. In addition, AOs and Exempt States (ESs) will also need to update their laboratory standards and policies and procedures to comply with the new federal regulatory changes. We have provided an assessment of the impact of estimated costs of these changes in Tables 6 and 7.

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017 and requires that the costs associated with significant new regulations ''shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' This IFC's designation under Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs (82 FR 9339), which was issued on January 30, 2017, will be informed by public comments received.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that the great majority of laboratories are small entities, either by being nonprofit organizations or by meeting the Small Business Administration definition of a small business (having revenues of less than $8.0 million to $41.5 million in any 1 year). For purposes of the RFA, approximately 75 percent of laboratories performing SARS–CoV–2 testing qualify as small entities. For purposes of this IFC, we expect that approximately 30 percent (n=77,024) of the total CLIA certified laboratories (n=256,747) could potentially be performing SARS–CoV–2 tests. Further, based on data from the CLIA website, we are estimating that 75 percent of the laboratories have a CoW (n=57,768) and 25 percent have a Certificate of PPM, CoC, CoA, or CoR (n=19,256). Each individual EUA test system authorized by the FDA specifies the settings in which the tests are authorized to be used during the PHE for COVID–19. Generally, COW and PPM laboratories include, but are not limited to, the following types of facilities: Physician office laboratories; pharmacies; skilled nursing/nursing facilities; and other types of point-of-care facilities. Generally, we would consider these types of laboratories to be small entities. Individuals and states are not included in the definition of a small entity. All laboratories performing SARS–CoV–2 testing are affected by this IFC, and the impact is economically significant. Therefore, the Secretary has determined that this IFC will have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. There are approximately 905 small rural hospitals in the U.S. Of the 905 small rural hospitals, approximately 500 are subsection (d) hospitals paid under IPPS and are subject to the HAC Reduction Program and HRRP. In section II.D. of IFC, we are updating the ECE policy for the two programs to allow the exclusion of data submitted for quarters impacted by the PHE for COVID–19. We estimate that the impact of the exclusion of data on scoring for small rural hospitals for the programs will be dependent upon hospitals' individual performance and experience, but that the exclusion of data will make small hospitals less likely to receive measure scores or meet minimum eligible discharge requirements for participation in the HAC Reduction Program and HRRP. All small rural hospitals, that is, both subsection (d) and critical access hospitals, often provide very limited laboratory services or may refer all their testing to larger facilities. We are unable to estimate the number of laboratories that support small rural hospitals, but do expect that the rule will have a significant impact on small rural hospitals. Therefore, the Secretary has determined that this rule will have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any proposed rule, or any final rule preceded by a proposed rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2020, that threshold is approximately $156 million. This IFC was is not preceded by a general notice of proposed rulemaking, and thus the requirements of UMRA do not apply.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. Two states have exempt status, which means we have determined that the state has enacted laws relating to the laboratory requirements that are equal to or more stringent than CLIA requirements and the state licensure program has been approved by us. These two states, New York and Washington, would need to update their standards, policies and procedures to maintain their exempt status to require reporting to CMS those accredited/exempt laboratories that have not reported SARS–CoV–2 test results as required. In addition, these two states would need to develop a CMP structure to impose CMPs that is equivalent to CMS and is based on their updated standards. In order to determine compliance with the reporting requirements, the State Agencies would be required to perform additional surveys on 5 percent of CoW and 5 percent of PPM laboratories. As previously stated, these two type of laboratories are not routinely surveyed. The total number of CoW laboratories as of March 2020 is 193,474. Five percent of 193,474 is 9,674 so for the duration of the IFC (3 years), a total of 3,225 CoW surveys would need to be performed annually across all State Agencies. The total number of PPM laboratories as of March 2020 is 30,120. Five percent of 30,120 is 1,506 so for the 3 years that this IFC would be in place, a total of 502 PPM surveys would need to be performed annually across all State Agencies. The combined number of these surveys that will need to be performed annually over the 3 years of the timeframe of the IFC is 3,727 across all State Agencies. Over the 3 years that this IFC is in place, one-third of the total number CoW and PPM laboratories would be surveyed each year. This would ensure that a total of 5 percent of each of these types of laboratories are surveyed during the duration of the PHE for COVID–19 to determine if SARS–CoV–2 requirements are met. Currently, there are no resources available to the State Agencies to perform these additional surveys. Therefore, this IFC would have a substantial direct effect on state or local governments. This IFC would also have a direct effect on preempting state laboratory requirements as they must change their current laboratory standards to remain equal to or more stringent than Federal laws when finalized.

C. Detailed Economic Analysis of the Provisions of the IFC

1. Revised Enforcement Requirements for LTC Facilities

Section II.A. of this IFC which implements a policy for specifying the CMP amounts tailored to noncompliance related to § 483.80(g)(1) and (2) (electronic reporting COVID–19 related data) will not result in any additional financial burden for LTC providers if they remain compliant in reporting. Following the May 8th effective date of this reporting requirement, we began assessing the compliance for all 15,674 (data from Quality, Certification and Oversight Reports (QCOR) as of August 11, 2020) Medicare and Medicaid certified nursing homes each week and have found compliance has consistently increased week after week. Based on data provided to CMS by the CDC, compliance with this requirement has been greater than 98 percent since the reporting week ending June 28, 2020. Although there has been unprecedented compliance with the requirement to report, CMS has issued 2,507 citations for noncompliance as of August 10, 2020, with corresponding CMPs imposed. Financial impact will occur for facilities who are not compliant with the new reporting requirement. We do not expect these requirements to have a substantial economic impact or pose a financial burden to nursing homes beyond that which has already been established by CMS's existing enforcement regulations. This rule does not add new requirements, but clarifies our process to impose penalties for a failure to report for which compliance is assessed on a weekly basis, which is different from how all other LTC requirements are reviewed. CMS' enforcement authority remains unchanged under this IFC. Instead, it clarifies the specific CMP penalty range for noncompliance with the new COVID–19 related reporting requirements at § 483.80(g)(1) and (2). Furthermore, the penalty amounts are consistent with the lower level penalty range available at § 488.438(a)(1)(ii) in order to encourage compliance and to discourage similar conduct in the future without causing undue hardship that could impair a facility's ability to minimize COVID–19 infections among its residents and staff. In addition, the penalty is not aggregated but is increased only if future compliance assessments reveal repeated violations. In the event that a facility is unable to meet reporting requirements and/or experiences financial hardship, a facility may utilize the Independent Informal Dispute Resolution process under § 488.431 to dispute the findings and may submit a financial hardship request to CMS.

2. CoP Requirements for Hospitals and CAHs, and Requirements for LTC Facilities

a. CoP Requirements for Hospitals and CAHs To Report COVID–19 Data as Specified by the Secretary During the PHE for COVID–19

Section II.B. of this IFC revises the infection prevention and control requirements for hospitals and CAHs to more effectively respond to the specific challenges posed by the COVID–19 pandemic. Specifically, we are adding provisions to require facilities to electronically report information related to confirmed or suspected COVID–19 cases in a standardized format specified by the Secretary. Many hospitals are already reporting data in a standardized format voluntarily. As detailed in section IV.G. of this IFC, we currently estimate the cost of these reporting requirements to total $212,232,900. This estimate is likely an overestimate of the costs associated with reporting because it assumes that all hospitals will report manually. Efforts are underway to automate hospital and CAH reporting that have the potential to significantly decrease reporting burden and improve reliability. We anticipate that the need for reporting will be temporary in direct relationship to the duration of the PHE. Existing guidance on reporting, which may be revised in the future, can be found at *https://www.hhs.gov/sites/default/files/covid-19-faqs-hospitals-hospital-laboratory-acute-care-facility-data-reporting.pdf,* and these guidance documents will be in CMS' 13891 portal. Data reported to the Secretary is used by Federal agencies and states, to provide data for the unified hospital picture, as well as guidance on the distribution of resources.

b. Requirement for Long-Term Care Facilities To Test Facility Staff and Residents for COVID–19

Section II.J. of this IFC revises the infection control requirements for LTC facilities at § 483.80 to require facilities to test their staff and residents for COVID–19 based on parameters set forth by the Secretary. Based on data from CDC and states where similar policies have already been implemented, we anticipate that this will result in widespread testing and significant resource use, but catch many cases that might otherwise go undetected. For example, implementing universal testing in 11 LTC facilities in Maryland increased the total number of detected cases in those facilities from 153 to 507.[91] Costs incurred by facilities have potential to vary drastically depending on the extent of outbreaks in their respective communities, whether the facility has point-of-care testing, and the size of each facility; however, for some of these facilities the cost of testing may be less than the costs associated with lost productivity and revenue due to unmitigated outbreaks. We solicit comments on our cost estimates, as well as any additional costs associated with acquiring reagents, test kits, or anything else we may not have considered.

Best practices for catching and eliminating these outbreaks, as well as availability of the tools necessary to do so, is a quickly changing landscape. As of late July, over 600 point-of-care antigen testing devices had already been shipped to LTC facilities nationwide, with plans to provide every facility with their own instrument(s) and tests within 14 weeks.[92] This method of testing effectively reduces the cost-per-test from approximately $100 to only $20. These efforts to provide every facility with these devices continue, but for the purposes of our estimates below, we assume a cost of $60 per test; this accounts for the potential cost of replacing the antigen testing device, as well as the possibility that some facilities will choose to verify negative results with lab testing. The cost of these testing activities will ultimately depend on the extent of future outbreaks, and how the best practices, and thus our parameters for universal testing, evolve. We recognize that testing alone is not enough to control, treat, and eliminate outbreaks of COVID–19. Providing safe care is the inherent duty of all long term care facilities. Implementing highly effective infection prevention and control procedures, such as proper hand washing techniques and techniques for donning and removing PPE, are expected to be part of everyday facility procedures and do not impose an additional burden upon facilities. CDC provides, and continually updates, their infection control guidance for LTC facilities.[93] This guidance recommends, among other things, expanded viral testing of all residents if there is an outbreak in a facility; cohorting residents in a COVID–19 care unit; assigning dedicated staff to the aforementioned care unit; and additional cleaning procedures. Although we do not have data to support exactly how many facilities are fully prepared for intervention at this scale, we assume that most facilities have made basic preparations in line with current best practices. Acknowledging this uncertainty, we are assuming the average facility requires intervention costing between 5 and 40 hours of the hourly wage of a registered nurse for each additional round of testing, doubled to account for the cost of overhead and fringe benefits. For facilities that are less prepared, a different mix of staffing could provide additional support for a similar cost.

In Tables 6 and 7, we provide sensitivity analyses showing the potential costs of universal testing in LTC facilities given these unknown variables described above. All costs below are assumed to be in addition to the current baseline testing activities; facilities that are already performing tests that would be in compliance with these testing requirements, or different parameters to trigger the testing requirements, would impact the number of facilities affected as detailed below. In the context of the Table 6, ''rounds of testing'' refers to the number of times each facility tests their entire staff and resident population on an annual basis. In light of uncertainty, this can be interpreted as the number of times the parameters set forth by the Secretary are triggered; additional tests that may be necessary to facilitate cohorting and identify new transmission events; or additional tests to verify negative results. We note that if baseline testing is not accounted for, benefits of this provision would be overstated in addition to (this category of) costs.

[91] Bigelow BF, Tang O, Barshick B, et al. Outcomes of Universal COVID–19 Testing Following Detection of Incident Cases in 11 Long-term Care Facilities. JAMA Intern Med. Published online July 14, 2020. doi:10.1001/jamainternmed.2020.3738.

[92] *https://www.cms.gov/files/document/covid-faqs-snf-testing.pdf.*

[93] *https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html.*

[94] For these estimates we assume the number of staff and residents are evenly distributed across facilities. This $10 million estimate is equal to: (approximately 3.2 million staff and residents * 5 percent of facilities * $60 per test * 1 round of testing) + (($37.24 cost for RN * 2 for fringe benefits and overhead) * 5 hours * 1 round of testing).

TABLE 6—SENSITIVITY ANALYSIS OF POTENTIAL COSTS OF LTC TESTING; LOW COSTS OF INTERVENTION

[In millions]

Rounds of testing	Facilities affected					
	5%	10%	25%	50%	75%	100%
	775	1,550	3,874	7,748	11,621	15,495
1	[94] $10	$20	$50	$99	$149	$198
2	20	40	99	198	297	396
3	30	59	149	297	446	594
4	40	79	198	396	594	792
5	50	99	248	495	743	990
6	59	119	297	594	891	1,188
7	69	139	347	693	1,040	1,386
8	79	158	396	792	1,188	1,584
9	89	178	446	891	1,337	1,783
10	99	198	495	990	1,485	1,981
11	109	218	545	1,089	1,634	2,179
12	119	238	594	1,188	1,783	2,377
13	129	257	644	1,287	1,931	2,575
14	139	277	693	1,386	2,080	2,773
15	149	297	743	1,485	2,228	2,971
16	158	317	792	1,584	2,377	3,169
17	168	337	842	1,683	2,525	3,367
18	178	357	891	1,783	2,674	3,565
19	188	376	941	1,882	2,822	3,763
20	198	396	990	1,981	2,971	3,961

TABLE 7—SENSITIVITY ANALYSIS OF POTENTIAL COSTS OF LTC TESTING; HIGH COSTS OF INTERVENTION

[In millions]

Rounds of testing	Facilities affected					
	5%	10%	25%	50%	75%	100%
	775	1,550	3,874	7,748	11,621	15,495
1	* $12	$24	$60	$119	$179	$238
2	24	48	119	238	358	477
3	36	72	179	358	537	715
4	48	95	238	477	715	954
5	60	119	298	596	894	1,192
6	72	143	358	715	1,073	1,431
7	83	167	417	835	1,252	1,669
8	95	191	477	954	1,431	1,908
9	107	215	537	1,073	1,610	2,146
10	119	238	596	1,192	1,788	2,384
11	131	262	656	1,311	1,967	2,623
12	143	286	715	1,431	2,146	2,861
13	155	310	775	1,550	2,325	3,100
14	167	334	835	1,669	2,504	3,338
15	179	358	894	1,788	2,683	3,577
16	191	382	954	1,908	2,861	3,815
17	203	405	1,013	2,027	3,040	4,054
18	215	429	1,073	2,146	3,219	4,292
19	227	453	1,133	2,265	3,398	4,531
20	238	477	1,192	2,385	3,577	4,769

* For these estimates we assume the number of staff and residents are evenly distributed across facilities. This $12 million estimate is equal to: (Approximately 3.2 million staff and residents * 5 percent of facilities * $60 per test * 1 round of testing) + (($37.24 cost for RN * 2 for fringe benefits and overhead) * 40 hours * 1 round of testing). This upper-bound scenario accounts for the possibility that each round of testing and intervention costs approximately $2,607 more per facility than the lower-bound scenario.

While we currently have no reason to believe testing will be required anywhere near the extent demonstrated at the high end of this range, we are presenting our cost estimates in this format to underscore the unpredictable nature of this pandemic. Other potential administrative costs associated with this provision are detailed in section IV.G.2. of this IFC. We note that almost half of the potential costs detailed above would be attributable to the testing of residents, the vast majority of which are enrolled in Medicare, Medicaid, or both, but Medicaid is the primary payer for approximately 62% of residents. The Families First Coronavirus Response Act requires state Medicaid and CHIP programs to cover any COVID–19-related testing and diagnostic services; cost-sharing is not permitted for COVID–19 testing and testing-related services. For residents in a Medicare covered Part A skilled nursing facility stay, testing is covered by the global PPS per diem rate that the long term care facility receives. In addition, HHS recently announced approximately $5 billion in Provider Relief Fund distributions under the CARES Act for nursing homes. However, we would like to note that LTC facilities are responsible for the costs of testing in order to comply with the infection control requirements of this rule, regardless of whether specific reimbursement is available from Medicare, Medicaid, the Provider Relief Fund, or any other sources. Of this amount, approximately $2.5 billion provides upfront funding to support increased testing, staffing, and Personal Protective Equipment (PPE), according to facilities' needs.[95]

There is also potential for substantial benefits by catching and eliminating COVID–19 outbreaks early in these facilities. HHS' ''Guidelines for Regulatory Impact Analysis'' explain in some detail the concept of Quality Adjusted Life Years (QALYs).[96] QALYs, when multiplied by a monetary estimate such as the Value of a Statistical Life Year (VSLY), are estimates of the value that people are willing to pay for life-prolonging and life-improving health care interventions of any kind (see sections 3.2 and 3.3 of the HHS Guidelines for a detailed explanation). The QALY and VSLY amounts used in any estimate of overall benefits is not meant to be precise, but instead are rough statistical measures that allow an overall estimate of benefits expressed in dollars.[97]

Research surrounding changes in health-related quality of life due to the novel coronavirus, as well as the overall case fatality rate, is still ongoing. Due to these substantial uncertainties, as well as the unknown extent of future outbreaks, we have presented a threshold analysis of life-saving benefits below. The following estimates assume a the Value of a Statistical Life (VSL) of approximately $10.1 million in 2020 as described in the aforementioned HHS Guidelines, inflated to 2019 dollars using the Implicit Price Deflators for Gross Domestic Product. We note, as detailed in the HHS Guidelines, that there is substantial uncertainty regarding how VSL varies with age,[98] making estimates of the VSL, which are typically developed using wage data for working-age populations, potentially overstated in contexts such as this for a novel coronavirus that disproportionately affects the elderly; overstatement of the VSL would in turn lead to underestimation of the fatal illnesses that would need to be avoided in order for the regulatory provision to break even.

Consistent with the HHS Guidelines, we assume that the average individual in these underlying VSL studies is approximately 40 years of age, allowing us to calculate a VSLY of approximately $469,000 to $818,000 at 3 and 7 percent discount rates respectively. Table 8, when viewed alongside Table 7, demonstrates the number of years of life extension needed to break-even with the corresponding costs of testing and intervention. We reiterate, as discussed in our cost estimates, that the break-even points below are subject to any flaws in our assumptions of costs. Due to this uncertainty, these estimates are based on our high estimate of the costs of intervention.

TABLE 8—THRESHOLD ANALYSIS OF AVOIDED FATAL ILLNESSES, DUE TO LTC TESTING AND ASSOCIATED PROTECTIVE ACTIONS, REQUIRED FOR THE REGULATORY PROVISION TO BREAK EVEN

[In life years]

Rounds of testing	Facilities affected					
	5%	10%	25%	50%	75%	100%
	775	1,550	3,874	7,748	11,621	15,495
1	15–26	29–51	73–128	145–254	219–382	291–507
2	29–51	59–102	145–254	291–507	438–763	583–1017
3	44–77	88–153	219–382	438–763	657–1145	874–1524
4	59–102	116–203	291–507	583–1017	874–1524	1166–2034
5	73–128	145–254	364–635	729–1271	1093–1906	1457–2541
6	88–153	175–305	438–763	874–1524	1312–2287	1749–3051
7	101–177	204–356	510–889	1021–1780	1531–2669	2040–3558
8	116–203	234–407	583–1017	1166–2034	1749–3051	2333–4068
9	131–228	263–458	657–1145	1312–2287	1968–3432	2624–4575
10	145–254	291–507	729–1271	1457–2541	2186–3812	2915–5082
11	160–279	320–559	802–1398	1603–2795	2405–4193	3207–5592
12	175–305	350–610	874–1524	1749–3051	2624–4575	3498–6099
13	189–330	379–661	947–1652	1895–3304	2842–4957	3790–6609
14	204–356	408–712	1021–1780	2040–3558	3061–5338	4081–7116
15	219–382	438–763	1093–1906	2186–3812	3280–5720	4373–7626
16	234–407	467–814	1166–2034	2333–4068	3498–6099	4664–8133
17	248–433	495–863	1238–2160	2478–4321	3717–6481	4956–8643
18	263–458	524–915	1312–2287	2624–4575	3935–6862	5247–9150
19	278–484	554–966	1385–2415	2769–4829	4154–7244	5539–9659
20	291–507	583–1017	1457–2541	2916–5084	4373–7626	5830–10167

[95] *https://www.hhs.gov/about/news/2020/08/07/hhs-announces-allocations-of-cares-act-provider-relief-fund-for-nursing-homes.html.*

[96] *https://aspe.hhs.gov/pdf-report/guidelines-regulatory-impact-analysis.*

[97] We note that using such a measure to make coverage or reimbursement determinations is prohibited by Section 1182(e) of the Act. That prohibition does not apply to the situation addressed in this IFC, where the purpose is not to determine medical coverage for individual patients, but to measure overall success in life-saving efforts to avert disease.

[98] There is somewhat more clarity about willingness-to-pay being positively correlated with length of life extension achieved by a rule or other policy intervention—an outcome that is related to age, but only somewhat loosely.

As described above, it is difficult to predict how many lives might be saved as a result of these testing requirements, but the benefits of catching, treating, and eliminating COVID–19 transmission and outbreaks among the over 3.2 million employees and residents of LTC facilities has potential to far exceed the costs. These benefits may be compounded by the possibility of LTC staff unknowingly infecting their families and respective communities, giving these testing requirements the potential for far-reaching benefits beyond the walls of LTC facilities.

3. Clinical Laboratories

As discussed in section II.C of this IFC, these provisions could impact all of the 256,747 CLIA-certified laboratories [99] to some extent. However, for purposes of this IFC, we estimate that approximately 30 percent (n=77,024) of the total CLIA-certified laboratories could potentially be performing SARS–CoV–2 testing. Although complete data are not available to calculate all estimated costs and benefits that would result from the changes in this IFC, we are providing an analysis of the potential impact based on available information and certain assumptions. Assuring a rapid and thorough public health response to the COVID–19 pandemic relies on having complete and comprehensive laboratory testing data, including standardized test results, relevant demographic details, and additional information that can improve both the public health response to SARS–CoV–2 and treatment of COVID–19. These data can contribute to understanding disease incidence and trends: Initiating epidemiologic case investigations, assisting with contact tracing, assessing availability and use of testing resources, and identifying supply chain issues for reagents and other material. Laboratory testing data, in conjunction with case reports and other data, also provide vital guidance for mitigation and control activities. Implementation of the requirements of this IFC will result in changes that are anticipated to have both quantifiable and non-quantifiable impacts on laboratories. In estimating the quantifiable impacts, we include costs to all laboratories that could result from the need to meet the new CLIA provisions.

[99] *https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/Downloads/cert_type.pdf.*

a. Laboratory Costs To Develop a Mechanism To Track SARS–CoV–2 Test Results

As discussed in section II.C. of this IFC, we are adding §§ 493.41 and 493.1100(a) to require that, during the PHE for COVID–19, as defined in § 400.200, each laboratory that performs a test that is intended to detect SARS–CoV–2 or to diagnose a possible case of COVID–19 must report SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe. We estimate that approximately 30 percent (n=77,024) of the total CLIA-certified laboratories [100] could potentially be performing SARS–CoV–2 testing. Each of these laboratories would incur a one-time cost for the time needed to develop a mechanism to track and report SARS–CoV–2 test results to be in compliance with this new requirement. As described in Table 10, we estimate the one-time costs for all laboratories to implement this requirement to be $78,240,979 to $109,537,371. (See section IV.A. of this IFC.)

b. Laboratory Costs To Collect Test Results for Reporting SARS–CoV–2 Test Results

As discussed in section II.C. of this IFC, we are adding §§ 493.41 and 493.1100(a) to require that, during the PHE for COVID–19, as defined in § 400.200, each laboratory that performs a test that is intended to detect SARS–CoV–2 or to diagnose a possible case of COVID–19 must report SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe. We estimate that approximately 30 percent (n=77,024) of the total CLIA-certified laboratories could potentially be performing SARS–CoV–2, and by this rule would need to collect those test results to report them in accordance with §§ 493.41 and 493.1100(a). We estimate the total cost would range from $2,028,812 to $12,172,873 *per day* to collect and report the SARS–CoV–2 test results. Collection of test results, as well as reporting would be an ongoing burden (including, for example, the daily requirement to report, testing, volume, and personnel) for each laboratory performing this type of testing. See sections IV.B. and IV.D. of this IFC.

[100] Includes Certificate of Waiver (CoW), Certificate of Provider-Performed Microscopy (PPM), Certificate of Compliance (CoC) and Certificate of Accreditation (CoA). Based on the CLIA web page (*https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/Downloads/cert_type.pdf*), the total number of laboratories as of March 2020 are as follows: CoW, n=193,474; PPM n=30,120; CoC n=17,432; CoA n=15,721; total =256,747.

c. Laboratory Costs To Report SARS–CoV–2 Test Results

As discussed in section II.C. of this IFC, we are adding §§ 493.41 and 493.1100(a) to require that, during the PHE for COVID–19, as defined in § 400.200, each laboratory that performs a test that is intended to detect SARS–CoV–2 or to diagnose a possible case of COVID–19 must report SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe. We expect that approximately 30 percent (n=77,024) of the total CLIA-certified laboratories could potentially be performing SARS–CoV–2 and need to report test results as required by the Secretary. Each of these laboratories would incur a *per day* cost that would range from $1,481,942 to $8,891,651. Reporting of test results would be an ongoing burden for each laboratory performing this type of testing. (See to section IV.C. of this IFC.)

d. Laboratory Costs To Update Policies and Procedures

We expect that the approximately 77,024 laboratories performing SARS–CoV–2 testing would incur costs for the time needed to review the revised reporting regulations and update their policies and procedures to be in compliance. The total one-time burden per laboratory to review and update affected policies and procedures is $42,648,189. (See section IV.D. of this IFC.).

e. Accreditation Organization (AO) and Exempt State (ES) Costs To Update Standards for Reporting SARS–CoV–2 Test Results

We would expect the seven approved AOs and two ESs would have to review their standards, provide updates and submit the changes to CMS related to SARS–CoV–2 test reporting for approval (9 organizations/exempt states × 25 or 30 hours). We assume a one-time cost of from $24,917 to $29,900 to identify the applicable legal obligations and to develop the updated standards needed to reflect the new requirements for SARS–CoV–2 testing. (See section IV E. of this IFC.)

f. Accreditation Organization (AO) and Exempt State (ES) Costs To Update Policies and Procedures Related to Reporting Laboratories Performing SARS–CoV–2 Testing That Do Not Report Results as Required

We would expect the seven approved AOs and two ESs would have to develop policies and procedures related to identifying laboratories that do not report SARS–CoV–2 test results in order to report these laboratories to CMS. We are requiring the AOs/ESs to report this information no later than 10 days after determining a laboratory is not reporting results, as required under §§ 493.41 and 493.1100(a). We assume a one-time cost would range from $9,967 to $14,950. In addition, the AOs and ESs would be required to report to CMS every 10 days those laboratories that have not reported test results as required. The annual total number of times each AO and ES is required to report to CMS is 36.5 (365 days/10 days). We estimate a cost of $1,192 to 2,383 per 10 days which translates to an annual total cost range of $43,508 to $86,980 to identify the laboratories and submit the information to CMS. (See section IV.F. of this IFC.)

g. Enforcement, Imposition of Civil Money Penalties (CMPs)

CLIA/AO/ES surveyors typically perform approximately 16,577 surveys annually.[101] In addition, the new requirements would also require 3,727 COW and PPM laboratories to be surveyed annually for reporting requirements. This is a total of 20,304 laboratories that would be required to be surveyed annually and that may be impacted by the imposition of CMPs for failing to report SARS–CoV–2 as required. We estimate the fiscal impact of imposing CMPs on the estimated 20,304 laboratories performing this testing to be 20 percent of laboratories performing SARS–CoV–2 testing. That is, 4,061 laboratories may have a CMP imposed during the PHE for COVID–19 for not complying with the new CLIA reporting requirements. While we believe initially the number of laboratories having a CMP imposed would be significantly higher, we postulate that the number of laboratories that will require the imposition of a CMP for not reporting SARS–CoV–2 test results will decrease during the PHE for COVID–19. We believe this decrease will be a result of laboratories implementing the new requirements included in this IFC.

We have no data indicating how imposition of the alternative sanction of CMP would affect all laboratories. Prior to the changes included in this IFC, CMPs were not imposed on CoW laboratories. In 2016, CMS imposed 30 CMPs for an average of $35,436 per laboratory; in 2017, 25 CMPs were imposed for an average of $72,237 per laboratory; and in 2018, 24 CMPs were imposed for an average of $44,230 per laboratory. The average total CMP imposed per fined laboratory over the 3-year period was $52,634. Based on our CMP requirements specific to SARS–CoV–2 at 493.1834(d)(2)(iii), we anticipate that would be a range of $1,000 per violation and $500 for each additional day of noncompliance that test results are not reported. For example, we are providing estimates for a minimum period of 3 days and a maximum period of 30 days. We estimate that the total cost of CMPs imposed across all laboratories collectively would range from $8,122,000 to $62,945,500 (4,061 laboratories × $2000 (3 days) or 4,061 laboratories × $15,500 (30 days)) for laboratories performing SARS–CoV–2 testing. (see Table 9).

h. Infrastructure

Several issues related to infrastructure have been identified (that is, reporting test results, personnel) that will have an increased burden on all laboratories. As stated above, for purposes of this IFC, we expect that the approximately 30 percent (n=77,024) of the total CLIA-certified laboratories could potentially be performing SARS–CoV–2 testing. Furthermore, based on data from the CLIA website [102] we are estimating that 75 percent of the 77,024 laboratories have a CoW (n=57,768), and 25 percent have a Certificate of PPM, CoC, CoA, or CoR (n=19,256). Generally, the types of facilities that have a CoW include, but are not limited to: Physician office laboratories (45%); pharmacies (5%); skilled nursing/nursing facility (6%); and other types of point-of-care facilities.[103] The facilities with PPM generally are physician office laboratories (POL) or other types of point-of-care (POC) facilities.[104] We would also estimate that 45 percent of the CoC, CoA, and CoR laboratories would be POLs. For these POL and POC laboratories (n=66,433; 57,768 (CoWs) + 8,665 (other certificate types)), we believe there would be infrastructure issues related to implementing the new CLIA requirement that test results must be reported as required by the Secretary. While reporting of SARS–CoV–2 test results affects all laboratories performing this testing, we believe that meeting the new reporting requirements will be more challenging for POL and POC laboratories given that this requirement creates the need for systemic changes to the ability to report results. If a laboratory does not currently have this capability to report in the form and manner specified by the Secretary, they would need to expeditiously ensure that the laboratory was able to submit the SARS–CoV–2 test results in such form and manner, and at such timing and frequency, as the Secretary may prescribe. Personnel would need to be trained to implement the new CLIA reporting requirements related to reporting of test results as prescribed by the Secretary. Further, given that CoW laboratories are not required to meet any personnel requirements, including laboratory director and testing personnel, this could contribute a significant challenge for these laboratories. In some cases, laboratory directors and testing personnel are not medical professionals. CoW laboratories may not have individuals in place that can train laboratory personnel to perform this task and may need to outsource this training.

While we do not have any data to be able estimate the fiscal burden that it would cost to update a laboratory's current software to ensure that the laboratory is able to report test results as required by the Secretary, we can estimate the time it would take each laboratory to implement the requirement. We are soliciting public comments related to cost and time it would take laboratories to update their software to ensure reporting of SARS–CoV–2 test results. It would take approximately 3 hours to implement or update to the form and manner prescribed by the Secretary and approximately 1 hour to train employees to be in compliance with this new requirement. We estimate the burden hours for updating and implementing the form would be 231,072 (77,024 laboratories × 3 hours). We estimate a database administrator/architect (15–1245) would be needed to implement or update the software to report the test results at an hourly wage of $46.21 per hour as published by the BLS in 2019.[105] The wage rate would be doubled to $92.42 to include overhead and fringe benefits. The total estimated cost to implement this requirement per laboratory would be $21,355,674 (77,024 laboratories × 3 hours × $92.42). We estimate a healthcare support worker (31–9099) would train employees to collect the additional required information at an hourly wage of $19.24 per hour as published by the

[101] As of March 2020, there were 17,432 Certificate of Compliance and 15,721 Certificate of Accreditation laboratories. CLIA surveys are performed biennially, so each year approximately half of the laboratories would be surveyed (33,154 × 0.50 = 16,577).

[102] *https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/Downloads/cert_type.pdf.*

[103] *https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/Downloads/factype.pdf.*

[104] *https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/Downloads/factype.pdf.*

[105] *https://www.bls.gov/oes/current/oes_nat.htm.*

BLS in 2019.[106] We estimate that at least one new or existing employee per laboratory (n=77,024) would need to be trained for the purpose of collecting this information. The wage rate would be doubled to $38.48 to include overhead and fringe benefits. The total estimated cost would be $2,963,884 (77,024 laboratories × 1 hour × $38.48) *per day* to collect the required information. Reporting of test results would be an ongoing burden for each laboratory performing this type of testing since laboratories would need to train employees to perform this task as employees left and needed to be replaced. (See Table 9.)

TABLE 9—ESTIMATED COSTS, INCLUDING DAILY COSTS, TO LABORATORIES, ACCREDITATION ORGANIZATIONS (AO) AND EXEMPT STATES (ES) TO IMPLEMENT REPORTING REQUIREMENTS

Regulatory change	Affected group	Total number of affected entities	Hourly cost	Occupation	Hours		Range of cost estimate for implementing new CLIA requirements	
					Low	High	Low estimate	High estimate
Collect Laboratory Results [1].	All Laboratories Performing SARS–CoV–2 Testing.	77,024	$52.68	29–2010	0.5	3	$405,762,400	$2,434,574,600
Reporting Costs [1] ..	All Laboratories Performing SARS–CoV–2 Testing.	77,024	38.48	31–9099	0.5	3	296,388,400	1,778,330,200
AO/ES Reporting to CMS [2].	AO/ES	9	66.20	15–1231	2	4	43,508	86,980
Imposition of CMPs	All Laboratories Performing SARS–CoV–2 Testing.	4,061	n/a	n/a	n/a	n/a	8,122,000	62,945,500
Total Increased Cost.	....	....	....	....	....	....	710,316,308	4,275,937,280

[1] Please note that "Collect Laboratory Results" and "Reporting Costs" *per day* estimates are $2,028,812 to $12,172,873, and $1,481,942 to $8,891,651, respectively. For purposes of the annual cost, we estimated 200 days/year for testing/reporting (365 days/year − 104 weekend days − 10 federal holidays − approximately 50 days to account for laboratories who do not test 7 days/week.)

[2] Reporting requirement of once every 10 days. Calculation factor is 36.5 (365 days per year/10 days). The total cost would range from $1,192 to $2,383 (9 × 2 or 4 hours × $66.20) per 10 days for an annual total cost of $43,508 to $86,980 ($1,192 or $2,383 × 36.5).

TABLE 10—ESTIMATED ONE-TIME COSTS TO LABORATORIES, ACCREDITATION ORGANIZATIONS (AO) AND EXEMPT STATES (ES) TO IMPLEMENT REPORTING REQUIREMENTS

Regulatory change	Affected group	Total number of affected entities	Hourly cost	Occupation	Hours		Range of cost estimate for implementing new CLIA requirements [1] and Section 3202(b) of the CARES Act	
					Low	High	Low estimate	High estimate
Tracking Mechanism.	All Laboratories Performing SARS–CoV–2 Testing.	77,024	$203.16 [1]	11–9111, 15–1245	5	7	$78,240,979	$109,537,371
Update Policies and Procedures.	All Laboratories Performing SARS–CoV–2 Testing.	77,024	110.74	11–9111	5	n/a	42,648,189	42,648,189
AO/ES Updating Standards.	AO/ES	9	110.74	11–9111	25	30	24,917	29,900
AO/ES Update Policies and Procedures.	AO/ES	9	110.74	11–9111	10	15	9,967	14,950
Infrastructure, Implementation of Test Reporting.	All Laboratories Performing SARS–CoV–2 Testing.	77,024	92.42	15–1245	3	n/a	21,355,674	21,355,674
Infrastructure, Personnel.	All Laboratories Performing SARS–CoV–2 Testing.	77,024	38.48	31–9099	1	n/a	2,963,884	2,963,884

[106] *https://www.bls.gov/oes/current/oes_nat.htm. 31–9099.*

TABLE 10—ESTIMATED ONE-TIME COSTS TO LABORATORIES, ACCREDITATION ORGANIZATIONS (AO) AND EXEMPT STATES (ES) TO IMPLEMENT REPORTING REQUIREMENTS—Continued

Regulatory change	Affected group	Total number of affected entities	Hourly cost	Occupation	Hours		Range of cost estimate for implementing new CLIA requirements [1] and Section 3202(b) of the CARES Act	
					Low	High	Low estimate	High estimate
Total Increased Cost.	....	....	....	....	....	....	145,243,610	176,529,968

[1] $101.58 hourly rate includes $55.37 (Management Level Employee) + $46.21 (Database Administrative/Architect). The wage rate would be double to $203.16 to include overhead and fringe benefits.

4. Quality Reporting: Updates to the Extraordinary Circumstances Exceptions (ECE) Granted for Four Value-Based Purchasing Programs in Response to the PHE for COVID–19, and Update to the Performance Period for the FY 2022 SNF VBP Program

a. Updates to ESRD QIP: Utilization of Fourth Quarter CY 2019 ESRD QIP Data and the Removal of the Option for Facilities To Opt-Out of the Extraordinary Circumstances Exception (ECE) Granted With Respect to First and Second Quarter (CY) 2020 ESRD QIP Data a

In section II.D.1. of this IFC, we are updating our regulations at 42 CFR 413.178(d)(7) to state that a facility has opted out of the ECE for COVID–19 with respect to the reporting of fourth quarter 2019 NHSN data if the facility actually reported the data by the March 31, 2020 deadline but did not notify CMS that it would do so., Additionally, we are removing the ability of facilities to opt-out of the ECE we granted with respect to Q1 and Q2 2020 ESRD QIP data. These updates do not require facilities to complete any forms or submit any additional information to receive an ECE, and therefore, the program does not anticipate any change in burden associated with this IFC.

The existing individual ECE request form policy is accounted for in the currently approved Hospital Inpatient Reporting PRA package, OMB control #0938–1022 (expiration date December 31, 2022). There are no changes to the individual ECE request form policy and therefore no changes to the burden associated with the ESRD QIP.

b. Updates to the Application of the HAC Reduction Program ECE Policy in Response to the PHE for COVID–19

In section II.D.2. of this IFC, we are updating the ECE policy for the HAC Reduction Program to not use Q1 and Q2 2020 data that were made optional under the Guidance memo for scoring in the HAC Reduction Program for scoring calculations in future program years (that is, the FY 2022 and FY 2023 program years). The existing individual ECE request form policy is accounted for in the currently approved Hospital Inpatient Reporting PRA package, OMB control #0938–1022 (expiration date December 31, 2022). There are no changes to the individual ECE request form policy.

This update does not require hospitals to complete any forms or submit any additional information to receive an ECE, and therefore, the program does not anticipate any change in burden associated with this IFC.

c. Update to the HRRP ECE Granted in Response to the PHE for COVID–19

In section II.D.3. of this IFC, we excepted the use of claims data from the first and second quarters of CY 2020 from the Hospital Readmissions Reduction Program because of our concern that the data collected during this period may be greatly impacted by the response to COVID–19, and therefore, may not be reflective of a hospital's performance during this time. The existing individual ECE request form policy is accounted for in the currently approved Hospital Inpatient Reporting PRA package, OMB control #0938–1022 (expiration date December 31, 2022). There are no changes to the individual ECE request form policy.

This update does not require hospitals to complete any forms or submit any additional information, and therefore, the program does not anticipate any change in burden associated with this IFC.

d. Update to the Hospital VBP Program ECE Granted in Response to the PHE for COVID–19

Section II.D.4. of this IFC updates the Hospital VBP Program ECE policy to allow CMS to exclude any data submitted regarding care provided during the first and second quarter of CY 2020 from our calculation of performance. This change does not require hospitals to complete any forms or submit any additional information, and therefore, the program does not anticipate any change in burden associated with this IFC.

The existing individual ECE request form policy is accounted for in the currently approved Hospital Inpatient Reporting PRA package, OMB control #0938–1022 (expiration date December 31, 2022). There are no changes to the individual ECE request form policy, and therefore, no changes to the burden associated with the Hospital VBP Program.

e. Revised Performance Period for the FY 2022 SNF VBP Program as a Result of the ECE Granted for the PHE for COVID–19

In section II.D.5. of this IFC, we are revising the performance period for the FY 2022 SNF VBP Program Year.

In the FY 2021 SNF PPS final rule,[107] we set out estimated impacts of the FY 2021 SNF VBP Program. At this time, those estimates represent our best approximation of the financial impact of the FY 2022 SNF VBP Program. We anticipate that the revised performance period would not have a substantial impact on the estimated payback percentage, Medicare savings, and amount of value-based incentive payments redistributed to SNFs for the FY 2022 SNF VBP Program.

5. NCD Procedural Volumes for Facilities and Practitioners to Maintain Medicare Coverage

As discussed in section II.E. of this IFC, these provisions result in no impact to the Medicare program because they will enable facilities and practitioners to continue to be eligible for coverage under the impacted NCDs during the PHE for COVID–19 that would have been eligible for coverage if the COVID–

[107] The FY 2021 SNF PPS Final Rule can be accessed at *https://www.federalregister.gov/documents/2020/08/05/2020-16900/medicare-program-prospective-payment-system-and-consolidated-billing-for-skilled-nursing-facilities.*

19 pandemic had not occurred. Without the pandemic, facilities and practitioners would likely have continued to perform procedures necessary to meet the procedural volume requirements specified in the NCDs.

6. Limits on COVID–19 and Related Testing Without an Order

As discussed in section II.F. of this IFC, we are revising the previous policy outlined in the May 8th COVID–19 IFC, which allowed for broad COVID–19 testing for a single beneficiary without a physician or other practitioner order by establishing that only a single COVID–19 diagnostic test and one of each other related test (as listed in the May 8th COVID–19 IFC) without a treating physician or other practitioner order is reasonable and necessary for Medicare payment. This limitation on tests without a treating physician/practitioner order will apply beginning on the effective date of this rule, and any tests furnished prior to the effective date would not be considered for purposes of the limit on tests without a physician or eligible ordering practitioner order. We are also establishing a policy whereby the orders of pharmacists and other practitioners that are allowed to order laboratory tests in accordance with state scope of practice and other pertinent laws can fulfill the requirements related to orders for covered COVID–19 tests for Medicare patients. We do not anticipate that these changes will affect overall Medicare expenditures over time because they will better align the requirements for COVID–19 and related testing with other Medicare laboratory tests, which require the order of a physician or other practitioner based on the clinical needs of the beneficiary.

6. Premium Reductions

a. PPACA Risk Adjustment

In this IFC, we clarify that issuers that choose to provide temporary premium credits to consumers [108] must report the adjusted plan premium amount, taking into account the credits provided to consumers as a reduction to premiums for the applicable months during 2020, for risk adjustment data submissions for the 2020 benefit year. As stated in section IV. of this IFC, the Collection of Information section, we do not believe that the clarifications regarding risk adjustment reporting in this IFC would impose additional administrative burden on health insurance issuers beyond the effort already required to submit data to HHS for the purposes of operating risk adjustment. Although we do not know how many states will permit issuers to provide temporary credits to reduce 2020 premiums or how many issuers will elect to do so, for purposes of this analysis, we estimate that approximately 40 percent of risk adjustment covered plans in each state market risk pool will provide these temporary premium credits to reduce the premiums charged to enrollees to support continuity of coverage during the PHE for COVID–19. We anticipate that reporting of the adjusted, lower subscriber level premiums for 2020 benefit year risk adjustment data submissions will lower the statewide average premium used to determine risk adjustment transfer amounts under the state payment transfer formula for the 2020 benefit year, thereby lowering aggregate risk adjustment payments, aggregate risk adjustment charges, and the overall magnitude of risk adjustment transfers, proportional to the amount of temporary premium credits provided by issuers of risk adjustment covered plans for the 2020 benefit year. Consistent with the assumptions used for the MLR program, as described below, we estimate that the aggregate impact of premium credits will result in an 8 percent reduction in annual premium, and a commensurate 8 percent reduction in transfers for the 2020 benefit year.[109] In the 2020 Payment Notice, HHS finalized the risk adjustment state payment transfer formula under the HHS risk adjustment methodology for the 2020 benefit year, and reaffirmed that HHS will continue to operate the risk adjustment program in a budget neutral manner. Therefore, there is no net aggregate financial impact on health insurance issuers or the federal government as a result of the risk adjustment provisions in this IFC. However, while risk adjustment transfers are net neutral in aggregate, we recognize that individual issuers may be financially impacted by reduced transfers (either lower risk adjustment payments or lower risk adjustment charges) if any issuer in the issuer's state market risk pool provides premium credits to enrollees. The extent of this impact will vary based on the number of issuers in a state market risk pool that elect to provide the temporary premium credits, the amount of these premium credits provided, as well as the market share of the issuers that provide these premium credits. For example, issuers with larger market share that offer large premium credits will affect the statewide average premium more significantly. Although we recognize the potential for financial impacts for individual issuers as a result of the clarifications in this IFC, we believe that if HHS permitted issuers that provided premium credits to submit unadjusted premiums for the purposes of calculating risk adjustment, distortions could occur which could also financially impact individual issuers. For example, absent the requirement that issuers that offer premium credits report the adjusted, lower premium amount for risk adjustment purposes, an issuer with a large market share with higher-than-average risk enrollees that provides temporary premium credits would inflate the statewide average premium by submitting the higher, unadjusted premium amount, thereby increasing its risk adjustment payment. In such a scenario, a smaller issuer in the same state market risk pool that owes a risk adjustment charge, and also provides premium credits to enrollees, would pay a risk adjustment charge that is relatively higher than it would have been if it were calculated based on a statewide average that reflected the actual, reduced premium charged to enrollees by issuers in the state market risk pool. Therefore, we believe that requiring issuers that offer temporary premium credits for 2020 coverage to accurately report to the EDGE server the adjusted, lower premium amounts actually charged to enrollees is most consistent with existing risk adjustment program requirements and mitigates the distortions that would occur if issuers that offer these temporary premium credits did not report the actual amounts charged to enrollees, while not imposing additional financial burden on issuers, as compared to an approach that would permit issuers to report unadjusted premium amounts.

b. Medical Loss Ratio

In this IFC, we clarify that issuers that choose to provide temporary premium credits to consumers in 2020 must account for these credits as reductions to premium for the applicable months during 2020 when reporting earned premium for the applicable MLR reporting year.[110] Although we do not

[108] See the CMS Memo ''Temporary Policy on 2020 Premium Credits Associated with the COVID–19 Public Health Emergency,'' (August 4, 2020), available at *https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/Premium-Credit-Guidance.pdf.*

[109] The effects of the risk adjustment program, including estimated outlays and receipts for the 2020 benefit year are provided in the 2020 Payment Notice final rule, published in the April 25, 2019, **Federal Register** (84 FR 17454 at 17551). We relied on those estimates for purposes of estimating the impacts of the temporary premium credit policies in this IFC.

[110] Because the MLR and rebate calculations are based on three years of data, reporting earned

know how many states will permit issuers to provide temporary credits to reduce premiums or how many issuers will elect to do so, for purposes of this analysis, we estimate that approximately 40 percent of issuers offering individual, small group or merged market health insurance coverage will provide these temporary premium credits to reduce the 2020 premiums charged to enrollees to support continuity of coverage during the PHE for COVID–19. If an issuer provides temporary premium credits and consequently reports a lower premium amount for MLR purposes, the lower reported premium will have the effect of increasing MLRs and reducing rebates. Although we do not know the number of issuers that will provide these credits or the amount of premium credits that issuers may elect to provide, for purposes of this estimate we assume that such premium credits would on average constitute approximately 8 percent of total annual premium (equivalent to one month of premium). Based on data for the 2018 MLR reporting year, we estimate that rebates for the 2020 MLR reporting year that will be paid in 2021 to enrollees by issuers that choose to provide temporary premium credits could decline by up to $500 million, as a result of enrollees receiving a total of up to $2 billion in premium relief up front in 2020. Because the MLR calculation uses three consecutive years of data, there may be additional rebate decreases in subsequent years, although the impact on rebates may be smaller as issuers would likely account for the premium relief provided to enrollees through these temporary premiums credits at the time they develop premium rates for the 2021 and 2022 benefit years.

7. Merit-Based Incentive Payment System (MIPS) Updates

In section II.I. of this IFC, for the 2020 MIPS performance period, we are proposing to include in the MIPS assignment methodology for the CMS Web Interface and CAHPS for MIPS survey the following additions due to the PHE for COVID–19: (1) CPT codes: 99421, 99422, and 99423 (codes for online digital E/M service (e-visit)), and 99441, 99442, and 99443 (codes for telephone E/M services); and (2) HCPCS codes: G2010 (code for remote evaluation of patient video/images) and G2012 (code for virtual check-in). We do not believe this proposal will impact the number of beneficiaries selected for sampling, which will be used to complete quality reporting via the CMS Web Interface or administer the CAHPS for MIPS survey; however, this proposal could impact the number of beneficiaries eligible to be sampled. Therefore, we do not anticipate any change in burden or impact on clinicians. In addition, we are modifying the improvement activity IA_ERP_3 previously titled ''COVID–19 Clinical Trial'' and continuing it through CY 2021. Because MIPS eligible clinicians are still required to submit the same number of activities and the per response time for each activity is uniform, we do not expect this modification to affect our impact estimates in terms of the number of estimated respondents or the burden of compliance.

premium for the 2020 benefit year will impact the MLR and rebate calculations for the 2020 through 2022 reporting years. See section 2718(b)(1)(B)(ii) of the PHSA. Also see 45 CFR 158.220(b).

8. Addressing the Impact of COVID–19 on Part C and Part D Quality Rating Systems

As discussed in section II.H. of this IFC, this policy allows us to calculate the 2022 Star Ratings. We do not anticipate changes in the distribution of ratings from prior years. Therefore, these provisions result in no impact to the Medicare program since ratings will be similar to prior years.

List of Subjects

42 CFR Part 410

Diseases, Health facilities, Health professions, Laboratories, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 413

Diseases, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR Part 414

Administrative practice and procedure, Biologics, Drugs, Health facilities, Health professions, Diseases, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 422

Administrative practice and procedure, Health facilities, Health maintenance organizations (HMO), Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 423

Administrative practice and procedure, Emergency medical services, Health facilities, Health maintenance organizations (HMO), Health professionals, Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 482

Grant program-health, Hospitals, Medicaid, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 483

Grant programs-health, Health facilities, Health professions, Health records, Medicaid, Medicare, Nursing homes, Nutrition, Reporting and recordkeeping requirements, Safety.

42 CFR Part 485

Grant programs-health, Health facilities, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 488

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 493

Administrative practice and procedure, Grant programs-health, Health facilities, Laboratories, Medicaid, Medicare, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 410—SUPPLEMENTARY MEDICAL INSURANCE (SMI) BENEFITS

■ 1. The authority citation for part 410 continues to read as follows:

Authority: 42 U.S.C. 1302, 1395m, 1395hh, 1395rr, and 1395ddd.

■ 2. Section 410.32 is amended by revising paragraph (a)(3) to read as follows:

§ 410.32 Diagnostic x-ray tests, diagnostic laboratory tests, and other diagnostic tests: Conditions.

(a) * * *

(3) *Public Health Emergency exceptions.* During the Public Health Emergency for COVID–19, as defined in § 400.200 of this chapter, the order of a physician or other applicable practitioner is not required for one otherwise covered diagnostic laboratory test for COVID–19 and for one otherwise covered diagnostic laboratory test each for influenza virus or similar respiratory condition needed to obtain a final COVID–19 diagnosis when performed in conjunction with COVID–19 diagnostic laboratory test in order to rule-out influenza virus or related diagnosis. Subsequent otherwise covered COVID–19 and related tests described in the previous sentence are reasonable and necessary when ordered by a physician

or nonphysician practitioner in accordance with this paragraph (a), or when ordered by a pharmacist or other healthcare professional who is authorized under applicable state law to order diagnostic laboratory tests. FDA-authorized COVID–19 serology tests are included as covered tests subject to the same order requirements during the Public Health Emergency for COVID–19, as defined in § 400.20 of this chapter, as they are reasonable and necessary under section 1862(a)(1)(A) of the Act for beneficiaries with known current or known prior COVID–19 infection or suspected current or suspected prior COVID–19 infection.

* * * * *

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES; PROSPECTIVELY DETERMINED PAYMENT RATES FOR SKILLED NURSING FACILITIES; PAYMENT FOR ACUTE KIDNEY INJURY DIALYSIS

■ 3. The authority citation for part 413 continues to read as follows:

Authority: 42 U.S.C. 1302, 1395d(d), 1395f(b), 1395g, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww.

■ 4. Section 413.178 is amended by revising paragraph (d)(7) to read as follows:

§ 413.178 ESRD quality incentive program.

* * * * *

(d) * * *

(7) With the exception of first and second quarter 2020 ESRD QIP data for which CMS granted an exception under paragraph (d)(6) of this section, a facility that has been granted an exception to the data submission requirements under paragraph (d)(6) of this section may notify CMS that it will continue to submit data under paragraph (d)(1) of this section by sending an email signed by the CEO or another designated contact to the ESRD QIP mailbox at *ESRDQIP@cms.hhs.gov.* Upon receipt of an email under this clause, CMS will notify the facility in writing that CMS is withdrawing the exception it previously granted to the facility. With respect to fourth quarter 2019 ESRD QIP data for which CMS granted an exception under paragraph (d)(6) of this section, a facility is deemed to have met the requirements of this paragraph if the facility actually submitted the data by the March 31, 2020 submission deadline but did not notify CMS that it would do so.

* * * * *

PART 414—PAYMENT FOR PART B MEDICAL AND OTHER HEALTH SERVICES

■ 5. The authority citation for part 414 continues to read as follows:

Authority: 42 U.S.C. 1302, 1395hh, and 1395rr(b)(l).

■ 6. Section 414.1305 is amended by adding the definition of ''Primary care services'' in alphabetical order to read as follows:

§ 414.1305 Definitions.

* * * * *

Primary care services for purposes of CMS Web Interface and the CAHPS for MIPS survey beneficiary assignment means the set of services identified by any of the following:

(1) CPT codes:

(i) 99201 through 99215 (codes for office or other outpatient visit for the evaluation and management of a patient); 99304 through 99318 (codes for professional services furnished in a nursing facility, excluding professional services furnished in a SNF for claims identified by place of service (POS) modifier 31); 99319 through 99340 (codes for patient domiciliary, rest home, or custodial care visit); 99341 through 99350 (codes for evaluation and management services furnished in a patient's home for claims identified by POS modifier 12); 99490 (code for chronic care management); and 99495 and 99496 (codes for transitional care management services);

(ii) Beginning with the 2020 MIPS payment year, 99487 and 99489 (codes for chronic care management); and

(iii) For the CY 2020 MIPS performance period and any subsequent performance period that starts during the Public Health Emergency, as defined in § 400.200, 99421, 99422, and 99423 (codes for online digital evaluation and management services (e-visit)); and 99441, 99442, and 99443 (codes for telephone evaluation and management services).

(2) HCPCS codes:

(i) G0402 (code for the Welcome to Medicare visit); and G0438 and G0439 (codes for the annual wellness visits); and

(ii) For the CY 2020 MIPS performance period and any subsequent performance period that starts during the Public Health Emergency, as defined in § 400.200, G2010 (code for remote evaluation of patient video/images); and G2012 (code for virtual check-in).

* * * * *

PART 422—MEDICARE ADVANTAGE PROGRAM

■ 7. The authority citation for part 422 continues to read as follows:

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

■ 8. Section 422.166 is amended by adding paragraph (i)(11) to read as follows:

§ 422.166 Calculation of Star Ratings.

* * * * *

(i) * * *

(11) *Special rules for the 2022 Star Ratings only.* For the 2022 Star Ratings only, CMS will not apply the provisions in paragraph (i)(9) or (10) of this section and CMS will not exclude the numeric values for affected contracts with 60 percent or more of their enrollees in the FEMA-designated Individual Assistance area at the time of the extreme and uncontrollable circumstance from the clustering algorithms or from the determination of the performance summary and variance thresholds for the Reward Factor.

* * * * *

PART 423—VOLUNTARY MEDICARE PRESCRIPTION DRUG BENEFIT

■ 9. The authority citation for part 423 continues to read as follows:

Authority: 42 U.S.C. 1302, 1306, 1395w–101 through 1395w–152, and 1395hh.

■ 10. Section 423.186 is amended by adding paragraph (i)(9) to read as follows:

§ 423.186 Calculation of Star Ratings.

* * * * *

(i) * * *

(9) *Special rules for the 2022 Star Ratings only.* For the 2022 Star Ratings only, CMS will not apply the provisions in paragraphs (i)(7) or (8) of this section and CMS will not exclude the numeric values for affected contracts with 60 percent or more of their enrollees in the FEMA-designated Individual Assistance area at the time of the extreme and uncontrollable circumstance from the clustering algorithms or from the determination of the performance summary and variance thresholds for the Reward Factor.

* * * * *

PART 482—CONDITIONS OF PARTICIPATION FOR HOSPITALS

■ 11. The authority citation for part 482 continues to read as follows:

Authority: 42 U.S.C. 1302, 1395hh, and 1395rr, unless otherwise noted.

■ 12. Section 482.42 is amended by adding paragraph (e) to read as follows:

§ 482.42 Condition of participation: Infection prevention and control and antibiotic stewardship programs.

* * * * *

(e) *COVID–19 Reporting.* During the Public Health Emergency, as defined in § 400.200 of this chapter, the hospital must report information in accordance with a frequency as specified by the Secretary on COVID–19 in a standardized format specified by the Secretary.

PART 483—REQUIREMENTS FOR STATES AND LONG TERM CARE FACILITIES

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

Authority: 42 U.S.C. 1302, 1320, 1320a–7, 1395i, 1395hh and 1396r.

■ 14. Section 483.80 is amended by adding paragraph (h) to read as follows:

§ 483.80 Infection control.

* * * * *

(h) *COVID–19 Testing.* The LTC facility must test residents and facility staff, including individuals providing services under arrangement and volunteers, for COVID–19. At a minimum, for all residents and facility staff, including individuals providing services under arrangement and volunteers, the LTC facility must:

(1) Conduct testing based on parameters set forth by the Secretary, including but not limited to:

(i) Testing frequency;

(ii) The identification of any individual specified in this paragraph diagnosed with COVID–19 in the facility;

(iii) The identification of any individual specified in this paragraph with symptoms consistent with COVID–19 or with known or suspected exposure to COVID–19;

(iv) The criteria for conducting testing of asymptomatic individuals specified in this paragraph, such as the positivity rate of COVID–19 in a county;

(v) The response time for test results; and

(vi) Other factors specified by the Secretary that help identify and prevent the transmission of COVID–19.

(2) Conduct testing in a manner that is consistent with current standards of practice for conducting COVID–19 tests;

(3) For each instance of testing:

(i) Document that testing was completed and the results of each staff test; and

(ii) Document in the resident records that testing was offered, completed (as appropriate to the resident's testing status), and the results of each test.

(4) Upon the identification of an individual specified in this paragraph with symptoms consistent with COVID–19, or who tests positive for COVID–19, take actions to prevent the transmission of COVID–19.

(5) Have procedures for addressing residents and staff, including individuals providing services under arrangement and volunteers, who refuse testing or are unable to be tested.

(6) When necessary, such as in emergencies due to testing supply shortages, contact state and local health departments to assist in testing efforts, such as obtaining testing supplies or processing test results.

* * * * *

PART 485—CONDITIONS OF PARTICIPATION: SPECIALIZED PROVIDERS

■ 15. The authority citation for part 485 continues to read as follows:

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

■ 16. Section 485.640 is amended by adding paragraph (d) to read as follows:

§ 485.640 Condition of participation: Infection prevention and control and antibiotic stewardship programs.

* * * * *

(d) *COVID–19 Reporting.* During the Public Health Emergency, as defined in § 400.200 of this chapter, the CAH must report information in accordance with a frequency as specified by the Secretary on COVID–19 in a standardized format specified by the Secretary.

PART 488—SURVEY, CERTIFICATION, AND ENFORCEMENT PROCEDURES

■ 17. The authority citation for part 488 continues to read as follows:

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

■ 18. Section 488.447 is added to read as follows:

§ 488.447 Civil Money Penalties imposed for failure to comply with 42 CFR 483.80(g)(1) and (2).

(a) CMS may impose a civil money penalty for noncompliance with the requirements at § 483.80(g)(1) and (2) of this chapter as follows:

(1) *Minimum.* A minimum of $1,000 for the first occurrence.

(2) *Increased amount.* An amount equal to $500 added to the previously imposed civil money penalty amount for each subsequent occurrence, not to exceed the maximum amount set forth in § 488.408(d)(1)(iii).

(b) The penalty amounts in this section will be adjusted annually under 45 CFR part 102.

(c) Compliance with the requirements at § 483.80(g)(1) and (2) of this chapter will be assessed weekly. Facilities found out of compliance with § 483.80(g)(1) and (2) of this chapter are not required to submit a plan of correction as indicated in § 488.408(f)(1).

(d) This section is in effect during and the Public Health Emergency (PHE), as defined in § 400.200 of this chapter, and will continue for up to one year after the end of the PHE.

PART 493—LABORATORY REQUIREMENTS

■ 19. The authority citation for part 493 is revised to read as follows:

Authority: 42 U.S.C. 263a, 1302, 1395x(e), the sentence following 1395x(s)(11) through 1395x(s)(16)).

■ 20. Section 493.2 is amended by revising the definition of ''Condition level requirements'' to read as follows:

§ 493.2 Definitions.

* * * * *

Condition level requirements means any of the requirements identified as ''conditions'' in § 493.41 and subparts G through Q of this part.

* * * * *

■ 21. Section 493.41 is added to subpart B to read as follows:

§ 493.41 Condition: Reporting of SARS–CoV–2 test results.

During the Public Health Emergency, as defined in § 400.200 of this chapter, each laboratory that performs a test that is intended to detect SARS–CoV–2 or to diagnose a possible case of COVID–19 (hereinafter referred to as a ''SARS–CoV–2 test'') must report SARS–CoV–2 test results to the Secretary in such form and manner, and at such timing and frequency, as the Secretary may prescribe.

■ 22. Section 493.555 is amended by adding paragraph (c)(6) to read as follows:

§ 493.555 Federal review of laboratory requirements.

* * * * *

(c) * * *

(6) Notify CMS within 10 days of any conditional level deficiency under §§ 493.41 or 493.1100(a).

■ 23. Section 493.1100 is amended by adding paragraph (a) and reserving paragraph (b) to read as follows:

§ 493.1100 Condition: Facility administration.

* * * * *

(a) *Reporting of SARS–CoV–2 test results.* During the Public Health Emergency, as defined in § 400.200 of this chapter, each laboratory that performs a test that is intended to detect SARS–CoV–2 or to diagnose a possible case of COVID–19 (hereinafter referred to as a ''SARS–CoV–2 test'') must report SARS–CoV–2 test results to the Secretary in such form and manner, and at such timing and frequency, as the Secretary may prescribe.

(b) [Reserved]

■ 24. Section 493.1804 is amended by revising paragraph (c)(1) to read as follows:

§ 493.1804 General considerations.

* * * * *

(c) * * *

(1) CMS may impose alternative sanctions in lieu of, or in addition to principal sanctions. (Except for a condition level deficiency under §§ 493.41 or 493.1100(a), CMS does not impose alternative sanctions on laboratories that have certificates of waiver because those laboratories are not routinely inspected for compliance with condition-level requirements.)

* * * * *

■ 25. Section 493.1834 is amended by adding paragraph (d)(2)(iii) to read as follows:

§ 493.1834 Civil money penalty.

* * * * *

(d) * * *

(2) * * *

(iii) For a condition level deficiency under §§ 493.41 or 493.1100(a), the penalty amount is $1,000 for the first day of noncompliance and $500 for each additional day of noncompliance.

* * * * *

Dated: August 14, 2020.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

Dated: August 21, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2020–19150 Filed 8–27–20; 4:15 pm]

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Part V

The President

Proclamation 10064—Adjusting Imports of Steel Into the United States
Memorandum of August 29, 2020—Extension of the Use of the National Guard To Respond to COVID–19 and To Facilitate Economic Recovery

Federal Register

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Presidential Documents

Title 3—

The President

Proclamation 10064 of August 28, 2020

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel mill articles (steel articles) on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862). The Secretary found and advised me of his opinion that steel articles were being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.

2. In Proclamation 9705 of March 8, 2018 (Adjusting Imports of Steel Into the United States), I concurred in the Secretary's finding that steel articles, as defined in clause 1 of Proclamation 9705, as amended by clause 8 of Proclamation 9711 of March 22, 2018 (Adjusting Imports of Steel Into the United States), were being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and decided to adjust the imports of these steel articles by imposing a 25 percent ad valorem tariff on such articles imported from most countries.

3. In Proclamation 9705, I further stated that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel article imports from that country and, if necessary, adjust the tariff as it applies to other countries, as the national security interests of the United States require.

4. In Proclamation 9740 of April 30, 2018 (Adjusting Imports of Steel Into the United States), I noted that the United States had agreed in principle with the Federative Republic of Brazil (Brazil) on satisfactory alternative means to address the threatened impairment to our national security posed by steel articles imported from Brazil. In Proclamation 9759 of May 31, 2018 (Adjusting Imports of Steel Into the United States), I noted that the United States had agreed on measures with Brazil that would provide effective, long-term alternative means to address Brazil's contribution to the threatened impairment to our national security. These included quantitative limitations that restrict the volume of steel articles imported into the United States from Brazil. In light of these agreed-upon measures, I determined that steel article imports from Brazil would no longer threaten to impair the national security and decided to exclude Brazil from the tariff proclaimed in Proclamation 9705, as amended. I further noted that the United States would monitor the implementation and effectiveness of those measures to address our national security needs.

5. In Proclamation 9759, I also directed the Secretary to monitor implementation of quantitative limitations applicable to steel article imports from Brazil

and inform me of any circumstance that in the Secretary's opinion might indicate that an adjustment of the quantitative limitations is necessary.

6. The Secretary has advised me that there have been significant changes in the United States steel market since the time I decided to exclude, on a long-term basis, Brazil from the tariff proclaimed in Proclamation 9705, as amended. The United States steel market has contracted in 2020. After increasing in 2018 and 2019, steel shipments by domestic producers through June of this year are approximately 15 percent lower than shipments for the same time period in 2019, with shipments in April and May of this year more than 30 percent lower than the shipments in the same months in 2019. The Secretary has further advised me that domestic producers' adjusted year-to-date capacity utilization rate through August 15, 2020, is below 70 percent and that the current rate has been near or below 60 percent since the second week of April. Brazil is also the second largest source of steel imports to the United States and the largest source of imports of semi-finished steel products. Moreover, imports from most countries have declined this year in a manner commensurate with this contraction, whereas imports from Brazil have decreased only slightly.

7. In light of these significantly changed market conditions, I have determined that the alternative measures regarding Brazilian steel imports, without any modifications, will be ineffective in eliminating the threat to the national security posed by imports of such articles, in the current environment. The United States and Brazil have held consultations regarding Brazil's steel exports to the United States. As a result of these discussions, the United States will lower, for the remainder of 2020, one of the quantitative limitations set forth in Proclamation 9759 applicable to certain steel articles imported from Brazil. In my judgment, this modification will preserve the effectiveness of the alternative means to address the threatened impairment to our national security by further restraining steel article exports to the United States from Brazil during this period of market contraction. In light of this modification, I have determined that steel article imports from Brazil will not threaten to impair the national security and thus have decided to continue to exclude Brazil from the tariff proclaimed in Proclamation 9705, as amended. The United States and Brazil will hold further consultations in December 2020 to discuss the state of the steel trade between the two countries in light of then-prevailing market conditions.

8. I have been informed that a reduction in this quantitative limitation set forth in Proclamation 9759 applicable to certain steel article imports from Brazil may delay or disrupt specific production activities in the United States for which imports of the steel articles covered by the quantitative limitation have already been contracted for delivery in the fourth quarter of this year. In light of these circumstances, and after considering the impact on the economy and the national security objectives of section 232 of the Trade Expansion Act of 1962, as amended, I have determined to direct the Secretary to provide relief from the quantitative limitation set forth in this proclamation in certain limited circumstances specified in more detail below, in addition to the relief from the quantitative limitations that the Secretary is already authorized to provide pursuant to clause 1 of Proclamation 9777 of August 29, 2018 (Adjusting Imports of Steel Into the United States).

9. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security of the United States.

10. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of statutes affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 232 of the Trade Expansion Act of 1962, as amended, section 301 of title 3, United States Code, and section 604 of the Trade Act of 1974, as amended, do hereby proclaim as follows:

(1) For purposes of administering the quantitative limitation applicable to subheading 9903.80.57 of subchapter III of chapter 99 of the HTSUS for Brazil, the annual aggregate limit for Brazil set out in the Annex to this proclamation shall apply for calendar year 2020. This aggregate limit, which shall take into account all steel article imports from Brazil covered by this subheading since January 1, 2020, shall be effective for steel articles entered for consumption, or withdrawn from warehouse for consumption, under this subheading, between August 28, 2020 and December 31, 2020. For calendar year 2021 and for subsequent years, the annual aggregate limit for Brazil shall revert to the aggregate limit for Brazil set forth in the Annex to Proclamation 9759, unless that limit is further modified or terminated.

(2) The Secretary shall, on an expedited basis, grant relief from the quantitative limitation applicable to subheading 9903.80.57 of subchapter III of chapter 99 of the HTSUS for Brazil, as set out in the Annex to this proclamation, for any steel article where (i) the party requesting relief entered into a contract or other written agreement for the production and shipment of such steel article before August 28, 2020; (ii) such agreement specifies the quantity of such steel article that is to be produced and shipped to the United States prior to December 31, 2020; (iii) such steel article is to be used in production activities in the United States and such steel article cannot be procured from another supplier to meet the delivery schedule and specifications contained in such agreement; and (iv) lack of relief from the quantitative limitation on such steel article would significantly disrupt the production activity in the United States for which the steel article specified in such agreement is intended. The volume of imports for which the Secretary grants relief under this clause shall not exceed 60,000,000 kilograms in the aggregate.

(3) The Secretary shall grant relief under clause 2 of this proclamation only upon receipt of a sworn statement signed by the chief executive officer and the chief legal officer of the party requesting relief, attesting that (i) the steel article for which relief is sought and the associated contract or other written agreement meet the criteria for relief set forth in clause 2(i) through (iv) of this proclamation; (ii) the party requesting relief will accurately report to U.S. Customs and Border Protection (CBP), in the manner that CBP prescribes, the quantity of steel articles entered for consumption, or withdrawn from warehouse for consumption, pursuant to any grant of relief; and (iii) the quantity of steel articles entered pursuant to a grant of relief will not exceed the quantity for which the Secretary has granted relief. The Secretary shall notify CBP of any grant of relief made pursuant to this proclamation. The Secretary shall revoke any grant of relief under clause 2 of this proclamation if the Secretary determines at any time after such grant that the criteria for relief have not been met and may, if the Secretary deems it appropriate, notify the Attorney General of the facts that led to such revocation.

(4) As soon as practicable, the Secretary shall issue procedures for the requests for relief described in clauses 2 and 3 of this proclamation. The issuance of such procedures is exempt from Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs). CBP shall implement relief provided under clause 2 of this proclamation as soon as practicable.

(5) Until such time as the applicable quantitative limitation provided in subheading 9903.80.57 of subchapter III of chapter 99 of the HTSUS for Brazil has been reached, CBP shall count any steel article for which

relief is granted under clause 2 of this proclamation toward such quantitative limitation at the time when such steel article is entered for consumption or withdrawn from warehouse for consumption. Any steel article for which relief is granted under clause 2 of this proclamation must be entered for consumption, or withdrawn from warehouse for consumption, on or before December 31, 2020, and, before January 1, 2021, further relief may not be granted for such article by the Secretary under clause 1 of Proclamation 9777. Steel articles for which relief is granted under clause 2 of this proclamation shall be subject to the duty treatment provided in subheading 9903.80.62 of subchapter III of chapter 99 of the HTSUS for Brazil, as established by the Annex to this proclamation.

(6) Subdivision (a)(iii) of U.S. note 16 to subchapter III of chapter 99 of the HTSUS is amended by striking ''9903.80.61'' and inserting in its place ''9903.80.62''.

(7) Subdivision (c) of U.S. note 16 to subchapter III of chapter 99 of the HTSUS is amended by striking, in the last sentence, ''and 9903.80.61'' and inserting in its place: '', 9903.80.61, and 9903.80.62''.

(8) Subdivision (d) of U.S. note 16 to subchapter III of chapter 99 of the HTSUS is amended by striking, in the first sentence, ''and 9903.80.61'' and inserting in its place: ''through 9903.80.62''.

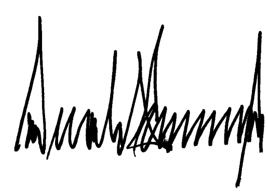
(9) The superior text to subheadings 9903.80.05 through 9903.80.58 of subchapter III of chapter 99 of the HTSUS is amended by striking ''and 9903.80.61'' and inserting in its place: ''through 9903.80.62''.

(10) To implement clause 2 of this proclamation, subchapter III of chapter 99 of the HTSUS is modified as provided in the Annex to this proclamation.

(11) The modifications to the HTSUS made by clauses 6 through 10 of this proclamation and the Annex to this proclamation shall be effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 28, 2020, and shall continue in effect, unless such actions are expressly reduced, modified, or terminated.

(12) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-eighth day of August, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fifth.



Billing code 3295–F0–P

ANNEX

TO MODIFY CHAPTER 99 OF THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

A. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 28, 2020, subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by inserting the following new subheading 9903.80.62 in numerical sequence with the material in the new tariff provision inserted in the columns labeled "Heading/Subheading", "Article Description", "Rates of Duty 1-General", "Rates of Duty 1-Special", and "Rates of Duty 2", respectively:

Heading/ Subheading	Article Description	Rates of Duty		
		1		2
		General	Special	
	"Iron or steel products of Brazil enumerated in U.S. note 16(b)(iv) to this subchapter, each covered by an exclusion granted by the Secretary of Commerce under note 16(c) to this subchapter:			
9903.80.62	Goods subject to a qualifying contract or other written agreement for which relief has been provided from the application of quantitative limitation otherwise imposed in relation to subheading 9903.80.57, provided that such goods shall be counted toward any quantitative limitation proclaimed by the President until such limitation has filled........	The duty provided in the applicable subheading		

B. For purposes of administering the quantitative limitation applicable to subheading 9903.80.57 with respect to Brazil, the following annual aggregate limit shall apply for calendar year 2020, unless modified or terminated:

BRAZIL

Heading/ Subheading	Article Description	Quantitative Limitation
	Iron or steel products of Brazil enumerated in U.S. note 16(b)(iv) to this subchapter, if entered in the aggregate quantity prescribed in subdivision (e) of such note for the calendar year starting on January 1, 2020 and for any portion thereof as prescribed in such subdivision (e):	
9903.80.57	Blooms, billets and slabs, semi-finished, provided for in subheading 7207.11.00, 7207.12.00, 7207.19.00, 7207.20.00 or 7224.90.00 (except for statistical reporting numbers 7224.90.0015, 7224.90.0025, and 7224.90.0035)...	3,155,137,048 kg

[FR Doc. 2020–19595
Filed 9–1–20; 11:15 a.m.]
Billing code 7020–02–C

Presidential Documents

Memorandum of August 29, 2020

Extension of the Use of the National Guard To Respond to COVID–19 and To Facilitate Economic Recovery

Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the ''Stafford Act''), and section 502 of title 32, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* It continues to be the policy of the United States to foster close cooperation and mutual assistance between the Federal Government and the States and territories in the battle against the threat posed by the spread of COVID–19, especially as the United States transitions to a period of increased economic activity and recovery in those areas of the Nation where the threat posed by COVID–19 has been sufficiently mitigated. To date, activated National Guard forces around the country have provided critical support to Governors as they have worked to address the needs of those populations within their respective States and territories who are especially vulnerable to the effects of COVID–19, including those in nursing homes, assisted living facilities, and other long-term care or congregate settings. Additionally, States and territories may need assistance in fighting COVID–19 hot spots as they emerge. Therefore, to continue to support States and territories as they make decisions about the responses required to address local conditions in their respective jurisdictions with respect to combatting the threat posed by COVID–19 and, where appropriate, facilitating their economic recovery, I am taking the actions set forth in sections 2 and 3 of this memorandum:

Sec. 2. *Additional Twenty-Five Percent Federal Cost Share.* To maximize assistance to the Governor of the State of Louisiana, where the National Guard has also been fully deployed and is engaged in the effort to help the State recover from the devastation of Hurricane Laura, and to facilitate Federal support with respect to the use of National Guard units under State control, I am directing the Federal Emergency Management Agency (FEMA) of the Department of Homeland Security to fund an additional 25 percent of the emergency assistance activities associated with preventing, mitigating, and responding to the threat to public health and safety posed by the virus that Louisiana undertakes using its National Guard forces, as authorized by sections 403 (42 U.S.C. 5170b) and 503 (42 U.S.C. 5193) of the Stafford Act. This, in addition to the 75 percent Federal cost share established in my prior memorandum dated August 3, 2020, titled ''Extension of the Use of the National Guard to Respond to COVID–19 and to Facilitate Economic Recovery,'' shall provide the State of Louisiana with a 100 percent Federal cost share.

Sec. 3. *Additional Twenty-Five Percent Federal Cost Share Termination.* The additional 25 percent Federal cost share for the State's use of National Guard forces for the State of Louisiana shall extend to, and shall be available for orders of any length authorizing duty through September 30, 2020. Such orders include duty necessary to comply with health protection protocols recommended by the Centers for Disease Control and Prevention of the

Department of Health and Human Services or other health protection measures agreed to by the Department of Defense and FEMA.

Sec. 4. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

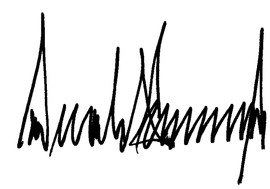
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Defense is authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, August 29, 2020

[FR Doc. 2020–19599
Filed 9–1–20; 11:15 am]
Billing code 5001–06–P

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LIST OF PUBLIC LAWS

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Last List August 18, 2020

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